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1925

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Patna Section

CONTAINING

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OF THE PATNA HIGH COURT REPORTED IN

(1) I. L. R. 4 PATNA
(2) 1925 PATNA HIGH COURT CASES
(3) 6 PATNA LAW TIMES
(4) 3 PATNA LAW REPORTER
(5) 26 CRIMINAL LAW JOURNAL
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1925

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THE

ALL INDIA REPORTER

1925 PATNA

COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables :—

TABLE No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1925 with corresponding references of the ALL INDIA REPORTER.

TABLE No. II.—This Table shows serially the pages of all NON-I. L. R. JOURNALS for the year 1925 with corresponding references of the ALL INDIA REPORTER.

TABLE No. III.—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER 1925, with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I.

Showing seriatim the pages of INDIAN LAW REPORTS, PATNA SERIES for 1925 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 4 PATNA.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 4 Patna=All India Reporter

ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.		
1	1925	*P*	681	139	1925	*P*	216	294	1925	*P*	577	478	1925	*P*	470
19	1924	*PC*	184	172	"	"	179	304	"	"	489	482	"	"	611
24	1925	*P*	330	180	"	"	435	311	"	"	540	484	"	"	677
34	1924	*PC*	221	187	"	"	434	320	"	"	551	488	"	"	414
37	1925	*P*	285	190	"	"	299	323	"	"	483	503	"	"	623
43	"	"	310	202	"	"	459	327	"	"	536	507	"	*PC*	117
51	"	"	355	204	"	"	450	336	"	"	392	510	"	*P*	625
53	"	"	480	210	"	"	281	378	"	"	369	604	"	"	559
57	1924	"	781	224	"	"	352	385	"	"	408	619	"	"	462
61	"	*PC*	198	231	"	"	378	394	"	"	787	626	"	"	797
67	1925	*P*	442	244	"	*PC*	42	404	"	"	421	646	"	"	772
73	1924	"	679	254	"	*P*	453	438	"	"	689	670	"	"	810
89	1925	"	241	259	"	"	389	440	"	"	807	688	1926	"	209
109	"	"	444	264	"	"	477	448	"	"	765	693	"	"	31
120	"	"	449	272	"	"	346	459	"	"	713	696	"	"	202
128	"	"	438	285	"	"	387	469	"	"	688	704	"	"	27
135	"	"	441	289	"	"	494	472	"	"	678				

I. L. R. 4 Patna=All India Reporter—(*Concld.*)

ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.		
707	1925	*PC*	146	741	1925	*P*	544	783	1926	*P*	170	820	1925	*P*	557
718	"	*P*	525	752	1926	"	109	788	1925	*PC*	213	824	1926	"	90
723	1926	"	207	760	1925	"	615	795	1926	*P*	173	838	1925	"	741
726	1925	"	478	766	1926	"	73	799	"	"	103	844	"	"	585
731	"	"	500	774	1925	"	597								

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1925 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

1925 Patna High Court Cases=All India Reporter

PHCC)	A. I. R			PHCC)	A. I. R.			PHCC)	A. I. R.			PHCC)	A. I. R.		
1	1925	*P*	323	111	1925	*P*	473	194	1925	*P*	544	281	1926	*P*	9
4	"	"	318	112	"	"	414	199	"	"	534	288	1925	"	784
6	"	"	131	120	"	"	472	201	"	"	602	292	"	"	820
17	"	"	352	121	"	"	474	206	"	"	597	294	"	"	674
22	"	"	346	125	"	"	559	209	"	"	499	298	1926	"	42
29	"	"	381	133	"	"	460	212	"	"	478	305	"	"	148
33	"	"	363	134	"	"	30	215	"	"	557	311	"	"	190
37	"	"	376	137	"	"	467	217	"	"	581	315	"	"	160
41	"	"	387	140	"	"	523	220	"	"	615	317	"	"	77
43	"	"	372	143	"	"	462	224	"	"	585	320	1925	"	741
46	"	"	389	147	"	"	435	228	"	"	591	324	1926	"	164
49	"	"	313	151	"	"	452	231	"	"	575	326	1925	"	125
53	"	"	384	153	"	"	517	233	"	"	614	330	1926	"	154
57	"	"	369	157	"	"	496	234	"	"	692	333	"	"	165
62	1924	"	802	160	"	"	588	236	"	"	737	337	1925	"	712
63	1925	"	291	164	"	"	484	239	1926	"	94	338	1926	"	87
64	"	"	435	167	"	"	488	250	1925	"	748	341	1925	"	688
65	"	"	392	170	"	"	568	254	1926	"	130	343	1926	"	192
89	"	"	421	180	"	"	512	263	1925	"	610	345	1925	"	765
104	"	"	470	183	"	"	525	265	"	"	743	353	1926	"	122
106	"	"	441	185	"	"	530	271	1926	"	1	357	"	"	141
109	"	"	374	189	"	"	500	278	1925	"	706	359	"	"	147

3 Patna Law Reporter (Civil)=All India Reporter

PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.		
1	1925	*P*	356	62	1924	*P*	594	109	1925	*P*	795	152	1925	*PC*	124
9	1924	*PC*	209	66	1925	"	681	111	1926	"	16	157	1924	"	156
16	1925	*P*	367	81	"	"	492	114	1925	*PC*	122	169	"	"	213
18	"	"	372	84	"	"	487	118	"	*P*	500	174	1925	*P*	612
22	"	"	299	87	"	"	498	126	"	*PC*	49	180	1924	*PC*	202
32	1924	"	781	90	"	"	482	132	"	*P*	549	190	"	"	206
36	1925	"	410	93	"	*PC*	45	136	"	"	576	193	"	"	144
43	"	"	369	97	"	*P*	123	138	"	"	547	204	1925	"	27
50	"	"	739	100	"	"	318	142	"	*PC*	176	208	"	"	105
52	1924	"	488	103	"	"	319	145	1924	"	221	225	"	*P*	754
59	1925	"	465	107	1924	"	805	146	"	*P*	547				

3 Patna Law Reporter (Civil)=All India Reporter.—(*Concld.*)

PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.		
227	1925	*PC*	75	251	1925	*P*	523	296	1925	*PC*	203	328	1925	*P*	823
237	"	*P*	750	255	"	*PC*	11	300	"	"	36	330	"	*PC*	293
242	"	"	160	268	1924	*P*	669	309	"	"	213	339	1926	*P*	210
245	1923	"	44	270	1926	"	180								
249	1925	"	712	290	1925	*PC*	181	315	"	"	139	341	"	"	213

3 Patna Law Reporter (Criminal)=All India Reporter.

PLR)	A.I.R.			PLR)	A.I.R.			PLR)	A.I.R.			PLR)	A.I.R.		
1	1925	*PC*	1	70	1925	*P*	514	95	1925	*PC*	130	134	1925	*P*	619
25	"	*P*	389	75	"	"	583	100	"	*P*	472	145	1924	"	689
27	"	"	17	77	"	"	584	101	"	"	526	150	1925	"	540
33	"	"	447	80	"	"	453	110	"	"	414	160	"	"	595
41	1924	"	767	85	"	"	281	123	"	"	389	163	1924	"	388
51	1925	"	330	93	"	*PC*	52	127	"	"	553	175	1925	"	536
61	"	"	48												

6 Patna Law Times =All India Reporter

PLT)	A.I.R.			PLT)	A.I.R.			PLT)	A.I.R.			PLT)	A.I.R.		
1	1924	*PC*	121	166	1925	*P*	408	351	1925	*P*	478	497	1925	*P*	470
4	1925	*P*	299	169	"	*PC*	1	355	"	"	313	500	"	"	741
12	"	"	216	185	1924	*P*	629	361	"	"	499	504	"	"	372
33	"	"	342	191	1925	"	210	363	"	"	460	507	"	"	588
39	"	"	389	201	1924	"	713	365	"	"	329	511	"	"	691
40	"	"	368	203	"	"	559	366	"	*PC*	117	514	"	"	739
42	"	*PC*	42	204	1925	"	322	367	"	*P*	559	515	"	"	717
47	"	*P*	281	206	"	"	523	376	1924	"	670	520	"	"	125
53	"	"	51	209	"	"	30	380	1925	"	614	524	"	"	710
62	1924	"	582	212	1924	"	603	381	"	"	453	526	"	"	434
67	1925	"	384	214	1925	"	473	385	"	"	605	528	"	"	540
71	"	"	139	215	"	"	553	390	1923	"	44	534	"	"	306
73	"	"	378	220	1924	"	669	392	1924	"	802	537	"	"	185
77	1924	*PC*	191	221	1925	"	181	393	1925	"	484	540	1926	"	171
78	1925	*P*	145	225	"	"	330	397	"	"	389	544	1925	"	465
82	"	"	44	233	"	"	189	400	"	"	179	547	"	"	369
87	1924	"	388	237	"	"	57	404	"	*PC*	146	552	"	"	595
97	"	*PC*	183	240	"	"	241	410	"	*P*	438	554	"	"	472
98	1925	*P*	357	253	1924	"	703	415	"	"	37	555	"	"	694
106	"	"	346	258	"	"	689	419	"	"	505	559	"	"	611
114	1922	"	227	262	1925	"	392	431	"	"	526	560	"	"	609
115	1925	*PC*	36	290	"	"	474	437	"	"	535	562	"	"	387
119	"	*P*	173	294	1923	"	297	440	"	"	64	565	"	"	727
122	1924	"	488	295	1925	"	461	448	"	"	488	567	"	"	521
127	1925	"	374	297	1924	"	633	451	"	"	590	570	"	"	599
129	1924	"	524	303	"	"	624	452	"	"	575	575	"	*PC*	203
130	"	"	767	309	1925	"	86	454	"	"	618	577	"	*P*	256
133	1925	*PC*	49	310	"	"	158	457	"	"	483	581	"	"	121
139	"	*P*	310	313	"	"	123	459	"	"	455	584	"	"	323
144	"	"	297	315	1924	"	560	465	"	"	168	588	"	"	713
146	"	"	279	321	"	"	557	473	"	"	376	593	1926	"	90
150	1924	"	758	323	"	"	597	477	"	"	619	598	1925	"	536
151	"	"	663	330	1925	"	117	481	"	"	318	604	"	"	733
152	1925	"	433	331	"	"	421	483	"	"	462	611	"	"	356
154	"	"	414	348	"	"	193	488	"	"	720	613	"	"	688
164	"	"	160	349	"	*PC*	122	493	"	"	723	615	"	"	729

6 Patna Law Times=All India Reporter.—(*Concld.*)

PLT	A. I. R.			PLT	A. I. R.			PLT	A. I. R.			PLT	A. I. R.		
620	1926	*P*	20	746	1925	*P*	514	780	1925	*P*	564	826	1925	*P*	467
626	1925	"	696	750	1924	*PC*	144	787	1926	"	9	830	"	"	496
634	"	"	625	757	1925	*P*	489	795	1925	"	525	833	1926	"	176
708	"	"	622	762	"	"	487	797	1926	"	16	838	1925	"	762
710	"	"	593	764	"	"	823	799	"	"	196	843	"	"	500
713	"	"	681	766	"	"	610	801	1925	"	795	849	"	"	517
725	"	"	482	768	1926	"	32	802	1926	"	31	855	"	"	512
727	"	"	704	769	1925	"	106	805	1925	"	530	857	"	"	435
731	1926	"	1	776	"	"	355	810	"	"	131	859	1926	"	140
738	1925	"	750	777	"	"	459	823	"	"	291	860	"	"	146
742	1923	"	451	778	"	"	293	824	"	"	127				

26 Cr. L. J & 85 to 90 Indian Cases=All India Reporter.

CrLJ & I.C.	A. I. R.	Cr LJ & I C	A. I. R.	CrLJ & I. C.	A. I. R.	CrLJ & I. C.	A. I. R.

Please refer to COMPARATIVE TABLE *No. II in* **1925 Lahore**.

TABLE No. III.

Showing seriatim the pages of the ALL INDIA REPORTER, 1925 PATNA Section with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including INDIAN LAW REPORTS.

N. B—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1925 PATNA
Column No. 2 denotes corresponding references of other REPORTS, JOURNALS and PERIODICALS.

A. I R 1925 Patna=Other Journals.

A.I.R.	Other Journals.			A.I.R.	Other Journals.			A.I.R.	Other Journals.			A.I.R.	Other Journals.		
1 FB	3	*Pat*	371	33	84	*I C*	332	51	6	*P L T*	53				
	5	*P L T*	145	34	3	*Pat*	804		26	*Cr L J*	270				
	1924	*P H C C*	33		26	*Cr L J*	277		84	*I C*	334				
	78	*I C*	200		84	*I C*	341	55	3	*Pat*	591				
16	3	*Pat*	344		7	*P L T*	36		25	*Cr L J*	1255				
	1924	*P H C C*	193	36	3	*Pat*	778		82	*I C*	263				
	78	*I C*	495		84	*I C*	320	57	3	*Pat*	818				
17	5	*P L T*	656		6	*P L T*	309		84	*I C*	293				
	1924	*P H C C*	29	37	3	*Pat*	230		6	*P L T*	237				
	25	*Cr L J*	919		1924	*P H C C*	9	59	3	*Pat*	829				
	81	*I C*	535		78	*I C*	312		5	*P L T*	646				
	3	*Pat L R Cr*	27		6	*P L T*	415		80	*I C*	34				
20	3	*Pat*	503	40	3	*Pat*	327	64	3	*Pat*	657				
	5	*P L T*	319		5	*P L T*	21		84	*I C*	677				
	1924	*P H C C*	126		1924	*P H C C*	105		6	*P L T*	440				
	2	*Pat LR Cr*	131		79	*I C*	794	68	5	*P L T Sup*	1				
	25	*Cr L J*	738	44	3	*Pat*	795	99	1924	*P H C C*	283				
	81	*I C*	226		80	*I C*	655		83	*I C*	638				
30	3	*Pat*	275		6	*P L T*	82		26	*Cr L J*	78				
	83	*I C*	871	47	3	*Pat*	654	106	3	*Pat*	947				
	1925	*P H C C*	134		82	*I C*	813		88	*I C*	219				
	6	*P L T*	209	48	3	*Pat*	647		6	*P L T*	769				
31	5	*P L T*	312		83	*I C*	679	112	25	*Cr L J*	687				
	75	*I C*	821		26	*Cr L J*	119		81	*I C*	175				
33	3	*Pat*	809		3	*Pat L R Cr*	61	113	75	*I C*	997				
	26	*Cr L J*	268	51	3	*Pat*	781	115	5	*P L T*	63				

A. I. R. 1925 Patna=Other Journals—(*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
115	2	*Pat L R Cr*	69	160	80	*I C*	716	241	4	*Pat*	89
	25	*Cr L J*	590		6	*P L T*	164		84	*I C*	305
	81	*I C*	78		3	*Pat L R*	242		6	*P L T*	240
117	3	*Pat*	870	161	78	*I C*	472	250	25	*Cr L J*	1274
	26	*Cr L J*	426	162	2	*Pat L R*	279		82	*I C*	282
	85	*I C*	42		85	*I C*	1010	251	78	*I C*	469
	6	*P L T*	330	165	82	*I C*	274	254	75	*I C*	1002
118	3	*Pat*	266		25	*Cr L J*	1266	256	1924	*P H C C*	333
	1924	*P H C C*	4	167	81	*I C*	823		85	*I C*	77
	78	*I C*	923		25	*Cr L J*	1047		6	*P L T*	577
121	3	*Pat*	859	168	1924	*P H C C*	297	259	3	*Pat*	968
	85	*I C*	90		84	*I C*	386		84	*I C*	178
	6	*P L T*	581		6	*P L T*	465	279	25	*Cr L J*	1089
123	3	*Pat*	853	173	82	*I C*	178		81	*I C*	913
	85	*I C*	25		6	*P L T*	119		6	*P L T*	146
	6	*P L T*	315	175	2	*Pat L PCr*	217	281	6	*P L T*	47
	3	*Pat L R*	97		85	*I C*	935		1924	*P H C C*	349
125	3	*Pat*	863		26	*Cr L J*	647		4	*Pat*	210
	84	*I C*	993	179	1924	*P H C C*	310		85	*I C*	164
	6	*P L T*	520		4	*Pat*	172		3	*Pat L RCr*	85
	1925	*P H C C*	326		84	*I C*	620	285	4	*Pat*	37
	91	*I C*	822		6	*P L T*	400		82	*I C*	984
127	3	*Pat*	857	181	80	*I C*	926	288	78	*I C*	457
	85	*I C*	88		6	*P L T*	221	291 (1)	3	*Pat*	966
	6	*P L T*	824	183	25	*Cr L J*	1257		1925	*P H C C*	63
128	1924	*P H C C*	273		82	*I C*	165		85	*I C*	94
	85	*I C*	110	185	3	*Pat*	824		6	*P L T*	823
129	2	*Pat L R*	268		84	*I C*	361	291 (2)	5	*P L T*	603
	84	*I C*	371		6	*P L T*	537		78	*I C*	774
131	1925	*P H C C*	6	187	3	*Pat*	417	293	3	*Pat*	964
	86	*I C*	274		83	*I C*	577		85	*I C*	93
	26	*Cr L J*	738		26	*Cr L J*	49		6	*P L T*	778
	6	*P L T*	810	189	3	*Pat*	45	294	78	*I C*	463
137	2	*Pat L R*	266		83	*I C*	603	297	1924	*P H C C*	307
	84	*I C*	151		6	*P L T*	233		82	*I C*	988
138	3	*Pat*	1018	191	3	*Pat*	872		6	*P L T*	144
	92	*I C*	133		26	*Cr L J*	314	298	78	*I C*	478
139	80	*I C*	901		84	*I C*	458	299	1924	*P H C C*	355
	6	*P L T*	71	193 (1)	2	*Pat L RCr*	201		6	*P L T*	4
140	80	*I C*	67		26	*Cr L J*	286		3	*Pat L R*	22
145 (1)	78	*I C*	436		84	*I C*	350		4	*Pat*	190
145 (2)	6	*P L T*	78		6	*P L T*	348		85	*I C*	172
	80	*I C*	710	193 (2)	78	*I C*	530	304	78	*I C*	479
148	78	*I C*	609	194	78	*I C*	492	306	1924	*P H C C*	304
151	2	*Pat L R*	273	197	79	*I C*	897		84	*I C*	383
	86	*I C*	676	198	78	*I C*	943		6	*P L T*	534
152	25	*Cr L J*	1018	201	77	*I C*	157	308	78	*I C*	19
	81	*I C*	794	210	3	*Pat*	915	310	4	*Pat*	43
153	80	*I C*	575		80	*I C*	544		83	*I C*	81
154	25	*Cr L J*	696		6	*P L T*	191		6	*P L T*	139
	81	*I C*	184	216	1924	*P H C C*	313	313	2	*Pat L RCr*	242
155	2	*Pat L R Cr*	122		6	*P L T*	12		1925	*P H C C*	49
	84	*I C*	792		4	*Pat*	139		6	*P L T*	355
158	25	*Cr L J*	557		84	*I C*	586		92	*I C*	338
	81	*I C*	45	228	82	*I C*	204	316	75	*I C*	1
	6	*P L T*	310	241	1924	*P H C C*	337	318	1925	*P H C C*	4

A. I. R. 1925 Patna=Other Journals.—(*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals.			A.I.R.	Other Journals		
318	3	*Pat L R*	100	369	4	*Pat*	378	433	6	*P L T*	152
	86	*I C*	107		6	*P L T*	547		86	*I C*	785
	6	*P L T*	481	372	3	*Pat L R*	18	434	4	*Pat*	187
319	83	*I C*	192		1925	*P H C C*	43		87	*I C*	47
	3	*Pat L R*	103		86	*I C*	626		6	*P L T*	526
321	2	*Pat LR Cr*	250		6	*P L T*	504	435 (1)	1925	*P H C C*	64
	85	*I C*	356	374	6	*P L T*	127		6	*P L T*	857
	26	*Cr L J*	516		1925	*P H C C*	109		27	*Cr L J*	44
322	6	*P L T*	204		86	*I C*	787		91	*I C*	76
	25	*Cr L J*	1357	376	1925	*P H C C*	37	435 (2)	4	*Pat*	180
	82	*I C*	717		86	*I C*	648		1925	*P H C C*	147
323	1925	*P H C C*	1		6	*P L T*	473		91	*I C*	213
	86	*I C*	92	378	4	*Pat*	231	438	4	*Pat*	128
	6	*P L T*	584		6	*P L T*	73		85	*I C*	543
326	78	*I C*	565		86	*I C*	996		6	*P L T*	410
329	26	*Cr L J*	141		26	*Cr L J*	932	441	4	*Pat*	135
	83	*I C*	701	381	1925	*P H C C*	29		1925	*P H C C*	106
	6	*P L T*	365		86	*I C*	153		91	*I C*	184
330	4	*Pat*	24		26	*Cr L J*	713	442	4	*Pat*	67
	26	*Cr L J*	170		7	*P L T*	14	444	4	*Pat*	109
	83	*I C*	730	384	6	*P L T*	67	447	3	*Pat L R Cr*	33
	6	*P L T*	225		1925	*P H C C*	53		26	*Cr L J*	866
	3	*Pat L R Cr*	51		86	*I C*	141		86	*I C*	802
336	78	*I C*	466	387	1925	*P H C C*	41	449	4	*Pat*	120
337	5	*P L T*	121		4	*Pat*	285		86	*I C*	564
	1	*Pat L R*	462		86	*I C*	543	450	4	*Pat*	204
	75	*I C*	381		6	*P L T*	562	452	1925	*P H C C*	151
339	26	*Cr L J*	297	389 (1)	6	*P L T*	39		90	*I C*	79
	84	*I C*	441		3	*Pat L R Cr*	25	453	4	*Pat*	254
342	6	*P L T*	33		86	*I C*	58		6	*P L T*	381
	86	*I C*	156		26	*Cr L J*	682		3	*Pat L R Cr*	80
	26	*Cr L J*	716	389 (2)	1925	*P H C C*	46		26	*Cr L J*	862
346	1925	*P H C C*	22		4	*Pat*	259		86	*I C*	718
	6	*P L T*	106		6	*P L T*	397	455	2	*Pat L R*	315
	86	*I C*	163		86	*I C*	657		6	*P L T*	459
	4	*Pat*	272		26	*Cr L J*	833		88	*I C*	323
352	4	*Pat*	224		3	*Pat L C Cr*	123	459	4	*Pat*	202
	1925	*P H C C*	17	392	1925	*P H C C*	65		88	*I C*	807
	86	*I C*	170	**FB**	6	*P L T*	262		6	*P L T*	777
355	4	*Pat*	51		4	*Pat*	336	460	1925	*P H C C*	133
	88	*I C*	70		87	*I C*	137		6	*P L T*	363
	6	*P L T*	776	408	6	*P L T*	166		88	*I C*	767
356	3	*Pat L R*	1		4	*Pat*	385	461	6	*P L T*	295
	86	*I C*	948		86	*I C*	777		87	*I C*	381
	6	*P L T*	611	410	3	*Pat L R*	36	462	1925	*P H C C*	143
357	6	*P L T*	98		86	*I C*	629		6	*P L T*	483
	86	*I C*	387	414	6	*P L T*	154		4	*Pat*	619
363	1925	*P H C C*	33		1925	*P H C C*	112		90	*I C*	251
	86	*I C*	642		86	*I C*	459	465	3	*Pat L R*	59
367	3	*Pat L R*	16		3	*Pat LR Cr*	110		86	*I C*	773
	86	*I C*	856		26	*Cr L J*	811		6	*P L T*	544
368	6	*P L T*	40		4	*Pat*	488	467	1925	*P H C C*	137
	86	*I C*	143	421	1925	*P H C C*	89		88	*I C*	502
369	1925	*P H C C*	57		6	*P L T*	331		6	*P L T*	826
	3	*Pat L R*	43		86	*I C*	597	469	85	*I C*	476
	86	*I C*	358		4	*Pat*	404	470	1925	*P H C C*	104

A. I. R. 1925 Patna=Other Journals—(*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
470	6	*P L T*	497	499	88	*I C*	483	544	7	*P L T*	4
	86	*I C*	721	500	3	*Pat L R*	118	547	3	*Pat L R*	138
	4	*Pat*	478	**SB**	1925	*P H C C*	189		89	*I C*	232
472	1925	*P H C C*	120		88	*I C*	332		7	*P L T*	87
	3	*Pat LRCr*	100		4	*Pat*	731	549	3	*Pat L R*	132
	86	*I C*	978		6	*P L T*	843		89	*I C*	340
	6	*P L T*	554	504	85	*I C*	459	551	4	*Pat*	320
	26	*Cr L J*	914	505	6	*P L T*	419		89	*I C*	280
473 (1)	6	*P L T*	214		85	*I C*	566	552	2	*Pat L R*	284
	87	*I C*	439	512	1925	*P H C C*	180		85	*I C*	1024
473 (2)	1925	*P H C C*	111		88	*I C*	987	553	6	*P L T*	215
	88	*I C*	478		6	*P L T*	855		3	*Pat LRCr*	127
	7	*P L T*	9	514	3	*Pat L R Cr*	70		26	*Cr L J*	965
474	1925	*P H C C*	121		88	*I C*	845		87	*I C*	421
FB	6	*P L T*	290		6	*P L T*	746	556	86	*I C*	575
	87	*I C*	531		26	*Cr L J*	1229	557	1925	*P H C C*	215
	5	*Pat*	1	516	85	*I C*	488		4	*Pat*	820
477	4	*Pat*	264	517	1925	*P H C C*	153		90	*I C*	249
478	6	*P L T*	351		88	*I C*	959	559	4	*Pat*	604
	1925	*P H C C*	212		6	*P L T*	849		6	*P L T*	367
	88	*I C*	104	521	85	*I C*	622		1925	*P H C C*	125
	4	*Pat*	726		6	*P L T*	567		88	*I C*	687
480	4	*Pat*	53	523	1925	*P H C C*	140	564	86	*I C*	559
	89	*I C*	236		6	*P L T*	206		6	*P L T*	780
	7	*P L T*	124		3	*Pat L R*	251	568	1925	*P H C C*	170
482	3	*Pat L R*	90		87	*I C*	473		88	*I C*	676
	87	*I C*	743	525	1925	*P H C C*	183	575	6	*P L T*	452
	6	*P L T*	725		4	*Pat*	718		1925	*P H C C*	231
483	4	*Pat*	323		6	*P L T*	795		88	*I C*	671
	6	*P L T*	457		91	*I C*	217	576	3	*Pat L R*	136
	26	*Cr L J*	889	526	3	*Pat L R Cr*	101		89	*I C*	343
	86	*I C*	825		6	*P L T*	431	577	4	*Pat*	294
484	1925	*P H C C*	164		88	*I C*	595		92	*I C*	474
	6	*P L T*	393		26	*Cr L J*	1171	581	1925	*P H C C*	217
	91	*I C*	221	530	1925	*P H C C*	185		5	*Pat*	13
487	3	*Pat L R*	84		88	*I C*	495		91	*I C*	288
	87	*I C*	739		6	*P L T*	805	583	3	*Pat L R Cr*	75
	6	*P L T*	762	534	1925	*P H C C*	199		89	*I C*	385
488	1925	*P H C C*	167		91	*I C*	167		26	*Cr L J*	1345
	6	*P L T*	448	535	6	*P L T*	437	584	3	*Pat L R Cr*	77
	90	*I C*	321		88	*I C*	522		89	*I C*	386
489	4	*Pat*	304		26	*Cr L J*	1162		26	*Cr L J*	1346
	86	*I C*	841	536	4	*Pat*	327	585	1925	*P H C C*	224
	6	*P L T*	757		26	*Cr L J*	878		4	*Pat*	844
492	3	*Pat L R*	81		86	*I C*	814		91	*I C*	308
	87	*I C*	736		6	*P L T*	598	588	6	*P L T*	507
494	4	*Pat*	289		3	*Pat LR Cr*	175		1925	*P H C C*	160
	89	*I C*	275	540	4	*Pat*	311		90	*I C*	276
	7	*P L T*	111		86	*I C*	964	590	6	*P L T*	451
496	1925	*P H C C*	157		3	*Pat LR Cr*	150		88	*I C*	669
	88	*I C*	697		6	*P L T*	528	591	1925	*P H C C*	228
	6	*P L T*	830		26	*Cr L J*	900		89	*I C*	811
498	3	*Pat L R*	87		1926	*P H C C*	44		7	*P L T*	27
	87	*I C*	741	544	1925	*P H C C*	194	593	26	*Cr L J*	870
499	6	*P L T*	361		88	*I C*	1035		86	*I C*	806
	1925	*P H C C*	209		4	*Pat*	741				

A. I. R. 1925 Patna=Other Journals—(*Concld.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
593	6	*P L T*	710	681	6	*P L T*	715	739	6	*P L T*	514
595	6	*P L T*	552	688	4	*Pat*	469		3	*Pat L R*	50
	6	*Cr L J*	861		6	*P L T*	613		86	*I C*	771
	86	*I C*	717		88	*I C*	813	741	6	*P L T*	500
	3	*Pat LR Cr*	160		1925	*P H C C*	341		88	*I C*	1032
597	1925	*P H C C*	206	689	4	*Pat*	458		4	*Pat*	838
	89	*I C*	170		27	*Cr L J*	137		1925	*P H C C*	320
	4	*Pat*	774		91	*I C*	809	743	5	*Pat*	96
	7	*P L T*	75	691	6	*P L T*	511		1925	*P H C C*	265
599	6	*P L T*	570		88	*I C*	1020		90	*I C*	806
	26	*Cr L J*	886		1926	*P H C C*	40	748	1925	*P H C C*	250
	86	*I C*	829	692	1925	*P H C C*	234		90	*I C*	356
602	1925	*P H C C*	201		91	*I C*	211	750	6	*P L T*	738
	89	*I C*	39	694	6	*P L T*	555		3	*Pat L R*	237
	7	*P L T*	129		89	*I C*	675		88	*I C*	485
605	6	*P L T*	385	696	6	*P L T*	626	753	86	*I C*	1016
	88	*I C*	340	702	88	*I C*	537	754	3	*Pat L R*	225
609	6	*P L T*	560		7	*P L T*	25		90	*I C*	579
	86	*I C*	791	703	85	*I C*	538	755	92	*I C*	697
610	1925	*P H C C*	263	704	26	*Cr L J*	921	760	92	*I C*	684
	6	*P L T*	766		86	*I C*	985	762	26	*Cr L J*	924
	26	*Cr L J*	1562		6	*P L T*	727		86	*I C*	988
	90	*I C*	442	706	1925	*P H C C*	278		6	*P L T*	838
611	4	*Pat*	483		26	*Cr L J*	1601	765	4	*Pat*	448
	6	*P L T*	559		90	*I C*	705		1925	*P H C C*	345
	89	*I C*	672	708	26	*Cr L J*	893	771	88	*I C*	874
612	3	*Pat L R*	174		86	*I C*	829	772	4	*Pat*	646
	88	*I C*	553	710	6	*P L T*	524		89	*I C*	961
614	6	*P L T*	380		85	*I C*	551		26	*Cr L J*	1441
	1925	*P H C C*	233	712(1)	1925	*P H C C*	337	783	88	*I C*	830
	88	*I C*	91		91	*I C*	768	784	1925	*P H C C*	288
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	4	*Pat*	760		89	*I C*	614		90	*I C*	691
	90	*I C*	501	713	4	*Pat*	459	787	4	*Pat*	394
618	6	*P L T*	454		6	*P L T*	588	795	3	*Pat L R*	109
	88	*I C*	707		26	*Cr L J*	954		88	*I C*	395
	26	*Cr L J*	1187		87	*I C*	106		6	*P L T*	801
619	6	*P L T*	477	717	6	*P L T*	515	796	89	*I C*	21
	3	*Pat L R Cr*	134		5	*Pat*	33		7	*P L T*	73
	88	*I C*	603		88	*I C*	1045	797	4	*Pat*	626
	26	*Cr L J*	1179		26	*Cr L J*	1269		91	*I C*	225
622	86	*I C*	928	720	6	*P L T*	488		27	*Cr L J*	49
	6	*P L T*	708		86	*I C*	540	806	88	*I C*	747
623	4	*Pat*	503	723	6	*P L T*	493	807	4	*Pat*	440
625	4	*Pat*	510		26	*Cr L J*	927	810	4	*Pat*	670
	87	*I C*	849		86	*I C*	991	818	26	*Cr L J*	1249
	88	*I C*	141	725	91	*I C*	735		88	*I C*	993
	6	*P L T*	634	727	6	*P L T*	565		7	*P L T*	49
674	1925	*P H C C*	294		5	*Pat*	106	820	1925	*P H C C*	292
	89	*I C*	814		90	*I C*	374		90	*I C*	559
	7	*P L T*	82	729	6	*P L T*	615		7	*P L T*	47
677	4	*Pat*	484		86	*I C*	1009	822	89	*I C*	195
678	4	*Pat*	472	732	86	*I C*	1021		7	*P L T*	95
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ABBREVIATIONS EXPLAINED.

All. or A.	....	Indian Law Reports, Allahabad Series.
A. L. J.	....	Allahabad Law Journal.
A. I. R. 1925 All.	....	All India Reporter, 1925 Allahabad.
Bom. or B.	....	Indian Law Reports, Bombay Series.
Bom L. R.	....	Bombay Law Reporter.
A. I. R. 1925 Bom.	....	All India Reporter, 1925 Bombay.
Bur. L. T.	....	Burma Law Times.
Bur. L. J.	....	Burma Law Journal.
Cal. or C.	....	Indian Law Reports, Calcutta Series.
C. L. J.	....	Calcutta Law Journal.
C. L. R.	....	Calcutta Law Reports.
C. W. N.	....	Calcutta Weekly Notes.
A. I. R. 1925 Cal.	....	All India Reporter, 1925 Calcutta.
Cr. L. J.	....	Criminal Law Journal.
I. A.	....	Law Reports, Indian Appeals.
I. C.	....	Indian Cases.
Lah. or L.	....	Indian Law Reports, Lahore Series.
A. I. R. 1925 Lah.	....	All India Reporter 1925 Lahore.
Lah. L. J. or L.L. J.	....	Lahore Law Journal.
L. B. R.	....	Lower Burma Rulings.
A. I. R. 1922 L. B.	....	All India Reportor 1922 Lower Burma.
L. R. (P. C.)	....	The Law Reporter, Privy Council Sec.
L. R. (A)	....	,, Allahabad Section.
Mad. or M.	....	Indian Law Reports, Madras Series.
M. L. J.	....	Madras Law Journal.
M. L. T.	....	Madras Law Times.
L. W. or M. L. W.	....	Madras Law Weekly.
M. W. N.	....	Madras Weekly Notes.
A. I. R. 1925 Mad.	....	All India Reporter, 1925 Madras.
N. L. J.	....	Nagpur Law Journal.
N. L. R.	....	Nagpur Law Reports.
A. I. R. 1925 Nag.	....	All India Reporter, 1925 Nagpur.
O. & A. L. R.	....	Oudh and Agra Law Reporter.
O. C.	....	Oudh Cases.
A. I. R. 1925 Oudh	....	All India Reporter, 1925 Oudh.
O. L. J.	....	Oudh Law Journal.
O. W. N.	....	Oudh Weekly Notes.
P. R.	....	Punjab Record.
P. L. R.	....	Punjab Law Reporter.
P. W. R.	....	Punjab Weekly Reporter
Pat. or P.	....	Indian Law Reports, Patna Series.
P. H. C. C.	....	Patna High Court Cases (Supplement to C. W. N.)
A. I. R. 1925 P.	....	All India Reporter, 1925 Patna.
A. I. R. 1925 P. C.	....	All India Reporter, 1925 Privy Council
Pat. L. R.	....	Patna Law Reporter.
Pat. L. J.	....	Patna Law Journal.
Pat. L. W.	....	Patna Law Weekly.
R. or Rang.	....	Indian Law Reports, Rangoon Series.
A. I. R. 1925 Rang.	....	All India Reporter, 1925 Rangoon.
Sar.	....	Saraswati P. C. Judgments.
S. L. R.	....	Sind Law Reporter.
Suther.	....	Sutherland P. C. Judgments.
A. I. R. 1925 Sind	....	All India Reporter, 1925 Sind.
U. B. R.	....	Upper Burma Rulings.
U. P. L. R.	....	U. P. Law Reporter.
A. I. R. 1922 U. B.	....	All India Reporter, 1922 Upper Burma

OTHER ABBREVIATIONS.

Appl	....	Applied.	Diss.	....	Dissented from.	P. C.	....	Privy Council.
Appr.	....	Approved	Expl.	....	Explained.	Ref.	....	Referred to
Dist.	....	Distinguished.	Foll.	....	Followed.	S. B.	....	Special Bench.
Disc.	....	Discussed.	F. B	....	Full Bench.			

THE
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PATNA HIGH COURT

✱ ✱ 1925 PATNA 1

Full Bench

DAS, ROSS AND KULWANT SAHAY, JJ.

Balmukund Marwari — Appellant.

v.

Basanta Kumari Dasi and another — Respondents.

A. A. O, No 65 of 1923, Decided on 10th January 1924, from an Order of Sub-, J. Purulia, D/ 18-1-1923.

✱ ✱ (*a*) *C. P. Code S. 144-Application under*-Is *governed by Limitation Act Art, 181*

Das and K. Sahay, JJ:—An application for restitution is governed by Art. 181 and not Art 182. [P. 8, C. 2 P. 13, C. 1]

Per Ross, J:—There is no reason in principle why an application for restitution should not be treated as an application for execution, and therefore such an application is governed by art 182 21 C. L. J. 467 (1916). 28 Cal 113-[1900] 16 I. C. 238; [1912] 11 C. L. J. 541 [1910] foll [P. 10 C. 1]

(*b*) *Practice-Patna High Court-Should follow Calcutta High Court.*

The Patna High Court should not without very good reason depart from a long course of decisions of the Calcutta High Court. 1 P. L. J. 232 affirmed. 3 P. L. J. 367 [1917] foll. [P 8,, C 2]

(*c*) *Practice-Division Bench will not re-agitate a decision of Division Bench in the same case—1923 P. 371 did not decide question of limitation.*

If a question is in fact decided by the Division Bench by its decision once, it is not open to another Division Bench at another stage of the same case to allow the question to be re-agitated before it. [P. 5 C. 1]

Das and Ross, JJ, (K. Sahay, J: contra) The question of limitation was not decided by the Division Bench in 1923 P. 371. [P. 6 C. 1]

✱ (*d*) *C. P. Code S. 144-Restitution resembles execution only superficially-Limitation Act Art 182.*

Das, J:—Execution presupposes a decree or order capable of being carried into effect; restitution presuposes an act of the Court. which has done an injury to the suitors. Execution will issue as of course; but in cases not comprehended strictly within the letter of Sec. 144 of the Code, restitution is not a matter of course but depends upon the discretion of the Court and will be ordered only when the justice of the case calls for it. The jurisdiction as to restitution bears only a superficial resemblance to the jurisdiction as to execution. The jurisdiction to order restitution is inherent in the Court and that it flows, not from any power which it may have to carry into effect the decree or order of the Court, but from the recognition of the duty which it owes to the suitors to take care that no injury is done to them by its acts. [P. 6, C. 1, 2, P. 7, C. 2; P. 8, C. 1]

✱ (*e*) *C. P. Code (1908)-Limitation Act (1908)-Both should be interpreted together.*

Das, J:—Code of Civil Procedure and the Indian Limitation Act are the two great procedural Codes in India and they were amended in the same year and were to come into operation on the same day. They are statutes in *pari materia* and are to be taken together as forming one system, and as interpreting and forcing each other. (784) 1 Leach, C. C. (4th Ed.), P. 355. foll. [P. 8 C 2]

Abani Bhusan Mukherjee — for Appellant.

Atul Krishna Ray — for Respondents.

Mullick, J. — Abinash Chandra Karmakar and Satish Chandra Karmakar brought a suit against Basanta Kumari Dasi and her brother for rent and ejectment in respect of a house and obtained an *ex parte* decree on the 10th January 1917. On the 20th March of the same year the Plaintiffs in that suit got possession of the house. On the 18th June 1917, the *ex parte* decree was set aside and the suit was restored for hearing. The result of the retrial was that the suit was dismissed on the 7th March 1918. On the 13th July 1918, an appeal from that decision to the District Judge was also dismissed on the ground that the Plaintiffs had no title. The defence of Basanta Kumari in that suit was that the house had been acquired by her husband from

one Dwarkanath Karmakar and on her husband's death devolved upon her son with whose consent she and her brother were occupying the house.

The *ex parte* decree having been set aside the appellant preferred an application on the 29th June 1921, under S. 144 of the Civil Procedure Code asking that she might be restored to possession. By that time Abinash Chandra Karmakar and Satish Chandra Karmakar were no longer in possession. It appears that in 1914 they had mortgaged the house to one Balmakund who obtained a decree upon his mortgage and took possession on the 24th May 1918.

The Munsif who was the Court of first instance and to whom the application for restitution was presented, dismissed it on the ground that it was barred by limitation. It was also contended before him that restitution could not be obtained against Balmakund who was not the representative of the Plaintiffs, Abinash Chandra Karmakar and Satish Chandra Karmakar, in the original suit, but on this point the Munsif decided in the applicants' favour.

In appeal the Subordinate Judge took the view that as Basanta Kumari had no title and was only in possession with the permission of her son she was not competent to apply for restitution.

Basanta Kumari then preferred a second appeal, namely, No. 144 of 1922, to this Court which was heard by a Division Bench with the result that the appeal was remanded for rehearing by a judgment [*Basanta Kumari Dasi* v. *Balmakund Marwari* (1)]. The Division Bench held that restitution could be obtained against Balmakund. On the question of limitation they held that Art. 182 of Sch. 1 of the Indian Limitation Act was applicable and that if Basanta Kumari could prove that she presented an application for recovery of possession on the 1st June 1918, and that the proceedings in her application were stayed by the order of the District Judge from the 1st June till the 13th July 1918, then the application was within the period allowed by Art. 182.

The Subordinate Judge has now allowed the application for restitution holding that on the 1st of June 1918, the applicant made an application for restoration of possession, that she was entitled to deduction of time during the period of stay, that is, from the 1st June till the 13th July 1918 and that her application was within 3 years of the 1st June 1918. He also found that on the 11th June 1919, the Petitioners made another application for restoration of possession and that her application of the 29th June 1921 was therefore within time in any case without making any deduction for the period of the stay of the proceedings.

The present second appeal, M. A. No. 65 of 1923, is preferred against the Subordinate Judge's order.

The sole question argued before us here is the point of limitation.

It is contended on behalf of the Appellant Balmakund Marwari that Art. 181 and not Art. 182 is applicable to the case and if that is so, then the right of restitution having accrued on the 18th June 1917 and the application for restitution having been made on the 29th June 1922, the application was barred under the provisions of Art. 181 even after making allowance for the period between the 1st June and the 13th July 1918. On behalf of the Respondents it is contended that the judgment of the Division Bench in Appeal No. 144 of 1922 conclusively decided that Art. 182 and not Art. 181 is applicable and it is urged that it is *res judicata*.

In my opinion a careful perusal of the judgment shows that it was not the intention of the Court to decide finally what was the period of limitation in this case and the matter is still open for decision.

There is, however, considerable difference of opinion on the point. The Division Bench have cited with approval *Somasundaram Pillai* v. *Chokkalingam Pillai* (2), where it was held that Art. 182 was applicable to an application for restitution. In

(1) 1923 Patna 371=(1923) P. H. C. C. I= 2 Pat 277=1 Pat. L. R. 338.

(2) [1916] 40 Mad. 780=38 I. C. 806=5 L W. 267.

Kurgodigouda v. *Ningangouda* (3), the question was whether Sec. 6 of the Indian Limitation Act could be applied to extend time on the ground of minority in the case of an application for restitution and it was observed that for the purposes of Sec. 6 such an application could fairly be treated as an application for execution.

On the other hand, *Shivabai* v. *Yesoo* (4) is clear authority for the contrary view that Art. 181 is applicable. In *Krupasindhu Roy* v. *Mahanta Balbhadra Das* (5), it appears to have been admitted that Art. 181 was applicable; but the matter was considered and the Respondents contend that it is an authority which conflicts with the decision of the Division Bench.

In the circumstances we think that the question is one which should be referred to the Full Bench.

There can be no doubt that for the purpose of appeal an order made in a proceeding for restitution is a decree within the meaning of the Civil Procedure Code, but the question is whether the application for restitution which starts the proceeding is an application for the execution of a decree. The relevant section in the Civil Procedure Code of 1882, was Sec. 583, and Sec. 144 of the present Code considerably amplifies that section and makes clear various points on which there was conflict. It was held in some cases, for instance, that a separate suit for restitution would lie. The present section omits all reference to execution and also in clear terms bars a separate suit.

The section when read with Sec. 36 of the Code provides that an order for restitution will be enforced as far as possible as a decree, but it does not say that the order is a decree.

Again the section applies only to cases where a decree is varied or reversed, and it may be contended that the reference to a Court of first instance indicates that the reversal should be made by an Appellate Court; but in my opinion the words 'Court of first instance' do not control the preceding words.

In any event S. 151 of the Code would apply and relief could be given under the inherent powers even if S. 144 was not expressly applicable to cases of reversal of *ex parte* decree.

But whether the decree of reversal be made by an Appellate Court or by the Court of first instance the question is whether the application for restitution is an application for the enforcement of any relief given by a decree. There is really no decree to execute, for the decree does not say that the Defendant is to be restored to possession. Indeed it could not give any such direction for the simple reason that a decree only speaks with reference to the facts upon which a plaint is founded and cannot take into account events which have happened thereafter. Or. 21 which contains rules framed for giving effect to S. 47, C. P. C. and which prescribes how an application for execution shall be framed and what procedure shall be followed in execution proceedings does not refer to any application for restitution.

The same reasoning applies to the contention that though there may be no decrees there is at least an implied order which is capable of execution under Or. 21. O. 21 does not relate to the execution of decrees and orders, but orders not expressly referred to therein do not come within its purview.

An application for restitution therefore, is, in my opinion, not an application for execution within the meaning of the Civil Procedure Code.

The next question is whether the words 'application for execution' have a wider meaning in Art 182 of Sch. I of the Indian Limitation Act. I think the answer must be in the negative. The Indian Limitation Act was amended in the same year as the Civil Procedure Code and must be read in conjunction with that Act. The term execution in Art. 182 means execution in accordance with the provisions of the Civil Procedure Code and refers, in my opinion, only to those decrees and orders which are referred to in Or. 21'.

If an order setting aside an *ex parte*

(3) [1917] 41 Bom. 625=41 I. C. 238=19 Bom. L. R. 638.
(4) [1918] 43 Bom 335=48 I. C. 130=20 Bom. L. R. 925.
(5) [1917] 3 Pat. L. J. 367=47 I. C. 47.

decree carried with it an implied decree or order for restitution subject to the rules contained in S. 47 of the Civil Procedure Code and in Or. 21, then there was no necessity for prescribing expressly in S. 144 that no suit shall be instituted, for that prohibition is already contained in S. 47. In my opinion an application for restitution is an original application something in the nature of a suit and is governed by Art. 181.

Accordingly as we differ from the decision of the Division Bench above referred to, we refer this appeal for final decision to a Full Bench.

The question to be decided is whether Art, 181 or 182 of Sch. I of the Indian Limitation Act is applicable to an application for the exercise of the power of restitution conferred either by S. 144 or by S. 151 of the C. P. C. and if neither of the above articles is applicable then is there any other article applicable to the case.

Bucknill, J.—I agree.

Judgment.

Das, J.—The question formulated for the decision of the Full Bench is as follows:—" Whether Art. 181 or Art. 182 of Sch. I of the Indian Limitation Act is applicable to an application for the exercise of the power of restitution conferred either by S. 144 or S. 151 of the Code of Civil Procedure, and, if neither of the above articles is applicable, then, is there any other article applicable to the case." A preliminary argument was advanced to us on behalf of the Respondent to the effect that the reference is not competent having regard to the fact that a Division Bench of this Court presided over by the learned Chief Justice and Mr. Justice Jwala Prasad expressed a final opinion on this point at an earlier stage of this case. It appears that two questions were involved in the application for restitution presented by the Defendant-Respondent Basanta Kumari Dasi; first, whether the application was not barred by limitation, and secondly, whether Balmakund, the Appellant, against whom the application was made could be regarded in the circumstances of the case as the representative-in-interest of the Plaintiffs, who obtained a decree against Basanta Kumari which decree was subsequently set aside on appeal. It may be mentioned that Balmakund was not a party to the suit but is in actual possession of the property which is the subject-matter of the application for restitution by virtue of his purchase at a Court sale held in pursuance of a decree which had been obtained by him against the Plaintiffs. The learned Munsif to whom the application for restitution was presented, dismissed it on the ground that it was barred by limitation. He held however, that Balmakund was the representative of the Plaintiffs, and that an effective order could be made against him provided the application was within time. Basanta Kumari appealed from the decision of the Munsif; and the learned Subordinate Judge dealing with the appeal took the view that no application for restitution could be made by Basanta Kumari against Balmakund. Having arrived at that conclusion he thought it unnecessary to deal with the question of limitation and he left that question undecided. From that decision Basanta Kumari appealed to this Court and a Division Bench of this Court presided over by the Hon'ble the Chief Justice and Mr. Justice Jwala Prasad took the view that Balmakund was the representative of the Plaintiffs and in that view the Division Bench set aside the decision of the Subordinate Judge and remanded the case to him for considering the question of limitation. The whole argument of the Respondent is based on this decision of the Division Bench, *Basanta Kumari Dasi* v. *Balmakund Marwari* (1), and it has been strongly insisted before us that the Division Bench decided finally that Art. 182 was applicable to an application for restitution and that it became necessary for the Division Bench to remand the question of limitation to the Subordinate Judge only because it was urged on behalf of Balmakund that even on the assumption that Art. 182 was applicable, the application for restitution was barred by limitation. It appears that certain facts which it was necessary for Basanta Kumari to establish to enable

her to contend that her application for restitution regarded as an application for execution was within time were not before the Division Bench of this Court as the question had not been gone into by the learned Subordinate Judge: and the whole argument of Mr. A. K. Roy on behalf of the Respondent was to the effect that the only question which was left for the decision of the Subordinate Judge was whether upon the facts the application of Basanta Kumari was within time, the Division Bench having decided finally that the application must be regarded as an application for execution. On remand the learned Subordinate Judge considered that he was bound by the decision of this Court that Art. 182 was applicable to an application for restitution; and he came to the conclusion that in the circumstances of the facts proved before him, the application was within time. From that decision there was an appeal to this Court and another Division Bench of this Court, presided over by Mullick and Bucknill, JJ., took the view that the question had not been finally decided by the earlier decision of the Division Bench and being of opinion that the question was of sufficient importance, has referred it for the decision of the Full Bench.

It is obvious that if the question was in fact decided by the Division Bench by its decision *Basanta Kumari Dasi* v. *Balmakund Marwari* (1), it was not open to another Division Bench at another stage of the case to allow the question to be re-agitated before it. I have, however, come to the conclusion that the question was not in fact decided by the Division Bench. I am willing to admit that there are expressions in the leading judgment which strongly support the argument advanced on behalf of the Respondent; but the question must, in my opinion, be decided on the terms of the actual order passed by the Court. Now the actual order runs as follows:—"In the result we set aside the decision of the Subordinate Judge refusing the Appellant's application but as the Appellant's right to succeed in that application must still depend upon the question of limitation, we direct that the learned Subordinate Judge before finally disposing of the appeal do consider the question of limitation and come to a decision thereon in the light of the facts already before him." It will be observed that the whole question of limitation was remanded for the decision of the learned Subordinate Judge. and not the narrower question of fact, namely, whether Basanta Kumari had taken certain steps in execution which would save her application for restitution under Art 182 of the Limitation Act. It is worthy of note that Mr. Justice Jwala Prasad agreed "to the order proposed," namely, the order remanding the question of limitation for the decision of the learned Subordinate Judge. As I have said already the judgment of the learned Chief Justice leaves no room for doubt that in his opinion Art. 182 is applicable to an application for restitution, but if he had intended to decide the question finally and if Mr. Justice Jwala Prasad agreed with that view, the order of remand would have been couched in different language. It is one thing to express a view, it is another and a different thing to decide a point. I can hardly believe that so careful a Judge as the learned Chief Justice should have asked the Subordinate Judge to decide the question of limitation, if he had decided it himself; and though I quite agree that it was in any case necessary to remand the case for the investigation of certain facts upon which alone it could be argued that the application for restitution was within time even assuming that Art, 182 was applicable to such an application, the form of order, in my opinion, precludes the argument that the Court decided that Art. 182 was applicable and remanded the case merely for the investigation of an issue of fact. If the argument of the learned Vakil for the Respondent were well-founded the Court should have remanded the case under the provisions of Or. 41, r. 25 and not under the provisions of Or. 41 r. 23. In any event I cannot ignore that Mr. Justice Jwala Prasad was careful to say that he agreed to the order proposed by the learned Chief Justice and that the order proposed

left the whole question of limitation to be decided by the learned Subordinate Judge. In my opinion the question of limitation was not decided by the Division Bench and it was open to Mullick and Bucknill, JJ., to refer it for the decision of the Full Bench. I would accordingly overrule the preliminary point raised on behalf of the Respondent.

I now come to the point raised in the Order of Reference, namely, whether Art. 181 or Art. 182 is applicable to an order for restitution. Now it seems to me that, before dealing with the question, it is necessary to have a clear idea as to what is meant by restitution, and whether the jurisdiction as to restitution is the same as the jurisdiction to execution. Art. 182 applies to an application for execution of a decree or order; and the broad question which we have to determine is whether an application for restitution is in essence an application for execution. That the jurisdiction to make restitution exists and is inherent in every Court is not open to doubt; nor is it open to doubt that that jurisdiction flows not from any express power that might be given in that behalf by the legislature, but from the recognition of the principle that "it is the duty of the Courts to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court." *Rodger* v. *The Comptoir De Paris* (6). I desire to emphasise the point that this jurisdiction was not for the first time conferred by the Code of Civil Procedure, but that it existed independently of the Code and could be, and was in fact, exercised whenever the act of the Court did any injury to the suitors. Execution, on the other hand, signifies the enforcement or effectuation of the judgments or orders of Courts of justice. In a narrower sense it means the enforcement of such judgments or orders by a public officer under certain express powers conferred by the Code. Execution presupposes a decree or order capable of being carried into effect; restitution presupposes an act of the Court which has done an injury to the suitors. Execution will issue as of course; but in cases not comprehended strictly within the letter of S. 144 of the Code, restitution is not a matter of course but depends upon the discretion of the Court and will be ordered only when the justice of the case calls for it. *Asutosh* v. *Upendra* (7). It seems to me that when the nature of the jurisdiction as to restitution is closely examined, it will be found that it bears only a superficial resemblance to the jurisdiction as to execution.

The argument in favour of the view that restitution is by way of execution has been put very forcibly and concisely by the learned Chief Justice of this Court in his order of remand, *Basanta Kumari Dasi* v. *Balmakund Marwari* (1). "Although," said his Lordship, "an application under S. 144 is not included in Or. 21 which lays down the rules of procedure in execution cases still in substance I think that an application asking for restitution in consequence of a decree having been set aside is just as much an application in execution of that decree as any other application which seeks to have the actual declarations in the decree enforced. It is true that the decree only deals with it in a negative sort of way but in fact the result of setting aside a decree in favour of one party is to give the other the right to be restored to the same position as he was in before that decree was passed and to set aside any advantage that the decree-holder might have obtained by executing the decree." I understand that the view of the learned Chief Justice is that restitution is nothing more than carrying into effect this negative aspect of the decree. Now let me take a concrete case. A obtains a decree against B for Rs. 5,000 and recovers the money from B by levying execution. The decree is ultimately set aside in appeal. I quite agree that the decree reversing the primary decree is authority for the view that A should refund to B the sum of money taken by him in execution, but in making restitution the Court has com-

(6) [1871] L.R. 3 P.C. 465—7 Moo. P.C. (N.S.) 314—40 L.J. P.C. 1—24 L.T. 111—19 W.R. 449—17 E.R. 120.

(7) [1916] 24 C.L.J. 467—38 I.C. 17—21 C.W.N. 564.

plete power to direct A not only to pay the sum of Rs, 5,000, but also to pay interest upon the sum to B. Upon what is the jurisdiction to compel payment of interest founded? I quite agree that the Appellate decree in so far as it reversed the decree of the Court of first instance may be read as containing a direction by implication that A should refund to B the sum of money taken by him in execution, but there is no direction either express or by implication that A should pay interest on the sum seized by him by virtue of a wrong order of the Court. There is no jurisdiction in a Court executing a decree to award interest where the decree itself is silent as to interest. Whence then does the Court derive jurisdiction to compel a party to refund not only the principle sum seized by him in exccution of an erroneous decree of Court (as to which there may be a direction by implication in the decree reversing the original decree) but also interest upon that sum (as to which there is no direction whatever either express or by implication)?

The answer, I think, is given by Lord Cairns in the leading case of *Rodger* v. *The Comptoir De Paris* (6). That was a case in which the Supreme Court of Hongkong gave a decree for money to the Plaintiff in an action for trover. There was an appeal to the Privy Council, but pending the appeal the Plaintiff recovered the sum decreed in his favour by levying execution. The Privy Council set aside the judgment of the Supreme Court of Hongkong and directed non-suit to be entered. The Defendant, the successful party in the Privy Council, applied for restitution not only of the money which had been paid under the original decree, but also of interest upon all the sums paid. The Supreme Court at Hongkong took the view that, there being no direction as to payment of interest in the decree of the Privy Council and interest not being recoverable either at common law or by statute in the case of repayment of money erroneously paid under a judgment which is reversed, it had no power to direct the payment of interest upon the sums paid under the original decree. Lord Cairns after pointing out that it was the duty of the tribunals to take care that no act of the Court does an injury to suitors in the Court, proceeded to say as follows:—"It is contended, on the part of the Respondents here, that the principal sum being restored to the present Petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the Petitioners. They will by reason of an act of the Court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far as, therefore, principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the Petitioners, and that the perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them with interest during the time that the money has been withheld." It will be noticed that Lord Cairns does not base his decision upon the ground that there was in that case a decree which could only be carried into effect by directing payment not only of the principal sums paid under the erroneous decree of the Court of first instance, but also of the interest on those sums. His decision, on the other hand, is based upon the view that it is the duty of the Court to take care that no injury is done to the suitors by any act of the Court. In my opinion the decision of Lord Cairns is authority for the view that the jurisdiction to order restitution is inherent in the Court and that it flows, not from any power which it may have to carry into effect the decree or order of the Court, but from the

recognition of the duty which it owes to the suitors to take care that no injury is done to them by its acts.

The next question is, have the Civil Procedure Code and the Limitation Act expressed a different view as to the nature of restitution? It has been argued before us that the Code of 1882 contains a clear intimation to the effect that an application for restitution is to be regarded as an application for execution and that it was not the intention of the Code of 1908 in any way to alter the law on the subject. The provision as to restitution found its place in the Code of 1882 in the chapter dealing with appeals, not in the chapter dealing with executions and S. 583 which contains the provision as to restitution ran as follows :— "When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same he shall apply to the Court which passed the decree against which the appeal was preferred, and such Court shall proceed to execute the decree passed in appeal according to the rules hereinbefore prescribed for the execution of derees in suits." I can find nothing in S. 583 to encourage the argument that in the Code of 1882 the legislature expressed the view that an application for restitution was to be regarded as an application for execution. If that was the view of the legislature, the provision should have found its place not in the chapter relating to appeals but in the chapter relating to execution. It no doubt laid down the procedure as to the execution, of an order for restitution, but there is no suggestion whatever in the section itself that an order for restitution should be considered as an order for execution. The Code of 1908 removes any doubt that might arise upon the interpretation of the earlier Code. The word "decree" has been defined in the Code of 1908 to include the determination of any question within S 144 which is itself a decree and capable of execution as such. It is in my opinion impossible now to contend that an order for restitution is an order in execution.

Apart from any other consideration, it seems to me that the term "application for the execution of a decree or order" in Art 182 of the Limitation Act must be understood in the sense in which that term is used in the Code of Civil Procedure. The Code of Civil Procedure and the Indian Limitation Act are the two great procedural Codes in India and they were amended in the same year and were to come into operation on the same day. They are statutes in *pari materia* and are to be taken together as forming one system, and as interpreting and enforcing each other. See *Palmer's* case (8). Now Art, 182 applies in terms to applications for execution of decrees or orders. Applications for execution of decrees or orders are dealt with in Or. 21 of the Code. In my opinion, Art. 182 applies to such applications for execution as are contemplated by the Code and are provided for in Or. 21 of the Code. It is not disputed that an application for restitution is not an application provided for in Or. 21 of the Code.

This is my view of the question submitted for the decision of the Full Bench, but even if that were not my view, I think, I would be bound to follow the decisions of the Calcutta High Court which are to the effect that an application for restitution is governed by Art. 181 and not Art. 182 of the Limitation Act. See *Harish Chandra* v. *Chandra Mohan* (9), *Masirunnissa Khatun* v. *Joy Chand Lal Boyed* (10), *Gangadhar Marwari* v. *Lachman Singh* (11) and *Asutosh Gossain* v. *Upendra Prosad Mitra* (7). It is quite true that a different view has been taken in the other High Courts, but as was pointed out by the Full Bench of this Court in *Haji Abdul Gani* v. *Raja Ram* (12): "This Court should not without very good reason depart from a long course of decisions of the Calcutta High Court." The question raised in the Order of Reference is a question of procedure and to do otherwise than follow the decisions of the Calcutta High Court

(8) [1784] 1 Leach. C. C. (4th Ed.), p. 355.
(9) [1900] 28 Cal. 113.
(10) [1912] 16 I.C. 238.
(11) [1910] 11 C.L.J. 541=6 I.C. 125.
(12) [1916] 20 C W.N. 829=1 Pat.L.J. 232=35 I.C. 468=3 P.L.W. 62 (F.B.)

on the point would cause great and unnecessary confusion. It has been contended before us that the question has not been argued in the Calcutta High Court as to the applicability of Art. 181 as opposed to the applicability of Art. 182 in relation to an application for restitution. That may be so, but where the question is one of procedure, it is of the utmost importance that the suitors should know where they stand and it is not a matter of much moment that the question was not raised in the Calcutta High Court in the form in which it has been raised here. It is sufficient that the Calcutta High Court has intimated to the suitors that Art 181 applies to an application for restitution. It is worthy of note that in this Court the view has been taken that Art. 181 is applicable to an application for restitution. See *Krupasindhu Roy* v. *Mahanta Balbhadra Das* (5).

In my opinion Art. 181 is applicable to an application for restitution and as it is conceded before us that if Art. 181 applies the application is clearly barred by limitation, I would allow this appeal, set aside the order of the Court below and restore the order of the Court of first instance.

As a result of the decision of the majority of this Bench, this appeal is dismissed with costs.

Ross, J.—The first point for consideration is whether it was decided by this Court in *Basanta Kumari Dasi* v. *Balmakund Marwari* (1) that the article governing the case is Art. 182. Two questions were raised in that appeal. The first was whether Balmukund Marwari then Respondent No. 1 was the representative in interest of the other two Respondents, so that restitution might be claimed as against him. The other was the question of limitation. The Munsif had decided both these points; the first in favour of the present Respondent and the second against her. The Subordinate Judge on appeal had held that the present Respondent was not entitled to regain possession from anybody; and, without dealing with the question of limitation, had dismissed the application. In this Court the first question dealt with was the position of Balmakund. It was held that his position was no better than that of his mortgagors and that the application for restitution was maintainable as against him. The Court then turned to the question of limitation which had not been dealt with by the Subordinate Judge. It was pointed out that it was not quite clear from the Munsif's judgment how far any application for execution of the decree was made or how far that application included a claim to be restored to possession of the property. The Subordinate Judge, who might have gone into the evidence, had not done so. But before sending back the case for a determination of this question by the lower Appellate Court, the learned Chief Justice considered that he had to be satisfied that even upon the facts so far as known that the then Appellant really had a case to present upon this part of the appeal. In this connection the question of Arts. 181 and 182 was discussed. The opinion was expressed that Art. 182 applied; and, there being therefore a case to present upon this part of the appeal, the case was remanded in the following terms: "In the result we set aside the decision of the Subordinate Judge refusing the Appellant's application; but as the Appellant's right to succeed in that application must still depend upon the question of limitation, we direct that the learned Subordinate Judge, before finally disposing of the appeal, do consider the question of limitation and come to a decision thereon in the light of the facts already before him. For that purpose he will be entitled of course to consider any orders in the case that have been made and that appear in the order sheet in the Court records or in the record before him." It seems to be plain from the terms of this order that the remand was a remand of the whole case under Or. 41, R. 23 of the Civil Procedure Code. The Subordinate Judge had in effect disposed of the application on a preliminary point and the Appellate Court remanded the case directing what issue was to be tried. It was not a remand under Or. 41, R. 25 of the Civil Procedure Code. The whole question of limitation was before the

Subordinate Judge and in my opinion it was not and could not have been the intention of this Court to decide a part of the question, namely, the article of the Limitation Act applicable, and leave a part only, namely, the question of fact for the decision of the Court to which the remand was made. The applicability of Art. 181 or 182 had to be discussed in order that the Court might be satisfied that there was a case worth remanding: but the opinion expressed on that part of the case was limited to that purpose and was not in my opinion intended to be in any sense conclusive of the question. On this point therefore I agree with the judgment that has just been delivered.

I now turn to the question whether Art. 181 or Art. 182 applies to an application for restitution and on this point I am of a different opinion. I can see no reason in principle why an application for restitution should not be treated as an application for execution. There may be no express direction for restitution in the decree, but restitution follows as a necessary consequence where a decree that has been executed is varied or reversed and the effect of S 144 of the Code is that a direction for restitution is implied in the decree. The order reversing or varying a decree is by implication an order for restitution of any property taken in execution of that decree and is immediately capable of execution. To my mind the words of the section, "The Court . . . shall . . . , . cause . . . . . restitution to be made." import execution. It may be noted in passing that in England if a judgment for the recovery of land be reversed or set aside after possession has been obtained thereunder, restitution may be obtained by a writ of possession addressed to the Sheriff—Chitty's King's Bench Forms, Fourteenth Edition, page 693.

Authority also seems to me to be decidedly in favour of this view.

Three decisions in Calcutta were cited in which it was held that Art. 181 applied. In *Harish Chandra* v. *Chandra Mohan* (9), the learned Judges referred to the decisions in *Nand Ram* v. *Sita Ram* (13) and *Kurupam Zamindar* v. *Sadasiva* (14) and said that they were disposed to agree with the latter; but added that whether Art. 178 or Art. 179 of the second schedule to the Indian Limitation Act of 1877 (Act XV of 1877) applied, the application was out of time. The question therefore did not call for decision in that case. In *Masirunnissa Khatun* v. *Joy Chand* (10), the decision in *Harish Chandra* v. *Chandra Mohan* (9) was followed without discussion; and on the facts the question whether Art. 181 or 182 of Act IX of 1908 applied did not require to be decided. In *Asutosh Gossain* v. *Upendra Prosad Mitra* (5), it was held that no question of limitation arose, though incidentally a reference was made to Art. 181. There is one case in Madras, *viz.*, *Kurupam Zamindar* v. *Sadasiva* (14), where also, although the learned Judges were disposed to think that Art. 178 applied, the application was barred whether the article applicable was Art. 178 or 179. Moreover it was held that the application was an application in execution, governed by the rules prescribed by the Code for the execution of decrees. It may also be noted that one of the Judges who was a party to that decision expressed a different opinion in *Venkayya* v. *Ragava Charlu* (15). In *Shivabai* v. *Yesoo* (4), it was stated that Art. 181 applied but there was no discussion of the question, the only other article considered being Art. 166. In *Hanifunnissa* v. *Chunni Lall* (16), it was assumed that the case was governed by Art. 181 and no question of law was discussed.

On the other hand there are reasoned decisions for the application of Art. 182 of which some of the more important are the following. In *Venkayya* v. *Ragava Charlu* (15), it was held that Art. 179 applied and it was observed that the reference to Art. 178 in *Kurupam Zamindar* v. *Sadasiva* (14) was a mere *obiter dictum*. In *Somasundaram Pillai* v. *Chokkalingam Pillai* (2) the question was discussed by Seshagiri Ayyar, J., who, referring to the argument based on the difference in language between

(13) [1886] 8 All 545 = (1886) A.W.N. 178.

(14) [1886] 10 Mad. 66.
(15) [1897] 20 Mad. 448.
(16) [1921] 19 A.L.J. 549 = 63 I.C. 184.

S. 583 of the previous Code of Civil Procedure and S. 144 of the present Code said: "We are unable to see the difference. S. 144 of the present Code has been so framed as to enable the successful party in the Appellate Court to be placed in *status quo ante*. The language of S. 583 of the old Code was not wide enough to cover all cases of benefits arising from the reversal of a decree being fully realized by the successful party. Apart from this change, we see no ground for holding that the legislature intended to make any departure in the procedure by which restitution is to be obtained. Under the old Code, restitution was by way of execution: see *Prag Narain* v. *Kamakhia Singh* (17). The same rule applies to similar applications under the new Code. The language of S. 47 of the Code would cover all cases of restitution. The party seeking the aid of the Court is agitating a question relating to the execution of the decree under which the other party deprived him of his property." The same view was taken in *Unnamalai Ammal* v. *Mathan* (18), a case of the Madras High Court, where it was held with reference to the difference between S. 583 of the old Code and S. 144 of the new Code that "the legislature could not have intended that an application for restitution should not be treated as an application in execution. All that the legislature intended was to make clear that certain applications, which under the old Code were not included in S. 583, were included in S. 144, Civil Procedure Code" The decision in *Asutosh Gossain* v. *Upendra Prosad Mitra* (7) was referred to and it was pointed out that the observation made in that case was *obiter* and that no reasons were given in support of the view that Art. 182 did not apply. In *Kurgodigouda* v. *Ningangouda* (3) an order for restitution was treated as an order for execution. The question was also dealt with in *Sayad Hamidalli* v. *Ahmadalli* (19) where Macleod, C. J., decided that an application for restitution could not be treated as anything else than an application for execution of the decree of the Appellate Court. It is the decree of the Appellate Court which entitles the successful Appellant to get back something which he had been deprived of by the decree of the lower Court, under which the then successful party had actually received possession. In order, therefore, to get back what he has lost, the successful Appellant must apply for execution of the order which entitles him to get back that possession. Clearly, therefore, Art. 182 applies to application under S. 144. In *Nand Ram* v. *Sita Ram* (13) Oldfield and Tyrrell, JJ., described the benefit by way of restitution under a decree as a necessary incident of the decree and held that the Plaintiff was competent to move the local Court to execute the Appellate decree in his favour according to the rules prescribed for the execution of decrees in suits and that Art. 179 applied. In *Damodhar Das* v. *Brij Lal* (20). Chamier and Piggott, JJ., held that execution covered restitution. The question, however, in my opinion, is concluded by the decision of the Privy Council in *Prag Narain* v. *Kamakhia Singh* (17). In that case the Respondents had applied in the execution proceedings for mesne profits and interest by way of restitution. It has held that their claim to have the questions in dispute determined in the execution proceedings was justified by S. 583 and 244 of the Code.

The weight of authority, therefore, in my opinion, is in favour of the view that Art. 182 governs the present case and I would answer the question in this sense. I would accordingly hold that the application for restitution was not barred by time and would dismiss the appeal with costs.

Kulwant Sahay, J.—This case has been referred to a Full Bench for decision of the question as to whether Art. 181 or Art. 182 of Sch. I of the

(17) [1909] 31 All. 551=36 I. A. 197=10 C. L. J. 257=11 Bom. L. R. 1200=6 M. L. T. 303=14 C. W. N. 55=3 I. C. 798=19 M. L. J. 599=13 O. C. 180 (P. C.)

(18) [1917] 33 M. L. J. 413=6 L. W. 359=(1917) M. W. N. 643=42 I. C. 530=22 M. L. J. 333.

(19) [1920] 45 Bom. 1137=62 I. C. 233=23 Bom. L. R 480.

(20) [1915] 37 All. 567=30 I. C. 77=13 A. L. J. 769.

Indian Limitation Act is applicable to an application for the exercise of the power of restitution conferred either by S. 144 or 151 of the Civil Procedure Code, and if neither of the above articles is applicable, then is there any other article applicable to the case. The question has arisen in a second appeal and therefore the whole appeal is before the Full Bench for final decision.

The question propounded arose under the following circumstances: On the 10th of January 1917, an *ex-parte* decree was obtained by Abinash Chandra Karmakar and Satish Chandra Karmakar against Basanta Kumari Dasi and another, directing among other reliefs the ejectment of the Defendants from a house occupied by them. This decree was executed and possession was delivered to the Plaintiffs decree-holders on the 29th of March 1917. Upon an application made by the Defendants under Or. 9, r. 13 of the Civil Procedure Code the decree was set aside by the Court of first instance and the suit was restored by an order dated the 18th of June 1917. The suit was ultimately dismissed after hearing on the 7th of March 1918. There was an appeal to the District Judge which was also dismissed on the 13th of July 1918. On the 29th of June 1921 the Defendants filed an application before the learned Munsif for restitution and prayed for restoration of possession of the house under S. 144 of the Code of Civil Procedure. It appears that at this time the Plaintiffs who had obtained the decree and were put in possession on the 29th of March 1917, were no longer in possession, but one Balmakund, a mortgagee from the original Plaintiffs decree-holders, was in possession by virtue of purchase and delivery of possession in execution of a mortgage decree obtained by him against the original Plaintiffs.

Two questions were raised before the learned Munsif by way of objection to the application under S. 144 of the Civil Procedure Code. The first objection was that the application could not be entertained against Balmakund who was not the representative of the original decree-holders; and the second objection was that the application was barred by limitation. The learned Munsif held that restitution could be granted against Balmakund who was a representative of the original decree-holders but the application was barred by limitation, and he accordingly rejected the application. On appeal to the Subordinate Judge it was held that the application could not be entertained inasmuch as the original Defendants had no title to the house the title being in the son of Basanta Kumari Dasi and the Defendants being in possession under the permission of the son, and further that the application could not be entertained against Balmakund In this view of the case the learned Subordinate Judge held that the question of limitation did not arise and he dismissed the application There was a second appeal to this Court which came up for hearing in a Division Bench presided over by his Lordship the Chief Justice and Mr. Justice Jwala Prasad. Their Lordships held that Subordinate Judge was wrong in holding that the application could not be maintained by the Defendants or that it could not be entertained against Balmakund. They accordingly set aside the order of the Subordinate Judge in so far as it held that the application was not maintainable; but as the question of limitation had not been decided by the learned Subordinate Judge, their Lordships remanded the case for a consideration of the question. In the course of the judgment his Lordship the Chief Justice expressed the view that the proper article applicable to the case was Art. 182 and not Art. 181 of the first schedule of the Indian Limitation Act. His Lordship expressed the opinion that applications for restitution were really applications for execution of decrees, and consequently Art. 182 applied, and the Petitioners for restitution were entitled to show that a previous application for restitution had been made by them within the period of limitation, and if they succeeded in doing so, then the present application filed on the 29th of June 1921, being within three years from the previous application, would be within time.

Moreover, it was stated before their Lordships that in a previous application for restitution which was filed within time a stay had been obtained from the Court of appeal below and that the period during which the stay was in force should be excluded. Their Lordships therefore remanded the case to the lower Appellate Court. On remand the learned Subordinate Judge has held that the application was within the period of limitation treating it as an application for execution under Art. 182 of the Limitation Act. Against this order of the learned Subordinate Judge the present second appeal has been preferred to this Court. This appeal came on for hearing in a Division Bench presided over by Mr. Justice Mullick and Mr. Justice Bucknill, and their Lordships differed from the opinion expressed by their Lordships the Chief Justice and Mr. Justice Jwala Prasad on the question of limitation, and the case has accordingly been referred for the decision of a Full Bench.

In my opinion the proper article applicable to an application for restitution under S. 144 or S 151 of the Civil Procedure Code is Art. 181 of Sch. I of the Indian Limitation Act. Sec. 144 provides for cases where a decree is varied or reversed, and if any party is entitled to any benefit on account of such variance or reversal by way of restitution or otherwise, that such restitution should be granted to such party and that the parties should be placed as far as it may be possible in the same position which they would have occupied but for such decree or such part thereof as has been varied or reversed. The right to apply for restitution is a right which is independent of any reliefs granted by the decree. The power to grant restitution is an inherent power in a Court to restore parties in the position which they occupied before the decree, which is reversed, was passed. It is the power to prevent any injury being caused to any party by any act of the Court itself, and this power, to my mind, is wholly independent of the rights conferred by a decree and which rights can be enforced only by way of execution. Where for instance in a suit for possession of property the Plaintiff succeeds in the Court of first instance, and in execution of that decree possession is delivered to him, but on appeal the decree is subsequently reversed, the final decree of the Court of appeal merely declares that the Plaintiff is not entitled to any relief and does not provide for re-delivery of possession to a successful Defendant. The Defendant in such a case cannot properly apply to execute the decree of the Court of appeal in order to be restored to possession because there is no such direction in the decree. The application can be made to the Court only in its inherent power to restore parties to their original position. This application for restitution is to my mind an application either in the suit itself or by way of miscellaneous proceeding invoking the Court's inherent jurisdiction to remedy an injury caused to a party. In some of the cases dealing with the point, it has been said that the relief granted by the decree of the Court of appeal which varies or reverses the decree of the Court of first instance is of a negative character and that it grants a relief to the successful party which is capable of enforcement by way of execution. With very great respect to the learned Judges who hold this view I am unable to agree with them. A decree can be executed only in so far as it grants any relief; so far as the successful Defendant is concerned it merely dismisses the claim of the Plaintiff, there is no relief either positive or negative granted to the Defendant, and there is no direction in the decree which is capable of execution. That an application for restitution under S. 144 is not an application for execution is clear on a reference of to the old S. 583 of the Code of 1882. S 583 provided for restitution in case of decrees passed in appeal under Chap. 41 of the Code of 1882 which related to appeals from original decrees. Moreover, it directed that on an application being made by any party entitled to any benefit (by way of restitution or otherwise) under a decree passed in appeal and

who desires to obtain execution of the same, the Court to which the application is made shall proceed to execute the decree passed in appeal according to the rules which were prescribed for the execution of decree in suits. There was therefore a clear provision in the Code of 1882 that applications for restitution should be dealt with as applications for execution. In S. 144 of the present Code there is no reference to execution at all. Moreover, if an application for restitution be treated as an application for execution, then I fail to see any necessity for enacting S. 144 at all because such matters had already been provided for in S. 47 of the Code. If an application for restitution is an application for execution then it relates to a questions arising between the parties to the suit or their representatives, and relating to the execution, discharge or satisfaction of the decree. Furthermore it is provided in S. 47 that questions relating to execution, discharge or satisfaction of a decree shall be determined by the Court executing that decree and not by a separate suit. S. 144 also provides that no suit shall be instituted for the purposes of obtaining any restitution or any other relief which could be obtained by application under sub-S. 1 of the section. To my mind, S. 47 deals with questions relating to execution of decrees which properly may be treated as applications in execution, while S. 144 deals with questions which do not come strictly within the meaning of execution of a decree but which are analogous to it, namely, applications for relief consequent upon a decree being set aside. Under the definition of a decree as given in the Code of Civil Procedure the determination of any question within S. 144 is a decree; and when an application is made for restitution under S. 144 and the Code makes an order directing restitution to be effected, that order is a decree which has to be enforced in the way in which decrees are enforced by way of execution. I am therefore of opinion that application for restitution under S. 144 or 151 of the Civil Procedure Code is not an application for execution and the proper article of the Limitation Act applicable to such an application is Art. 181 of the first schedule of the Act. That Art. 181 applies to such applications has been uniformly held by the Calcutta High Court [see *Harish Chandra* v. *Chandra Mohan* (9) and *Asutosh Gossain* v. *Upendra Prosad Mitra* (7)]. There has been a divergence of opinion on this point in the Bombay High Court. In *Kurgodigouda* v. *Ningangouda* (3) and *Sayad Hamidalli* v. *Ahmadalli* (19) it has been held that Art. 182 applies, while in *Shivabai* v. *Yesoo* (4) the view has been expressed that the proper article applicable is Art. 181. In Madras the later case are in favour of the view that Art. 182 applies [see *Venkayya* v. *Rogava Charlu* (15) and *Somasundram Pillai* v. *Chokkalingam Pillai* (2)]. The Allahabad High Court also take the same view in the case of *Nand Ram* v. *Sita Ram* (13); whereas the Patna High Court in the case of *Krupasindhu Roy* v. *Mahanta Balbhadra Das* (5) took the view that Art. 181 was applicable. With very great respect to the Judges who hold the contrary view I beg to differ from them, and I would answer the question referred to us by saying that the proper article applicable to an application for restitution is Art. 181 of Sch. I of the Indian Limitation Act.

It has, however, been contended by the learned Vakil for the Respondents that the question as to which article of the Indian Limitation Act is applicable to the present case has already been determined by this Court in the order of remand of their Lordships the Chief Justice and Mr. Justice Jwala Prasad, and that it is no longer open to us to come to a different finding on the same question in this case, and reliance has been placed upon the case of *Rai Birj Raj Krishna* v. *Chhatu Singh* (21). On the other hand, it has been contended by the learned Vakil for the Appellant that their Lordships in their order of remand did not intend to lay it down as a proposition of law that Art. 182 was applicable, and that when the question of limitation was sent down to the Court below for decision it was the whole question and it is still open to the Appellant to contend that the

(21) 1923 Patna 226.

proper article applicable to the case is Art. 181 and not Art. 182. The learned Judges before whom the case came in appeal after the remand have taken the view that the Division Bench which made the order of remand did not intend to decide this question finally. I am unable to agree with them. When I read the judgment of his Lordship the Chief Justice I can have no doubt that his Lordship did lay it down as a proposition of law that the proper article applicable to the question was Art. 182, and the case for a finding on the question of fact as to whether or not the application, treating it as an application in execution, was within time within the meaning of Art. 182 of the Limitation Act. In the first place in dealing with the question as to whether the application for restitution was maintainable his Lordship the Chief Justice observes as follows:—"I think therefore that apart from the question of limitation which must be considered presently the decision of the learned Subordinate Judge cannot stand." His Lordship thereupon proposed to consider and did as a matter of fact proceed to consider the question of limitation. His Lordship then observes that it was not quite clear from the judgment of the Munsif how far any application for execution of the decree was made or how far that application included a claim to be restored to possession of the property, and after referring to the fact that the learned Subordinate Judge had not dealt with this matter his Lordship says that the Subordinate Judge would be entitled to go into the evidence upon this matter and arrive at a conclusion about it. But before sending back the case for determination of this question by the lower Appellate Court, His Lordship thought that he must be satisfied that the Appellant really had a case to present upon this part of the the appeal even upon the facts disclosed so far. His Lordship then proceeds to consider the question whether an application under S. 144 of the Civil Procedure Code was to be treated as an application in execution, because if it was not to be so treated, then it was quite clear that the application would be barred by limitation and no remand would be necessary. His Lordship then refers to the case of *Somasundaram Pillay* v. *Chokkalingam Pillay* (2), where it was laid down that an application for restitution was an application for execution under the present Civil Procedure Code and says: "In my opinion that case was properly decided." His Lordship then examines the question in detail and comes to the following conclusion; "I think, therefore, that it is only right and proper to regard an application under S. 144 as an application made in execution of a decree." His Lordship then refer to certain circumstances which if proved would save the application, treating it as one for execution, from being barred by limitation. One of those circumstances was the fact appearing from the Munsif's judgment that on 12th June 1918, an application for execution had been made by the Appellant in the appeal before his Lordship and with reference to that application His Lordship observes as follows:—"If in fact that application was made, then I think it being, as I have already said, an application in execution, and governed by Art. 182 of the Limitation Act, the present application must be regarded as in time." It was because there was no finding in the judgment of the lower Appellate Court upon the question as to whether such previous application for execution had been really filed and whether there was in that previous execution application an application for possession, that a remand to the lower Appellate Court became necessary; otherwise, had there been a finding, no remand would have been necessary. I have therefore no doubt in my mind that it was not a mere expression of a view by His Lordship the Chief Justice but a clear and binding decision on the point that the article applicable to the present case was Art. 182 of the Limitation Act. As regards the form of the order of remand I think there can be no doubt on reading the whole judgment that the order of remand directed the lower Appellate Court to come to a finding of fact and then to decide the case having regard to the deci-

sion on the point of law already arrived at by this Court. This view is supported by the form of the decree drawn up in that appeal. I think no inference can be drawn from the words "I agree to the order proposed" used by Mr Justice Jwala Prasad. His Lordship apparently agreed with the Hon'ble the Chief Justice in his decision on the point of law otherwise he would certainly have expressed his views on the point if he held a different view. I am therefore of opinion that it is no longer open to contend in this case that the proper article applicable is Art. 181. I would therefore dismiss this appeal on this ground.

Appeal dismissed.

✱ ✱ 1925 PATNA 16

JWALA PRASAD AND KULWANT SAHAY, JJ.

Run Bahadur Singh—Petitioner.

v

Bajrangi Prasad Singh—Opposite Party.

Civil Revision No. 335 of 1923, Decided on 3rd January 1924, from an order of Sub. J. Patna D/- 25th June 1923,

✱ ✱ *C. P. Code, S. 47 (2)—Case between rival assignees of decree converted by Court into suit—Appeal lies.—C. P. Code, O. 21, R. 16.*

Where two rival assignees from decree-holder applied for execution of the same decree and the question arose as to the validity of the assignments and the case was converted by Court into a suit under S. 47 (2) and decided.

Held: the Court acted within its jurisdiction even supposing that it acted under O. 21 R. 16, an appeal lay from the decision as from one passed in a regular suit. [P 17 C 1]

S. N. Bose—for Petitioner.

B. C. Sinha—for Opposite Party.

Facts.—A mortgage decree was passed on 8th December 1915, and the petitioners alleged that it had been assigned to them by Basant Lal the original decree-holder. They applied for its execution on 24th February 1923. Opposite party Bajrangi Prasad alleging that the decree had been assigned to him also applied for its execution on 26th February 1923. It therefore became necessary to determine which of the two assignments was true which it did by an order dated 25th June 192 , holding the assignment in favour of Bajrangi as valid. Against this order the petitioners apply in revision contending that the Court had no jurisdiction to convert the proceeding into suit as it did under S 47 (2) of the C. P. C. and thus to determine the question as between the two rival assignees :—

Jwala Prasad J—[After setting out facts, the judgment continued :—]

The order in question purports to have been passed in a suit into which the proceeding originally instituted was converted by the Subordinate Judge. A decree also has been prepared in accordance with the said order. The opposite party had, under the direction of the Court, to pay Court-fee upon Rs. 7,000, the consideration money mentioned in his deed of assignment. Now, if the order of the Subordinate Judge is one passed in a regular suit and culminated in a decree regularly prepared and passed under the Code of Civil Procedure, then a first appeal would lie from that decree to this Court. If, on the other hand, the order is one passed under S. 47 of the Civil Procedure Code, then also an appeal would lie to this Court.

It is, however, contended that the order in question was neither passed in a regular suit nor under S 47 of the Code, for the question determined by the Court did not arise in a dispute between the parties to the original suit but between the representatives of one of the parties to the suit, namely, the decree-holder.

It is then contended that as the dispute did not come under S 47 of the Code, the Court had no jurisdiction to convert the application made by Bajrangi Prasad Singh into a suit for it is said that under Clause (3) the Court could only convert a proceeding under S. 47 into a suit, but as the application was not a valid proceeding under the section the Court had no jurisdiction to treat the same as a plaint in a suit. The

learned Vakil contends that the applitions of the parties and the order of the Court below would come under Order 21, rule 16, of the Code, under which the Court has to determine whether an assignee of the decree-holder should be permitted to proceed in execution. It is said that as the matter comes under that provision of the Code, there is no appeal, and, as there is no appeal, the present application is competent as an application in revision; but the learned Vakil has failed to show that the final order of the Court below directing Bajrangi Prasad Singh to proceed with the execution was not within the jurisdiction of the Court. Hence the order is not capable of revision. With this final order the learned Vakil has no grievance; but he impugns the procedure adopted by the Court below whereby the Subordinate Judge arrived at this conclusion. In short, his argument is that the Court below should not have tried the application of Bajrangi Prasad Singh as a suit, and should have simply determined the right of one of the rival claimants to execute the decree, leaving the matter to be fought out and determined in a regular suit instituted by Bajrangi Prasad Singh or by the petitioners. He considers the procedure adopted by the Court below to be a grave irregularity affecting the final order passed by the Court below. Now, by whatever method the Court has arrived at its decision, it cannot be said that the Subordinate Judge acted without jurisdiction. In trying the matter as a suit perhaps the Subordinate Judge went more exhaustively than he would have done had the matter been treated only as an application under S. 47 of the Code. Therefore we cannot accept the contention of the learned Vakil that the final order of the Court below was without jurisdiction even if it came under Order 21 Rule 16, of the Code. We cannot interfere with this order in revision. If, on the other hand, the matter came under S, 47 of the Code, the application in revision is incompetent. Again, if it did not come under S. 47 but arose in the course of the trial of the application treated by the Court below as a suit, there is the final decree prepared by the Court below, and the question now raised cannot be determined except in a regular appeal filed against the decree. The present application, therefore, has to be rejected.

The learned Vakil, on behalf of the petitioners, then asks us to convert the application in revision filed in this Court into a memorandum of appeal against the decree passed by the Court below. This can be done upon the petitioners paying proper Court-fee and filing a copy of the decree.

In the circumstances of the case we are prepared to treat the application as an appeal upon the condition mentioned above which must be complied within a week of the determination of the amount of Court-fee payable upon the memorandum of appeal. Upon the requisite Court-fee being paid and copy of the decree filed, the appeal will be heard without the preparation of any paper-book, the appellants undertaking to supply typed copies of the papers necessary for determination of the appeal, which we do not think are many.

On the failure of the petitioners to comply with the conditions mentioned above, namely, the payment of the Court-fee and filing of a copy of the decree, the present application will be treated as dismissed with costs.

Kulwant Sahay, J.—I agree.

Revision changed into appeal

✱ ✱ 1925 PATNA 17

MULLICK AND BUCKNILL, JJ.

Gita Prasad Singh and others—Accused—Petitioners.

v.

King Emperor—Opposite Party.

Cr. Rev. No. 417 of 1923, Decided on 21st July 1923. from the Order of Sess. J. Monghyr, D/- 15th June 1923.

✱ ✱ (a) *Landlord and Tenant—Tenancy—After cessation of tenancy possession of tenant is wrongful and landlord can forcibly eject him but without undue force—Penal Code S. 147.*

The tenant whose right is determined has no right to remain forcibly upon the land and say to his landlord that he will cultivate that land till such time as he is evicted by a Civil

Court. From the moment the title of the tenant expires, the landlord is in possession in the eye of the law, and provided that he does not use undue force, he is entitled to go upon the land and if necessary to use force for the purpose of asserting and maintaining his possession. [P. 19, C. 1.]

✱ (*b*) *Penal Code, S. 147—Order under S. 144 Cr. P. C. is not evidence of possession.*

An order under S. 144, should not be treated as substantive evidence of possession in a case of rioting. No importance should be attached to a temporary injunction under S 144, Cr. P. C. which is intended for emergencies. The judgment in such a case is certainly not admissible as a judgment. The fact of the order may be admissible under S. 13 of the Indian Evidence Act but having regard to the peculiar jurisdiction conferred by S. 144, no inference can be drawn from it as to the possession. [P. 20, C. 1.]

Hasan Imam and *P. C. Rai*—for Petitioners.

H. L. Nandkeolyar, Assistant Government Advocate—for the Crown.

Mullick, J.—The Petitioners were tried by a second class Deputy Magistrate who being of opinion that the sentences that ought to be passed were in excess of his powers referred the case to the Sub-Divisional Magistrate. The Sub-Divisional Magistrate has found the Petitioner guilty of offences under Ss. 147 and 323 of the Indian Penal Code and sentenced Gita Prasad Singh and Jageswar Prasad Singh to rigorous imprisonment under S. 147 of the Indian Penal Code for two months and a fine of Rs. 100 each. The remaining Petitioners have been sentenced to rigorous imprisonment for two months each.

An appeal was made to the Sessions Judge and he, by his order dated the 15th June 1923, has affirmed the sentences and dismissed the appeal.

The present application is made by the Petitioners for the exercise of our revisional jurisdiction.

It has been found that the alleged riot took place on plot No. 7657 and that the complainant Mahabir Singh was in possession on the 23rd July 1922, and was engaged in sowing *janera* and *methi* upon the land when he was attacked by the Petitioners and a large mob and he and one Baideo on his side were wounded with *lathis*. Information was given by two Chaukidars named Chatardhari and Borhan to the police station shortly before the riot to the effect that a breach of the peace was imminent and when the Head Constable arrived with them at the place of occurrence he found Mahabir and Baldeo on the land as well as five persons on the side of the Petitioner Gita Prasad Singh. Gita Prasad Singh states that he was not at the occurrence but that his men went to plough the land and were engaged in sowing *methi*, *janera*, caster oil and *til* when they were attacked by Mahabir and a large mob.

The learned Sessions Judge finds *bakasht* land belonging to one Raghubans who was a joint proprietor with Gita Singh and others in the estate in which the disputed land now lies. Sometime ago there was a Collectorate partition and the disputed plot fell to the share of Raghubans. The case of Gita Singh is that this plot had previously been in his exclusive possession and that although it fell within the block assigned to Raghubans, he did not relinquish possession and that on the 16th February 1922, there was a settlement between Raghubans on the one side and himself on the other, by which he took a *zarpeshgi* mortgage of this plot and other lands for a consideration of Rs. 10,000 and that on the date of occurrence he was in possession of the land. On the other hand Mahabir's case is, and the learned Sessions Judge finds, that in the year 1325 F. Mt. Pryago, the grand-mother of Raghubans, executed on his behalf, he being still a minor, in favour of Mahabir in respect of this land a temporary lease for 4 years which expired about May 1922.

Mahabir alleged at the trial that on the 24th January 1922, that is to say, four months before the expiry this lease, Mt. Pryago executed a second lease in his favour for a term of nine years. This document the learned Sessions Judge finds was a forgery. Therefore the position is that after the expiry of the first lease the title of Mahabir was determined and he had no right on the strength of his original lease to remain upon the land. The learned Sessions Judge, however, finds that Mahabir was holding over, but legally there could have

been no holding over without the consent of the landlord, and in this case Raghubans deposes that Mahabir was never a tenant and he certainly was not his tenant after May 1922 Therefore no case of holding over can be mentioned It is, however, contended that, although Mahabir may have had no title he was in actual physical possession of the land and that it was a criminal act on the part of Gita to go upon the land for the purpose of cultivating it, and, upon being resisted to assault Mahabir.

Now as an abstract proposition of law, it appears to me that this argument goes too far. The tenant whose right is determined has no right to remain forcibly upon the land and say to his landlord that he will cultivate that land till such time as he is evicted by a Civil Court. From the moment the title of the tenant expires, the landlord is in possession in the eye of the law, and provided that he does not use undue force, he is entitled to go upon the land and if necessary to use force for the purpose of asserting and maintaining his possession.

In the present case the question is, whether Gita Singh who was on the 23rd July 1922, in the shoes of the landlord Raghubans did any act which brought him within the purview of the criminal law? The oral evidence, in my opinion, is certainly no worse on the side of the defence than it is on the side of the prosecution. After the expiry of the lease in 1325 F. the 23rd July 1922, was the first date on which agricultural operations could have been carried on, and it does not appear to me that since the cutting of the crop of the previous year any act of possession had been done by Mahabir. In my opinion he was not in peaceful possession on the 23rd July.

The evidence shows that Gita Singh's party was the first to arrive, and the police and the Chaukidar witnesses, in my opinion, should be believed when they state that the bullocks and the ploughs were the property of Gita Singh and not of Mahabir. When asked to give particulars as to the wood of which the ploughs were made, Mahabir's men were unable to give any satisfactory replies to the police.

With regard to the kinds of grain that were sowed the story told by Gita Singh's party is much more consistent with the result of the police investigation than the story told by Mahabir. This fact has been noticed by the learned Sessions Judge, but he has declined to attach much weight to it.

Also with regard to the names of the ploughmen taken by him Mahabir has broken down. In the course of the trial an attempt was made to show that one Lalji was one of the ploughmen but in an information lodged at 11 A.M., on the day of occurrence at the thana by one Shew Gulam. it was stated that the man's name was Tofi and it was sought at the trial to show that Lalji and Tofi were one and the same person. That attempt failed. This point also has been found against the prosecution by the learned Sesssions Judge, but he thinks that the evidence of possession is so strong that this discrepancy is not of much consequence.

The learned Judge has not discussed in detail the evidence of the nine witnesses who gave evidence of possession on behalf of the prosecution; nor of the eight witnesses who gave evidence on behalf of the defence; but he seems to have been chiefly influenced by an order under S. 144 of the Criminal Procedure Code passed on the 10th May 1922, by the Sub-Divisional Magistrate of Begusarai. Apparently an apprehension of a breach of the peace having been reported by the police in respect of the land now in dispute, the Sub-Divisional Magistrate, without taking any oral evidence but after the examination of certain documents, issued a prohibitory order upon Gita Singh restraining him from going upon the land. That order was affirmed in the first instance by the District Magistrate but further enquiry was ordered by the High Court and the case was remanded to the District Magistrate. By that time the period of two months for which the order was in force had expired and the District Magistrate considered it unnecessary to hold any further enquiry.

The learned Sessions Judge has used the findings of the Deputy Magistrate in the above proceedings as legal evidence of the possession of Mahabir, and in my opinion he was wrong in doing this. The judgment in the case is certainly not admissible as a judgment. The fact of the order may be admissible under S. 13 of the Indian Evidence Act but having regard to the peculiar jurisdiction conferred by S. 144, no inference can be drawn from it as to the possession of Mahabir. It was a summary order, and although the police asked for action under S. 145 of the Criminal Procedure Code, the learned Sub-Divisional Magistrate adopted the course which has been time after time viewed with disfavour by the High Court, and the very mischief which was sought to be cured has occurred in this case; a temporary injunction intended for emergencies has been utilised in the present trial as substantive evidence of the possession of the successful party. In my opinion the learned Judge should not have attached any value to the Sub-Divisional Magistrate's order, and he has, in my opinion, been greatly influenced in the decision of this case by his erroneous appreciation of the value of that order.

We have in consequence been compelled to treat this case as an appeal and to examine the evidence for ourselves in order to see whether the finding with regard to the possession of Mahabir can be sustained. Having regard to the legal position and to the evidence I think the finding of the learned Judge is wrong and that the Petitioners committed no offence in going upon the land for the purposes of ploughing it. If they had acted in a tumultuous manner and exceeded the right of private defence which undoubtedly was theirs, they would no doubt have been guilty of the offence of rioting. In this case the force used was, in my opinion, not excessive having regard to the nature of the attack delivered by Mahabir.

The learned Assistant Government Advocate has attempted to challenge the finding of the learned Sessions Judge with regard to the second *patta* of the 24th January 1922: but it is quite clear that at the time that this second *patta* was alleged to have been executed by Mt. Pryago (by the pen of the patwari Jagdambi) the proprietor Raghubans had attained majority and that Mt, Pryago had no authority to execute the document. In my opinion the learned Judge was right in finding that the document was a forgery and that it had been manufactured by Jagdambi after his dismissal for the purposes of this case. The date of Jagdambi's dismissal has not been found. According to Raghubans, it took place about January 1921, according to Jagdambi himself it took place in or about August 1922; but whatever be the correct date, there can be no doubt that at the time of the second *patta* Raghubans had attained majority and Mahabir knew that neither Mt. Pryago nor Jagdambi had any authority to renew his lease. Any argument based on the supposition that he acted *bona fide*, is, in my opinion, untenable.

In these circumstances the convictions and sentences will be set aside and the Petitioners acquitted. They will be discharged from their bail and the order under S. 106 of the Criminal Procedure Code which has been passed against them will also be set aside.

Bucknill, J.—I agree.

Conviction set aside.

✱✱ 1925 PATNA 20

ADAMI AND BUCKNILL, JJ.

King Emperor—Appellant.

v.

Bishun Singh and another—Respondents.

Government Appeal No 1 of 1924, Decided on 12th February 1924 against the order of the Divisional Officer at Dinajpur, D/-1st September 1923.

✱✱ *Criminal P. C. Code, Ss. 403, and 234—There is no presumption as to date of receipt of stolen property where several articles of stolen property are found in possession of accused—Procedure to be adopted for trial is to charge the accused for 3 offences regarding 3 parcels on the assumption that each offence is independent.*

Where no evidence, one way or other, exists as to whether receipt of various parcels of stolen property took place at the same or different dates no presumption can be drawn or

assumption made as against the accused either that the offence of retention by the receiver constitutes one or more than one connected transaction. The prosecution cannot base its case or justify its procedure upon any presumption or assumption operating against an accused unless such presumption or assumption is grounded upon evidence. If the prosecution frames a charge on the presumption that the retentions constituted a set of independent offences, it must include only three parcels in respect of which the charge is made and the prosecution may then be met with the plea that these retentions in fact constituted one transaction and one offence, in which case the charge could be amended accordingly and the whole of the stolen property included in one single charge and the accused tried at one single trial. Similarly, if the prosecution chooses to prosecute on several separate charges in several separate proceedings, directly one case is concluded and the accused is convicted or acquitted, the plea, will, of course, at once be put forward, namely, that the accused can take the benefit of the provisions of S. 403 of the Criminal Procedure Code on the ground that the retentions constituted a single transaction and a single offence and no presumption or assumption to the contrary can be raised as against the accused. It is obvious, therefore, that the only safe course to adopt, in cases of this character where no date of reception is known or can be proved by the prosecution, is to take advantage of the first course indicated above. This course whilst giving the accused the advantage of not being injured by the inclusion in the count of a very large number of parcels of stolen property (a course which might affect him prejudicially if his case was being tried before assessors or a jury and the avoidance of which is really the object of S. 234 of the Criminal Procedure Code) prevents the accused from objecting effectively in any way to the trial; for if he contends that the whole matter is but one transaction and one offence then the charge can at once be amended to include the whole of the property.

Where two accused had already been tried for the offence of the retention of stolen property (carpets) found in their possession at the same time as were the stamps the subject-matter of the second trial, and their plea at the second trial was that they had already been tried at the first trial with the same offence as that with which they were charged in the second trial,

Held: they, in effect claim the presumption in their favour that their retention of all these goods was one offence and one transaction: and to the benefit of this presumption they are entitled. The fact that one has been acquitted and the other convicted makes no difference. The contention that as the articles recovered from their possession were of very diverse character, the offences of the dishonest retention of each set of articles were distinct offences is negatived by the definition of what is the same offence as defined in sub-S. (2) of S. 234 of the Criminal Procedure Code. It is there prescribed that offences are of the same kind when they are punishable with the same section of the Indian Penal Code (1888) 15 Cal. 511; (1893) 15 All. 317; 1923 Cal. 557; 1905) 9 C. W. N. 1033 Disc 3 [P 27 C 2; P 28 C 1, 2]

Sultan Ahmed, *Government Advocate*—for Appellant.

G. C. Pal and P. K. Mukerjee—for Respondents.

Bucknill, J.—This was an appeal made on behalf of the Crown, from an acquittal by the Sub-Divisional Officer of Dinajpur of two men named Bishun Singh and Lochan Singh who were charged before him with an offence punishable under the provisions of S. 411 of the I. P. C. The reason why the Sub-Divisional Officer acquitted the accused was purely on a point of law. The judgment of the Sub-Divisional Officer is dated the 1st September last. The facts in the matter are very simple. It would appear that in the house belonging to the two accused who are brothers, a considerable quantity of property, which it is alleged was stolen property, was discovered. This property is said to have been derived so I understand, from three different thefts; part of the property consisted of some Rs. 2,750 worth of unused half-anna postage stamps which had been stolen from a railway waggon in transit from Howrah to Indore; and, in the case in which the Sub-Divisional Officer acquitted the two accused, these stamps were the subject-matter of the charge against them which was that the stamps had been dishonestly retained by them, they knowing or having reason to believe that they were stolen property. Other property which was discovered at the search of the house of the accused consisted of carpets; the alleged dishonest retention of these carpets was made the subject of a separate Criminal proceeding in which the accused were charged under S. 411 with dishonest retention of these carpets; the accused were tried by an Honorary Magistrate with first class powers (one Captain Miller) who acquitted Lochan Singh but convicted Bishun Singh sentencing the latter to 18 months' R. I. A third lot of property found at the house of the accused at the same time as the stamps and carpets, consisted, so we are informed, of buckets and padlocks,

and those articles were made the subject-matter of still a third criminal proceeding, though at the date of the Sub Divisional Officer's judgment that trial had not then taken place. The Sub-Divisional Officer at the commencement of his judgment explains how it came about that three separate proceedings were instituted in respect of these three different sets of articles. He writes "in the first instance the police sent up the accused under three charge-sheets and this case (that is to say, the case relating to stamps) was transferred by me to the file of Captain Miller (Honorary Magistrate with first class powers) for disposal. He returned the case as he was already trying the accused under S. 411, I. P. C. in connection with other property (carpets) found at the same time and place (January 21st 1923) as that found in this case. Another similar case was transferred to the Sub-Deputy Magistrate and the other, returned by Captain Miller (the present case), I kept myself. There seemed, however, to be conflicting rulings on the subject of joinder of charges in such cases and I subsequently referred the matter to the District Magistrate for taking the opinion of the Legal Remembrancer. After a considerable time had elapsed, I received the reply of the latter through the District Magistrate. This was to the effect that the data given him were not sufficient for him to be able to pronounce an authoritative opinion, but that from the facts which had been brought to his notice he thought separate trials should be held. The cases were therefore proceeded with from the point where they had been left and in accordance with the original charge-sheets." In the present case 21 witnesses were examined on behalf of the prosecution before the Sub-Divisional Officer and they proved, without any doubt, that, the stamps which were found in the accused's house were stolen from a railway waggon and were part of a consignment of stamps in transit from Howrah (Calcutta to Indore. The theft took place on the 22nd December 1922. There was no proof as to who was the thief nor as to when or how the stamps came into the possession of the accused. The accused pleaded not guilty and after the charge had been framed, put forward the plea that the stamps were discovered at their house on the same date and at the same place as the carpets which had been the subject-matter of the criminal proceeding under S. 411, I. P. C., before Captain Miller and that, therefore there could be no second trial (*i. e.*, in respect of the stamps) in connection with what was the same offence, there being no evidence to show that the stamps and the carpets had been received by them (the accused) on different dates. On behalf of Lochan Singh it was further maintained that, as he had been acquitted by Captain Miller on the same evidence as had been adduced in the stamp case, he could not be tried again in view of the provisions of S. 403 of the Criminal Procedure Code. This plea was supported by a reference to several decided cases and it is certainly difficult to see how in view of these decisions the Sub-Divisional Officer could have come to any other conclusion than that he must acquit the accused, as indeed he did. The learned Government Advocate, however, invites us to differ from the decisions in some of these cases and to hold that there was no valid objection to this second trial.

The first of these cases is *Ishan Muchi* v. *Queen Empress* (1) It was a case dealing with charges of dishonestly receiving stolen property (S. 411, I. P. C.) and it laid down the dictum that a person, in whose possession various parcels of stolen property derived from different sources (*i. e.*, the proceeds of different thefts) are simultaneously found, cannot, in the absence of evidence to show that the various parcels were received at different times, be subjected to a series of trials on charges of dishonest reception, each relating to a different parcel. The learned Judges (Prinsep and Piggot, JJ.) were of the opinion that, if there was no evidence proving reception of the various parcels at different times, it must be assumed that they were

(1) [1888] 151 Cal. 511.

received at the same time and that consequently but one offence was committed. The reasoning is that the offence takes place at the moment of receipt assuming, of course, that at receipt the receiver knew or had reason to believe that the property was stolen, and with this decision the learned Government Advocate does not quarrel What he does object to is that in subsequent decisions the same reasoning has been applied in cases dealing with the dishonest retention of stolen property. It may be desired to give some detail of the case just quoted in order that it may be clearly seen upon what foundation the later decisions were based In *Ishan Muchi* v. *Queen-Empress* (1) certain persons were charged under S. 411, I. P. C. and tried at two separate trials for dishonestly receiving two lots of stolen property each of which had been stolen at different times from a different person; they were convicted in both cases and appealed in both. In each case the evidence clearly proved that the particular lot of property which was the subject-matter of the trial had been in fact stolen from its respective owner, both lots of property (or parts of both lots) were found at one search in the accused's houses; they denied all knowledge of how the property had come there. There was no evidence as to who the thieves were or as to how and when or from whom the accused had received any of the property. Prinsep and Piggot, JJ., in their judgment stated: "There is no proof against them save the fact that the goods found in their possession were stolen from different persons and were found in their possession under such circumstances as to prove a guilty knowledge on their part. There is no proof as to their receipt of the goods, nothing to show that they received them at different times or from different persons. All the goods in the possession of each prisoner may have been stolen by the same thief and may have been by him delivered to that prisoner at the same time although stolen on different occasions. If each prisoner received the goods found in his possession together at the same time, that would constitute only one offence. There is nothing in the fact that the goods were stolen at different times, to constitute by itself proof that they were received at different times, or under such circumstances as to show that more than one offence was comitted in receiving them." Their Lordships, therefore, holding that there had been only one offence, set aside the second conviction on the ground that it was illegal in view of the provisions of S. 403 of the Criminal Procedure Code

With regard to the first conviction their Lordships expressed the view that the only offence actually proved at all against the accused was one not of dishonestly receiving but of dishonestly retaining stolen property and they accordingly altered the first conviction changing it to one of dishonest retention. It is from this latter action that it has been argued for the respondents here that the same principle enunciated with regard to dishonest reception of stolen property is applicable with regard to dishonest retention thereof and it is contended that if the principle applicable to both was not the same, their Lordships would not have set aside the second conviction at all but would have merely dealt with it as they did with the first *i. e.*, would have converted it into a conviction of dishonest retention. There is certainly some force in this argument, for it would appear that later decisions have clearly adopted this principle in cases of dishonest retention. The first of these later decisions was in the case of *Queen Empress* v. *Makhan* (2) in which the facts were not unlike those in the matter now before this Court. Two parcels of stolen property belonging to and stolen from two different parties A and B at different dates, were found at a search in Makhan's house. He was first charged with dishonest retention of a shawl belonging to and stolen from A (S. 411) and was convicted: whilst serving his sentence in respect of this conviction he was again charged under S. 411 with dishonest retention of other property belonging to and stolen from B and was again

(2) [1893] 15 All. 317—(1893) A. W. N. 101.

convicted; from this second conviction he successfully appealed. The ground on which Makhan appealed was that the property which was the subject-matter of the second trial was his own. Aikman, J., however, set aside the second conviction thinking that the case was covered by the decision in *Ishan Muchi* v. *Queen-Empress* (1) cited above. The Appellant was not represented at the hearing of the appeal and it would appear that no consideration arose as to whether the principle enunciated with regard to the dishonest reception of stolen property was applicable to the dishonest retention of stolen property; the learned Judge does not discuss any such question but seems to have assumed that the same principle was applicable in all cases both of reception and retention. In his judgment Aikman. J., observes; "The prisoner Makhan appeals against his conviction by the learned Sessions Judge of Meerut for an offence punishable under S. 411, I. P. C. It appears from the record that on the 5th of September 1892 the prisoner's house was searched by the police in the presence of witnesses and certain property found to have been stolen was in his possession. Amongst that stolen property was a shawl. For the dishonest possession of that shawl the prisoner was convicted by a Magistrate of the first class on the 7th November 1892 and was sentenced to nine months' rigorous imprisonment under the provisions of S. 411, I.P.C., which imprisonment he is now undergoing. The conviction against which he now appeals is in respect of the dishonest possession of certain other stolen properties belonging to a different complainant which were found in his possession at the same time as the shawl. In my opinion this second conviction cannot be sustained. The mere fact that property stolen on two different occasions from different persons is found at one and the same time in the possession of an accused person is not of itself sufficient to prove that the accused person has committed two different offences under S. 411 of the Indian Penal Code as it is quite possible that the property though stolen on two different occasions may have been received from the same thief at the same time; *vide Ishan Muchi* v. *Queen-Empress* (1). I am therefore constrained to allow this appeal." It will be seen that the Judge simply deals with the case as if it was one of dishonest reception; the point raised now before us was in no way agitated. This case was followed by that of *Ganesh Saha* v. *The Emperor* (3) The facts were again, very similar in many respects to those in the case now before us. Several articles of stolen property were found in Ganesh Saha's room; he was first charged under S. 411, I. P. C. in respect, of the dishonest retention of same articles belonging to and stolen from A; he was convicted but on appeal acquitted. He was then charged again under S. 411, I. P. C. in respect of the dishonest retention of some articles belonging to B and was convicted. Newbould and Suhrawardy, JJ., on appeal set aside the conviction by the following judgment; "The Petitioner in this case has been convicted under S 411, I. P. C. on the charge of having been in the dishonest possession of stolen property on the 7th December 1921. It appears that on that date several articles of property were found in the room occupied by the Petitioner. In respect of some of them he was prosecuted and after being convicted under S. 411, I. P. C. by the trying Magistrate he was acquitted on appeal. He has now been tried and convicted in respect of other properties found in his possession on the same date. There was evidence that the different articles which were the subject of the charges in the two trials were stolen from different persons but there is no evidence that they were received at different times. The facts of the case cannot be distinguished from those of *Queen-Empress* v. *Makhan* (2) which follows the decision of of a Divisional Beneh of this Court in *Ishan Muchi* v. *Queen Empress* (1). On this authority we hold that the second trial

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[3) 192 Cal. 557—50 Cal. 594—37 C. L. J. 326—27 C. W. N. 554—24 Cr. L. J. 707.

was illegal under the provisions of S. 403, Cr. P. C."

It will be observed here that no idea of there being any difference in the principle to be adopted in cases of dishonest reception and retention was mooted, it was assumed that the principle was the same and the point now raised before us by the learned Government Advacate was not contemplated.

The distinction was, however, referred to and to some extent discussed in the case of *Ram Sarup Bania* v. *The Emperor* (4) though the point there arose for consideration in connection with a question with respect to how many different sets of stolen articles a person can at one trial be charged under S. 411 with having dishonestly received or retained. The circumstances, so far as they are material, are that the accused were charged in one count with having dishonestly received or retained 8 sets of cooking utensils belonging to and stolen from 8 different persons on eight different dates and with, thereby, having committed an offence punishable under S. 411, I. P. C., they were convicted. There was another count in which the accused were charged with having aided and abetted each other in the commission of the offence datailed in the first count but this is not here material. Their Lordships (Pargiter and Woodroffe, JJ.) held that as there was no evidence that the acts of receiving or retaining were so connected together as to form one transaction, the charges framed and the single trial held with respect thereto were illegal; that the mere fact that there was no evidence of separate receipt or retention did not justify the joinder of the charges as it lay upon the prosecution to establish the facts which would justify such a procedure and that the dishonest receipt or retention of each article constituted a seperate offence and the accused could only be tried for three of such offences committed within one year unless it was shown that the receipt or retention of all the articles was so connected as to form one transaction.

(4) [1905] 9 C. W. N. 1027 = 3 Cr. L. J. 847.

Now it will be noted that in this case the charge was an alternative one of receiving or retaining; that it was contended by the Crown, that as all this stolen property was found in the accused's possession at one time it might be presumed, even hough it was composed of proceeds of tmany different thefts from different people committed at different times, that the (receipts or) retentions were so connected as to form one transaction and that, consequently, at one trial, the accused could be charged with dishonest reception or retention of all the parcels (whatever their number) of stolen goods in view of the provisions of S. 235 (1) of the Cr. P. C. But the Court held that no such presumption could be drawn against the accused. I gather that the Court, had rightly, thought that if any presumption was to be drawn it must be in the accused's favour, and therefore that the accused could only at one trial be charged in respect of three parcels of stolen articles in view of the provisions of S. 2 4 of the Cr P. Code. The question as to whether the accused could be subject-to a second trial in respect of the retention of other parcels of stolen property, not the subject-matter of the first, was not in direct contemplation or argued, though Woodroffe, J., seems to indicate in one part of his judgment that separate trials in respect of each separate parcel of stolen property was the proper course of procedure, for he observes (p. 1028). Upon information received to the effect that the accused were dealers in stolen property, their shops were searched on the 24th September last; some six cart loads of utensils were found and removed to the thanah. On the 28th September the accused were brought before the Magistrate. Separate trials were instituted in his Court and in the Suburban Courts with reference to the different articles of property above-mentioned, which are said to have been stolen on eight different dates extending from about the beginning of the month of April to the 21st September 1904. The learned Chief Presidency Magistrate says that this was done despite his point-

ing out at an early stage that there was no evidence of the separate receiving of such property on different occasions and that therefore one charge would lie in respect of the whole mass of the alleged stolen property. The initial procedure" (and here I understand Woodroffe, J., to refer to the institution of the several separate trials) "was in my opinion the correct one and the learned Chief Presidency Magistrate was in error in supposing that the mere fact (if it were so) that there was no evidence of separate receiving entitled him to frame the charge as he has done." It must however be admitted that the question as to whether the accused could be subjected to a series of trials did not directly arise although in a later portion of his judgment he states as follows:—"There was a separate offence in respect of each of the articles alleged to have been dishonestly retained and only three of such offences could be charged and tried in one trial unless it was shown that the dishonest retention of all the articles was so connected as to form one transaction."

The material parts of the judgments of the learned Judges may be with advantage quoted. Pargiter, J., observed: "The charges framed in this case are contrary to the law. They relate to the properties alleged to have been stolen in eight different thefts. There appears to be no evidence to prove that they were received at one and the same time. It cannot be inferred that because all the properties were found in the possession of the accused at the same time in circumstances which suggest that they were retained dishonestly, they therefore constituted one dishonest retention. It may be that the property stolen in one theft came into their hands by one transaction and constituted one dishonest retention; but the eight thefts are alleged to have been committed at various times during the period of nearly six months and the presumption would rather be that they came into the hands of the accused persons by different transactions. The finding then of all the properties in the accused person's possession at one time would not operate to combine all the transactions into one whole so as to make one combined charge legal" Woodroffe, J., remarks: "Upon information received to the effect that the accused were dealers in stolen property, their shops were searched on the 24th September last; some six cart loads of utensils were found and removed to the thanah. On the 28th September, the accused were brought before the Magistrate. Separate trials were instituted in his Court and in the Suburban Courts with reference to the different articles of property above-mentioned, which are said to have been stolen on eight different dates extending from about the beginning of the month of April to the 21st September 1904 The learned Chief Presidency Magistrate says that this was done despite his pointing out at an early stage that there was no evidence of the separate receiving of such property on different occasions and that therefore one charge would lie in respect of the whole mass of the alleged stolen property. The initial procedure was in my opinion the correct one and the learned Chief Presidency Magistrate was in error in supposing that the mere fact (if it were so) that there was no evidence of separate receiving entitled him to frame the charge as he has done It lay upon the prosecution to establish the facts which would justify such a charge. It cannot be upheld simply because there may be no evidence one way or the other. The receipt of each article constituted a separate offence and the accused could only be tried for three of such offences committed within one year unless it were shown that the receipt of all the articles formed one transaction. Not only has this not been shown (there being admittedly no evidence on the point) but on the contrary in the present case the charges themselves and the evidence appear to me to indicate that the receiving did not take place at one and the same time, the thefts (in respect of two of which the accused are charged in the alternative with being guilty) having taken place on eight several dates between the beginning

of April and the end of September 1904. I have already dealt with the contention that, as there was nothing to show separate receiving, the charge and trial as made and held should stand. The other point on which we were addressed by the learned Advocate-General was with reference to the charge of retaining, *viz.*, that, even if there were separate acts of receiving, there was but one offence of dishonest retaining; or, if several offences, they constituted one and the same transaction. It was argued by learned Counsel for the accused that there was no distinction as to the time when the offence was committed between dishonest receiving and dishonest retention. This contention is in my opinion unsound. In the case of dishonest receiving the offence is completed when the stolen property is received, the receiver knowing or having reason to believe at the time that the property was stolen property; whereas in the case of dishonest retaining the offence is committed not when the property is received but when after knowing or having reason to believe it is stolen, it is dishonestly retained. I think, however, that this distinction is not of importance upon the point with which we have to deal, for there was a separate offence in respect of each of the articles alleged to have been dishonestly retained and only three of such offences could be charged and tried in one trial, unless it was shown that the dishonest retention of all the articles was so connected as to form one transaction. This as I have pointed out in connection with the charge of dishonest receiving has not been done, and cannot in the absence of evidence be assumed.

"The mere fact that all the articles were being dishonestly retained on the day that they were discovered with the accused does not constitute a simple offence or establish that several offences were committed in one and the same transaction." I imagine that the word "simple" here means "single" as opposed to "multiple."

"I must therefore hold that the first and second charge and the single trial held with respect thereto was illegal. I set the judgment and conviction aside and direct that the accused be charged and retried with respect to such offences as he may properly be charged with and tried under the provisions of the Criminal Procedure Code relating to the joinder of charges."

One thing at any rate of value emerges from this decision and that is that, where no evidence one way or other exists as to whether receipt of various parcels of stolen property took place at the same or different dates, no presumption can be drawn or assumption made as against the accused either that the offence of retention by the receiver constitutes one or more than one connected transaction. The prosecution cannot base its case or justify its procedure upon any presumption or assumption operating against an accused unless such presumption or assumption is grounded upon evidence. This decision is of importance for, if it is correct, an accused may plead either that his retention of various parcels of stolen goods was one transaction in which case he can obviously only be tried under (under S. 403) once: or that such retentions constituted a set of disconnected saparate offences in which case he can (at one trial) only be charged in respect of 3 parcels (S. 234) and could plead either way as it best suited him to meet in whatever way the charge was framed against him. But he could not plead both: and if he contended that his retentions were one transaction he could be charged at one trial with retention of the whole of the stolen property bunched and listed together: whereas if he pleaded that retentions were all distinct and separate offences it is difficult to see why, as Woodroffe, J., indicates, separate trials should not be held in respect of each parcel of stolen property; for each retention then constitutes a separate and distinct offence and, provided the offence did not depend upon the same facts, he could not call in aid the provisions of S. 403 of the Cr. P. C. The legal question therefore appears to me to resolve itself into very simple elements When the date or dates at which the various parcels of goods

were received are not known to the prosecution, the date is not material in dealing with charges of retention upon which the prosecution is thrown back and the prosecution, therefore, has to get on as well as it can without a date of reception. As no date of reception is known or can be proved the prosecution is confronted with the difficulty that no presumption or assumption can be drawn against the accused; either that his retentions of the several parcels of stolen property constituted one transaction and that therefore he could be tried in respect of the whole property at one trial or that his retentions were composed of separate and distinct offences, each offence relating to a particular parcel of stolen property: and it must be borne in mind that in whichever way the prosecution frames its charge against the retainer it may be met with the, to some extent, effective counter plea. For example, if the prosecution frames a charge on the presumption that the retentions constituted a set of independent offences, it must include only three parcels in respect of which the charge is made and the prosecution may then be met with the plea that these retentions in fact constituted one transaction and one offence, in which case the charge could be amended accordingly and the whole of the stolen property included in one single charge and the accused tried at one single trial. Similarly, if the prosecution chooses to prosecute (as it has done in this case) on several separate charges in several separate proceedings, directly one case is concluded and the accused is convicted or acquitted, the plea, which has been advanced in this case here, will, of course, at once be put forward, namely, that the accused can take the benefit of the provisions of S. 403 of the Criminal Procedure Code on the ground that the retentions constituted a single transaction and a single offence and no presumption or assumption to the contrary can be raised as against the accused. It is obvious, therefore, that the only safe course to adopt, in cases of this character where no date of reception is known or can be proved by the prosecution, is to take advantage of the first course which I have indicated. This course, whilst giving the accused the advantage of not being injured by the inclusion in the count of a very large number of parcels of stolen property (a course which might affect him prejudically if his case was being tried before assessors or a jury and the avoidance of which is really the object of S. 234 of the Criminal Procedure Code), prevents the accused from objecting effectively in any way to the trial; for if he contends that the whole matter is but one transaction and one offence then the charge can at once be amended to include the whole of the property. In the present case the prosecution has (unwisely perhaps) chosen to embark upon three separate proceedings when, as the Sub-Divisional Officer points out, a single trial, dealing with all the three parcels of stolen property, could with safety and propriety have been set on foot. The two accused have already been tried for the offence of the retention of stolen property (carpets) found in their possession at the same time as were the stamps, the subject-matter of this, the second trial; that one has been acquitted and the other convicted make no difference. Their plea is that they have already been tried at the first trial with the same offence as that with which they are now charged in this the second trial; they, in effect, claim the presumption in their favour that their retention of all these goods was one offence and one transaction: and to the benefit of this presumption they are entitled.

It may be suggested that as the articles recovered from their possession were of very diverse character the offences of the dishonest retention of each set of articles were distinct offences. This suggestion, however, appears to be negatived by the definition of what is the same offence as defined in sub-S. (2) of S. 234 of the Criminal Procedure Code. It is there prescribed that offences are of the same kind when they are punishable with the same section of the I. P. C. In the case of the charges of retention of the three sets of articles which have been made the subject-matter

here of three separate proceedings the offences are clearly of the same kind as defined above and whilst S. 234, sub S. (1) of the Code allows a person to be charged with and tried for three offences of the same kind at one trial, which have been committed within the space of 12 months from the first to the last of such offences, S. 403, sub-S. (1) of the Code clearly lays it down that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence. That statement of the law would therefore appear to dispose of the matter. It is true that S. 403, sub-S. (1) provides a further loophole for an accused by prescribing that a person shall not be liable to be tried again on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236 or for which he might have been convicted under S. 237; but neither of these two sections are in any way relevant to the matter which is displayed by the present circumstances. It is true that, in order to support a charge of dishonest retention of stolen property, there has to be given in proof of the retainer's guilty knowledge such a set of circumstances as, to persons of ordinary understanding in the situation of the accused persons. must have led to the conclusion that the property retained by him had been stolen or otherwise dishonestly acquired; and it need hardly be said that the nature of the property itself may be a factor of no little importance in many cases, whilst consideration may also well be paid to the nature and value of the property in relation to the accused's business and position in life; but such features do not change the character of the offence but are only parts of the evidence which has to be adduced in order to obtain a conviction in respect of the offence: such factors are therefore not material in considering the point which has arisen in this appeal. Somewhat similar considerations appear also to govern the bearing of sub-S. (2) of S. 403 of the Criminal Procedure Code upon the decision of the Sub-Divisional Officer. This sub section provides that a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under S 235, sub-S. (1) and on reference to S. 235, sub-S. (1) it will be seen that that sub-section lays it down that, if in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence. There are, however, two bars to the applicability of the combined provisions of these sub-sections to the circumstances of the present case. In the first place if the acts of retention are regarded as the same transaction, certainly only one offence was committed by the accused, *viz*, that of the dishonest retention of stolen property; whilst, in the second place, it is also equally clear that if the series of acts of retention did form the same transaction there was no distinct offence as apart from dishonest retention of stolen property for which any separate charge could have been made against the accused under S. 235, sub-S. (1). Nor, indeed in the absence of some proof, can any presumption or assumption be made against the accused, either that the retentions of the different sets of articles constituted separate offences or formed a series comprising one transaction For these reasons. I am of opinion that in this case the Sub-Divisional Officer has come to a correct conclusion and that the appeal must be dismissed I should like, however, to point out that the dire results which are contemplated by the Sub-Divisional Officer as likely to occur as a result of his decision by no means necessarily need follow. If property is found in the possession of an individual which is alleged to be stolen property and if a charge embodying three parcels of such stolen property is preferred against the retainer and the retainer is convicted or acquitted, it by no

means permits him to maintain possession of other property found in his possession which persons other than he claim as their own; and, although it may be that he cannot, in respect of that other property, be further criminally proceeded against, the rightful owners have a civil claim for recovery which can be enforced in a simple manner. At the same time I wish to guard against it being understood that I should support any suggestion that there is any warrant for handing over by any authority, other than through the medium of a Court, property not included in the criminal proceedings to persons who allege that such property has been stolen from them and is in the wrongful possession of the party in whose possession it has been found: any such suggestion would obviously be open to the very gravest abuse.

Adami, J.—I agree.

Rule made absolute.

✱ 1925 PATNA 30

JWALA PRASAD AND ADAMI, JJ.

Sheikh Muhammad Nasrullah—Applicant.

v.

Sheikh Muhammad Shukurullah—Opposite party

Civ. Rev. No. 350 of 1923, Decided on 17th December 1923, from an Order of Sub. J. Patna, D/- the 16th July 1923.

✱ *C. P. Code, O. 33 R. 5—Dismissal of application on ground of limitation is revisable—C. P. Code, S. 115.*

Order of dismissal of application to sue as pauper on the ground that the suit is barred by limitation is *ultra vires* and the order of dismissal is revisable. [P 30, C 2]

J. N. Sen Gupta and *M. N. Pal*—for Applicant.

Brij Kishore Prasad—for Opposite Party.

Facts.—Plaintiff's mother Mt. Chanda died on 28th April 1912 leaving petitioner, the opposite party and Sheikh Salimulla as her heirs. Opposite party No. 2 had made gift of his share in favour of petitioner and his brothers. He also claimed a share in the dower debt. He alleged in plaint that he was born on 15th February 1904, that his mother died on 28th April 1912 which he alleged as the dates of his cause of action. The plaint was filed on 24th March 1923. Defendants appeared on receipt of notice under O. 33 R 6 and contended that plaintiffs being born on 28th February 1899, he became *sui juris* on 28th February 1917 and thus the suit as filed was beyond three years of his attaining majority. The Court took evidence on the point of plaintiff's majority, found against him and dismissed the application to sue as pauper and revision is sought on the ground that the Court had no jurisdiction to pass the order.

Jwala Prasad, J.—[After giving a brief history of the case, the Judgment continued:—]

The order complained of amounts to a dismissal of the claim of the plaintiff as having been barred by limitation; in other words, this was a dismissal upon the merits of the claim of the plaintiff, but at that stage the merits of the plaintiff's claim were not before the Court. The Subordinate Judge could enter into the merits of the case under rule 4 of Order 33, and for that purpose he could examine the plaintiff who applied for permission to sue as pauper. That stage has, however, passed, in smuch as the Court upon a reading of the plaint was satisfied that the case, as laid in the plaint, disclosed a cause of action, and that the facts, if true, showed that the plaintiff's claim had merits. Unless the Court was satisfied upon these grounds and had held that the application was not bad under any of the grounds mentioned in rule 5, it could not register the application and receive evidence as to the pauperism or otherwise of the applicant. The Court, therefore, acted without jurisdiction in going into the merits of the case upon the plea of limitation This seems to be the proper construction of the rules laid down in the Code under Order 33 and the trend of authorities upon the subject, the latest authority being *Jogendra Narayan Roy* v. *Durga Charan Guha Thakurta* (1). This decision has

(1) [1919] 46 Cal. 651=52 I. C. 610.

reviewed the case law on the subject and also the rules contained in Order 33. So far back as 1876 in the case of *Parkash Ojha* v. *Dusruth Ojha* (2) it was held that where a Subordinate Judge decided the question of limitation, not upon the examination of the petitioner, but upon that of other witnesses summoned for a different purpose, he exceeded his jurisdiction. In the present case the Court decided the question of limitation not upon the examination of the petitioner but upon the evidence of the clerk of the New College, and certain documents filed on behalf of the defendants, apparently when the evidence called for by the Court was for the purpose of determining the pauperism or otherwise of the applicant. A contrary view upon the subject in *Vijendra Tirtha Swami* v. *Sudhindra Tirtha Swami* (3) was considered and dissented from in the aforesaid case of *Jogendra Narayan Roy* v. *Durga Charan Guha Thakurta* (1). We fully accord with the views of the learned Judges of the Calcutta High Court, and we hold that the decision of the Subordinate Judge is *ultra vires*. This fully meets the contention of the learned Vakil, on behalf of the opposite party, who urges that the Subordinate Judge had acted within his jurisdiction and that the present application did not raise a question of jurisdiction and that it was, therefore, not fit to be entertained by us in revision. The decision of the Subordinate Judge is wrong, however, upon a firmer ground, and it seems to us that the finding of the Subordinate Judge that the suit was brought more than three years after the plaintiff attained majority does not seem to dispose of the entire claim of the plaintiff. His claim was, among others, for recovery of possession of his share in the moveable properties left by his mother who is said to have died on the 28th April, 1912. Such a suit can well be maintained within twelve years of the death of the lady or of the dispossession of the plaintiff if he had already acquired possession at any time after her death. The suit was instituted on the 24th March, 1923, well within twelve years of the death of the plaintiff's mother. Therefore, that portion of the plaintiff's claim if not the other portion. is undoubtedly not barred by limitation, and the applicant, in spite of the finding of the Subordinate Judge was entitled to have his application for permission to sue as pauper legally disposed of.

Accordingly we set aside the order of the Subordinate Judge, and direct that the application be disposed of in accordance with law. The application is allowed with costs.

Adami, J.—I agree.

Petition allowed

(2) [1876] 25 W. R. 74.
(3) [1896] 19 Mad, 197.

1925 PATNA 31

DAS AND ROSS, JJ.

Raghunath Prasad Singh—Petitioner.

v.

Sadhu Saran Prasad Singh and another—Opposite Party.

Mis. Judicial Case No. 28 of 1923, Decided on 31st July 1923.

T. P. Act, S. 60—Mortgagee himself breaking entirety of mortgage—Any sharer in the mortgaged property can redeem piecemeal.

Section 60 of the T. P. Act seems to imply that where the mortgagee by his own act, in acquiring one of the mortgaged properties, has split up the integrity of the mortgage, any person interested in a share of the mortgaged properties may redeem that share on payment of the proportionate amount of the balance of the mortgage debt. [P 32 C 2]

L N. Singh and S. N. Roy—for Petitioner

K. P. Jayaswal and S. N. Dutt—for Opposite Party.

Das, J.—This is an application by respondent No. 6, the purchaser of one of several properties mortgaged by one Brahamdeo Prasad Singh, on the 24th July, 1904. for amendment of a decree passed on appeal in the High Court in a suit on the mortgage. It appears that two of the mortgaged properties had been purchased by the mortgagee himself. The relevan por-

tion of the judgment of the court is as follows:—

"It appears that Chota Narain one of the mortgagees, purchased two of the mortgaged properties, namely 3 annas 8 pies share in Mauzah Chakia, and 4 pies 3 Karants share in Mauzah Nawada Kapur. It is argued on behalf the defendants that integrity of the mortgage having been destroyed by the action of the mortgagee the mortgage-debt must be apportioned as between them in proportion to the value of the properties. The learned Subordinate Judge has dealt with the evidence and has recorded a finding that the contention of the Defendants is entitled to succeed but that the plaintiffs have failed to put sufficient material before the court for ascertaining the value of the various mortgage shares. Now, the learned Subordinate Judge concedes that there was evidence before him but he thought that the evidence was not sufficient. In my opinion he should have decided the point on the evidence, good, bad or indifferent, that, was placed before him by the parties. We direct, by the consent of the parties, that the learned Deputy Registrar of this Court when drawing up the decree do make the apportionment on the basis of the khewats that I understand are on the record. Let the decree be drawn up accordingly."

The decree as drawn up contains the following clause 3 :—

"There shall be an apportionment on the basis of the khewat as between the mortgagors and the mortgagees for the properties purchased by Chota Narain, the original mortgagee."

In making this apportionment 3 annas 8 pies share of Chakia have been valued at Rs. 67-13 and 4 pies 3 karants of Nawada Kapur at Rs. 320-3-0 a total of Rs. 388. The contention on behalf of the respondent No. 6, who is the purchaser of 3 annas 8 pies share of Mouzah Assoya, one of the mortgaged properties, is that under the terms of the judgment of this Court each of the mortgaged properties has to be valued and the mortgage-debt apportioned among them according to their respective values. It is argued on his behalf that as the mortgagee himself split up the mortgage he is no longer entitled to claim that the mortgage should be redeemed in its entirety.

The application is contested by the mortgagee who claims to be entitled to all the remaining properties for the whole of the mortgage-debt except as reduced in proportion to the value of the properties that he himself has purchased.

It seems to me that on the language of the judgment the applicant is entitled to have the mortgage-debt apportioned between the defendants in proportion to the values of the several properties, if there is otherwise no objection to this course.

Section 60 of the Transfer of Property Act, dealing with the right of the mortgagor to redeem, contains the following provision:—

"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a motgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired in whole or in part the share of a mortgagor."

This section seems to imply that where the mortgagee by his own act in acquiring one of the mortgaged properties has split up the integrity of the mortgage any person interested in a share of the mortgaged properties may redeem that share on payment of the proportionate amount of the balance of the mortgage-debt. The principle has been recognised in *Debendra Nath Sen* v. *Mirza Abdul Samad Soroji* (1) where at page 175 their Lordships observe as follows.

"As illustrations of exceptions to the general rule, it may be mentioned that an apportionment will be directed.....where the mortgagee himself has become the owner of a part of the equity of redemption or where by his own conduct there has been a break up of the entire security. Thus an apportionment has been directed where, as in *Surjiram Marwari* v. *Brahmdeo Prasad* (2), a

(1) [1909] 10 C. L. J. 150=1 I. C. 264.
(2) [1905] 2 C. L. J. 202.

mortgagee has acquired in whole or in part the share of the mortgagor in the equity of redemption or where, as in *Nawab Azimut Ali Khan* v. *Jowahir Singh* (3), a mortgagee has purchased the equity of redemption in one out of several properties comprised in the mortgage security..... The test to be applied in each case is, whether there has been a severance of the security at the instance or with the consent of the mortgagee, and an apportionment will not be enforced upon the mortgagee unless special equitable considerations are established."

In the case of *Nawab Azimut Ali Khan* v. *Jowahir Singh* (3) an estate was subject to a mortgage in satisfaction of decrees against the original mortgagor or his representatives, in different parcels. One parcel was purchased by the plaintiffs and another parcel by the mortgagee. In a suit by the plaintiffs as owners of the equity of redemption in the parcel which they had purchased for redemption on payment of their rateable share of the mortgage-debt, the following observations were made by the Judicial Committee:

'The appellant (that is, the mortgagee) does not, as their Lordships understand, contest the proposition that the plaintiffs, as purchasers of that equity of redemption in a portion of the mortgaged premises, are entitled to redeem that portion on payment of some proportion of the mortgage debt."

See also the decisions in *Hari Kissen Bhagat* v. *Veliat Hossein* (4), and *Surya Bibi* v *Monindra Nath Roy* (5)

In view of these authorities and of the actual language of the judgment it seems to me that the contention of the petitioner is well founded.

The decree must be amended by apportioning the mortgage debt between the defendants in proportion to the values of the properties held by each.

The petitioner is entitled to the costs of this application: hearing fee two gold mohurs.

Ross, J.—I agree.

Decree amended.

(3) [1870] 13 M I. A. 404=14 W R 17 (P. C.)
(4) [1903] 30 Cal 755=7 C W N 723.
(5) [1899] 4 C W N 507.

1925 PATNA 33

ADAMI AND BUCKNILL, JJ.

H. V. Low and Co., Ltd.—Petitioners.

v.

Maharaja Sir Manindra Chandra Nandy and others—Opposite Party.

Cr. Revision No 128 of 1924, Decided on 8th April 1924, from an order of Asst Deputy Commissioner of Dhanbad, D/- 15th February 1924.

★ (a) *Criminal P. C., S. 145—Sub-S. (IV).*
Dispossession should be wrongful as well as forcible. [P 34, C 1]

(b) *Criminal P.C., S. 145—Question of title—Criminal P. C., S. 144.*
Questions of title, fraud, etc., cannot be tried in proceedings under S 145 or 144. [P 34, C 1]

Hasan Imam, P. K. Sen and *B. B. Mukherjee*—for Petitioners.

P. C Manuk Nimmullah, Mehar Nath Roy and *N. C. Ghosh*—for Opposite Party.

Facts—K. B. by contract appointed L. and Co., managing agents of his collieries one of which was known as E. for a term of 20 years during which L & Co., were to have absolute and unfettered control of the management of the collieries subject to certain terms. After about four years, K B. dismissed L. and Co. from the agency on the ground of misconduct and fraud and on the same day, Y, K.B's general manager went to colliery E and announcting to A the manager there and the staff that the agency had terminated, took over direct possession of the colliery without being resisted by anybody After this, one of the partners of L. and Co, visited the colliery one day and finding what had happened, applied for proceedings to be taken against K.B. Y and A under S. 145 or S. 144 of the Criminal P. C and when the application was rejected, moved the High Court for revision of the order In the meanwhile K.B. had filed a suit for a declaration that his agreement with L and Co., was validly determined by him (K. B)

Adami, J.—This Court is asked in exercise of its Revisional Jurisdiction to set aside an order of the Additional Deputy Commissioner, Dhanbad, re-

jecting the application of the petitioners that he should draw up proceedings either under S. 144 or S 145 of the Criminal Procedure Code against the opposite party and to direct the said Deputy Commissioner to take action under one or other of those sections.

[After stating facts His Lordship continued:—]

Mr. Hasan Imam has argued that Messrs H V. Low and Co., Ltd. were in admitted possession up to February 4th and that they still have title to possession, while the disloyalty of their manager and servants cannot deprive them of possession. He contends that even if they were dispossessed on February 4th, they were wrongfully dispossessed and so proceedings under S. 145 should have been taken.

Even if they were wrongfully dispossessed, it is clear that they were not forcibly dispossessed and the first proviso to sub-s. (4 of S. 145 requires that the dispossession should be forcible and wrongful. It is equally clear that Mr. Adamson and the staff are now in actual possession on behalf of the Maharaj, whether rightly or wrongly

The question as to the construction of the agreement between the parties, whether it amounted to a lease or merely to a Managing Agency, whether the Maharaja was justified in dismissing the Managing Agents, whether longer notice was required and whether the present petitioners are entitled to possession are questions which are proper for a Civil Court to decide, and which probably will be decided in the civil suit now pending between the parties; they are not questions which could be decided in proceedings under S 144 Cr. P. Code; and yet no orders under S 144 could be passed unless a decision had been come to by a competent Court on several of these points.

The learned Additional Deputy Commissioner was perfectly correct in refusing to attempt to decide the question of title and fraud and wrongful dismissal in proceedings under S. 5 or S 144 or to usurp the power of Civil Court in the direction of ejecting the party now in actual physical possession of the colliery.

Furthermore from the petition it is clear that a breach of the peace is likely only if the petitioners seek to enter the colliery and to enforce their claim The counter affidavits sworn by Messrs Lyall and Adamson as well as the explanation submitted by the Additional Deputy Commissioner show that, beyond the fact that Military Police were sent to a police station near the colliery, there was no show of force which would lead the petitioners to apprehend any violence, and it is explained by the Additional Deputy Commissioner that the Military Police were sent to the Police Station only in case the petitioners might resort to violence. It was in fact unlikely that firm like of Messrs. H V. Low and Co, would countenance the use of force.

The Additional Deputy Commissioner was satisfied that there was not a likelihood of the breach of the peace; this Court directs him to be satisfied as to such likelihood, and unless he is satisfied on this point he cannot proceed under either S. 145 or S 144

The remedy of the petitioners lies in the Civil Court. The Additional Deputy Commissioner rightly refused to take action under the Code of Criminal Procedure.

The application is rejected.

Bucknill, J.—I agree.

Application rejected.

✱ 19 5 PATNA 34

ADAMI AND BUCKNILL, JJ.

Hussain Bukhsh Mian—Applicant.

v

King Emperor—Opposite Party.

Cri Revision No. 54 of 1924, Decided on 4th April 1924, from a decision of S J. of Saran, D/-28th January, 1924.

✱ (a) *Penal Code, S. 429—Killing of animal by theft of thereof does not merit double conviction for theft and mischief—Penal Code S. 379*

Where theft of an animal has been committed, the mere killing of it afterwards by the person who stole it, for the purpose of eating it himself cannot add another offence.

[P 35, C 1, 2]

*** (b) *Penal Code, S. 379—Mischief or theft—Penal Code, S. 429.***

Where after a thief has stolen and slaughtered an animal another person joins him in skinning the animal by the latter is not guilty either under S. 379 or S. 429. P. 35, C. 2]

Muhammad Yunus with *Annanthanath Pal*—for Applicant.

Bucknill, J. [After setting out facts, his Lordship proceeded as follows:—]

The complainant was a man called Babu Lal Ahir. His cow appears to have strayed away and entered a field which contained some crops. His daughter was unable by herself, she being but a very small child, to persuade the animal to come out of the place into which it had trespassed; and she ran home to tell her father. When her father came to turn the cow out it was not to be found. One of the prosecution witnesses, however, heard some noise in the fields behind his hut and he noticed the second and third applicants driving the cow through the fields. He gave information of what he had seen and several persons then went as quickly as they could to the locality, which was some few bighas away from where the accused persons lived, and there they found the cow dead and the three applicants all skinning it.

Mr. Yunus contends, and I think rightly, that so far as the second and third applicants who were convicted of both offences of theft and mischief are concerned the circumstances do not warrant any such double convictions. The modern law on the subject appears to be quite clear that this contention is sound. In the case of *Malar Sahib* (1) it was held that the killing of a stolen sheep cannot be indicted separately as constituting mischief; in *Bipat Ahar* v. *Auchuk Bhoonea* (2) it was there held that a double sentence for theft and mischief is illegal and improper; in *Emperor* v. *Ramlu Rattanji* (3) it was again held that a person who steals a fowl and then kills it cannot be punished separately for the offence of theft and mischief.

I think that there can be no doubt that where theft of an animal has been committed, the mere killing of it afterwards by the person who stole it for the purpose of eating it himself cannot add another offence. In this case, therefore, I think that the two convictions recorded against the second and third applicants cannot stand. The real offence which here was committed was the theft of the cow; and its being subsequently killed and eaten by them and their friends or disposed of does not justify their being separately convicted in addition to the conviction and sentence on the charge of theft, of an offence punishable under the provisions of S. 424.

With regard to the question of sentence upon these two applicants, as their conviction under the provisions of S. 424 has to be set aside, the only sentence which will stand against them will be that recorded against them in connection with the offence of theft of which they have been convicted; that is a sentence of six months' rigorous imprisonment. Under the circumstances of this case I see no reason why that sentence should really be reduced; it was a somewhat barefaced theft and the carrying out of it shows from the evidence the determination and effrontery of these applicants.

The position, however, of the first applicant is somewhat different; he was not seen at the time when the theft was committed and there is really hardly any evidence, except of a somewhat inferential character, to show that he was present when the cow was killed. Supposing he had joined the other two after they had killed the cow and had assisted them to skin it, he would certainly neither be guilty of an offence of theft or of an offence punishable under the provisions of S. 429 of the Penal Code; whether if he had guilty knowledge that the animal had been stolen he could be prosecuted under some other section of the Indian Penal Code, I am not prepared here to say. But it is quite clear that under neither of the S. 379 and 429 could he have been successfully prosecuted.

Now in this case, as I have said, there is no direct evidence which shows that he was present either at

(1) [1902] 1 Weir, 497.
(2) [1866] 6 W. R. (Cr.) 5.
(3) [1905] 5 Bom. L. R. 46).

the th ft or before the cow was killed ; there is only evidence to show that after the cow was dead h was assisting the two other appli ants to skin it. It is true that, in the judgment of the lower appellate Court, it is stated that a head constable met the first applicant when he was in charge of a dafadar and after his name had been mentioned as one of the accused in the first information, and, on enquiring from him as an accused person what had happened, the head-constable was told, so he says, by the first applicant, that he (the first applicant) had slaughtered an ox which he had purchased and that the people were making an unnecessary fuss about it. Mr Yunus has, I think, rightly pointed out that this statement, although it might be regarded as of exculpatory character for one purpose, cannot be regarded as receivable in evidence for the purpose of incriminating the applicant It is also true and it seems quite clear that neither the first applicant nor in fact any of the applicants put forward a defence which was true. They alleged, so I understand that the animal which had been killed was one which had been purchased by them from a third party. However, whatever may be the nature of the evidence the fact remains that with the exception of the statement (which I do not think was admissible in evidence and to which I have already referred) there is nothing, so far as could be pointed out to us on the record, which shows that this applicant appeared upon the scene prior to the slaughter of the cow in question.

Under those circumstances, although I myself may say that I have great doubts as to whether this applicant was not really present at the time when the cow was killed, I do not think that here is sufficeint evidence against him to prove that fact. In consequence the conviction and sentence which have been recorded against this applicant must be set aside and the applicant set at liberty. The fine if paid should be refunded to him.

Adami, J.—I agree.

Order modified.

✱ 1925 PATNA 36

DAS AND ROSS, JJ.

Rameswar Mahton—Defendant—Applicant

v.

Lala Dwarka Prasad— Plaintiff—Opposite Party.

Civil Revision Cases Nos. 468, 479, 480, 481. 482, and 483 of 1923, Decided on 1st April 1924, from an order of Sub J. Patna, D/ 6th October 1923.

(a) Civil P. C. S. 151=Court cannot do what is prohibited by the Code.

A Court has no inherent jurisdiction to do that which is prohibited by the Code. So it cannot set aside its own decree save under O. 20. R. 3. [P. 36, C. 2.]

** b Civil P. C. S 115 -High Court need not interfere save for aiding justice—Lower Court's order under S. 151. C. P. C. passed without jurisdiction setting aside its own decree, is not reviewable where the decree would have been successfully avoided in review.*

The Court is not bound to interfere under section 115 except in aid of justice. [P. 36, C. 2]

Where the lower Court acceded to plaintiff's prayer under S 151 to set aside a decree.

Held: that though the Court had no jurisdiction under that section to set aside its own decree, yet, as plaintiff would have succeeded had he applied under O. 47. R. 1 instead of under S. 151, High Court should not interfere. [P. 37, C. 1]

Atul Krishna Ray—for Applicant

K. P. Jayaswal with Bimola Charan Sinha—for Opposite Party.

Das, J.—It may be conceded that there is no jurisdiction in the Court to set aside its own decree under S. 151 of the Code. It ought to be remembered that the Court has no inherent jurisdiction to do that which is prohibited by the Code, and Order 20, rule 3, of the Code provides that:

"a judgment, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review."

In my opinion there was no power in the Court to alter or add to the judgment in the exercise of its inherent jurisdiction.

But the question now arises whether we ought to set aside the order passed by the Court. The application before us is under S. 115 of the Code and it is well established that the Court is not bound to interfere under S. 115 except in aid of justice. What happened was this. The applicants were the tenants and the opposite party was the landlord. It was objected that the name of the landlord had not been registered in the Land Registration Department, and the

Court on that ground dismissed the suit While the judgment was actually being written the landlord produced documents showing that his name had actually been registered in the Land Registration Department. The learned Judge says that these documents were produced before he signed his judgment; but as a matter of fact his attention was drawn to it after he signed the judgment. There is no question that, had the opposite party applied for review, the Court would have granted review without the slightest hesitation. All that can now be said is that instead of applying under Order 47 rule 1, as the landlord should have done he applied under section 151 of the Code.

In our opinion we ought not to exercise our power under S. 115 in this case.

The application must be refused but, in the circumstances, without costs.

This order will govern analogous Civil Revision Cases Nos. 479. 480, 481. 482 and 483 of 1923.

Ross, J.—I agree.

Application rejected.

✱✱ 1925 PATNA 37

DAS AND ROSS, JJ.

East Indian Railway Co.—Defendants—Appellants.

v.

Ram Lakhan Ram—Plaintiff—Respondent.

A. A. O No. 49 of 1923, Decided on 4th December 1923, against the order of Addl Sub Judge, Shahabad, D/-22nd December 1922

✱✱ *Civil Procedure Code, O. 1 R. 10(5)—Misdescription can always be corrected—Misdescribed party and wrong party differ from each other—But if two persons sue wrong one is sued and no question of representation arises, the case is not one of misdescription.*

On the language deliberately employed by the legislature in the provision of the Code, there is no room for controversy that the proceedings as against any person added as a Defendant shall be deemed to have begun only on the service of summons. Where there is a misdescription of the Defendant in the cause title there is complete power in the Court to make the necessary correction without any regard to lapse of time, for in case of misdescription the Court will not have any difficulty in arriving at the conclusion that the Defendant has been substantially sued though under a wrong name. There is all the difference in the world between misdescribing a party intended to be sued and suing a wrong party.

Where a personal decree was sought against the Agent, East Indian Railway Company, and there was no suggestion in the plaint that it was sought to bind the Railway Company by any decree that the Plaintiff might obtain against the Defendant.

Held: no question of representation arose in such a case. Where there are two known persons in existence and the plaintiff brings the suit against one of them and afterwards applies to have the other brought on the record as a Defendant on the ground that he all along intended to sue him or treated him as substantially the party sued, and no question of representation arises in the case, it is impossible to maintain the view that there is a case of misdescription. [P. 38, C. 2; P. 39, C. 2.]

Naresh Chandra Sinha and Netai Chandra Ghose—for Appellants.

Parmeshwar Dyal and Rai Tribhuban Nath Sahai—for Respondent.

Das, J.—I think that this appeal must succeed. It is not disputed before us that the suit as filed on the 23rd December 1920 was against the Agent, East Indian Ry. Co., and that by his application for amendment, the plaintiff sought to substitute the Railway Company for the Defendant originally sued. It is admitted that, had the suit been filed at the date when the Plaintiff presented his application for amendment, it would have been open to the Railway Company to contend that the suit was barred by limitation: and the learned Munsif giving effect to the well-known rule that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendment, declined to accede to the application made on behalf of the Plaintiff. The learned Subordinate Judge in the Court below has come to the conclusion that the application for amendment of the plaint ought to have been allowed by the learned Munsif and in that view he has remanded the case to the Court of first instance for disposal on the merits.

In my opinion the question must be decided on the terms of Or. 1. R. 10 (5). of the Code of Civil Procedure. On the language deliberately employed by the legislature in the provision of the Code to which I have referred, there is no room for controversy that the proceedings as against any person added as a Defendant shall be deemed to have begun only on the service of

summons. Now it is admitted before us that the suit as against the Railway Company would be barred by limitation if the proceedings in connection with the suit be deemed to have begun only on the service of the summons. That being so, it seems to me that the learned Munsif was right in declining to accede to the application made before him on behalf of the Plaintiff if the Railway Company be regarded as an added party to the suit.

It was strongly contended before us that the Railway Company should not be regarded as "a person added as Defendant" within the meaning of the term as used in Or. 1, r. 10 (5) of the Code. I quite admit that where there is a misdescription of the Defendant in the cause title there is complete power in the Court to make the necessary correction without any regard to lapse of time, for in a case of misdescription the Court will not have any difficulty in coming to the conclusion that the Defendant had been substantially sued, though under a wrong name. The cases relied upon by the learned Vakil for the Respondent are all cases of misdescription, and the decisions in all these cases rest on the view that the Defendant sought to be added as a party was always in the record as a Defendant, though under a wrong name. In the case of *Munni Kasaundhan* v. *Crooke* (1) the Plaintiff intended to sue, and did sue, the Municipal Committee of Gorakhpur, but instead of suing the Committee through the President as the Plaintiff should have done, he sued it through the Secretary. It was a case of misdescription, pure and simple and the Allahabad High Court pointed out that no personal relief was sought against the Secretary, the whole object of the Plaintiff being to bind the Committee by any decree that might be passed in his favour. In *Henry Mohan Mukerjee* v. *Nurendra Nath Mukerjee* (2) the Plaintiffs claimed a decree expressly against the *debutter* estate and the Defendant was brought on the record not only in his personal capacity, but also as the Receiver of the *debutter* estate. Subsequently after the expiry of the period of limitation prescribed for the suit the plaint was amended and the Defendant (who was a party on the record both in his personal capacity and as Receiver of the *debutter* estate) was described in the cause title as the *sebait* of the *debutter* estate. The Calcutta High Court, in affirming the view of the lower Appellate Court that amendment should be allowed, pointed out that the Plaintiffs expressly asked for a decree against the *debutter* estate and that the only question was whether the *debutter* estate was actually before the Court, as in substance it was throughout; and it expressed the view that "where relief was originally claimed as against a party who had to be represented by some person, the proper representation of that party subsequently made has not the effect of adding a new Defendant to the suit." As I read, the decision of the Calcutta High Court is based on the view that where the party intended to be sued and substantially sued has been misdescribed in the cause title there is complete power in the Court to give the appropriate relief to the Plaintiff without any regard to the terms of S. 22 of the Limitation Act. The other cases (except one to which I shall presently refer) upon which reliance was placed substantially take the same view.

But in my opinion there is all the difference in the world between misdescribing a party intended to be sued and suing a wrong party. It was strongly contended before us that the Plaintiff intended to sue the Railway Company and in substance sued the Railway Company; but the plaint speaks for itself; and it is quite impossible for us to have recourse to extrinsic evidence. A personal decree was sought against the Agent, East Indian Railway Company, and there is no suggestion in the plaint that it was sought to bind the Railway Company by any decree that the Plaintiff might obtain against the Defendant. No question of representation arises in this case and it is quite impossible for us to have recourse to the doctrine enunciated in *Peary*

(1) [1879] 2 All. 296.
(2) [1905] 32 Cal. 582—9 C.W.N. 421.

Mohan Mukerjee v. *Naren IraNath Mukerj e* (2). The only case which appears to support the contention of the Respondent is the case of *The Surajpur Manufacturing Company Ltd.* v. *B. B & C. I Railway Company* (3) but there is this difference between the Bombay case and the case before us that though the title of the Defendant was entered in the plaint as follows:—"The Agent, B. B. & C, I. Ry. Company, Ltd.," the prayer was that the Defendant Company should pay the amount sued for. In these circumstances the Bombay High Court took the view that the relief having been claimed against the Railway Company and not against the Agent personally, it was the Railway Company which was substantially the Defendant in the suit. But as I have pointed out, in the present case the Plaintiff asks for a personal decree against the Agent of the Railway Company. The point has been expressly decided by my learned b other in the case of *Sinehi Ram Biharilal* v. *The Agent, East Indian Railway Company* (4) and I entirely agree with the conclusion at which my learned brother arrived: It may be pointed out that a similar view has been taken at least in two cases in the Calcutta High Court—the case of *Nubeen Chunder Paul* v. *Stephenson* (5) and the case of *India General S. N & R. Co., Ltd.*, v. *Lal Mohan Saha* (6). In the last mentioned case the suit was filed against two Companies and the Defendant Companies were described as "the Indian General Steam Navigation and Railway Company, Limited" and "the River Steam Navigation Company, Ltd." by their joint Agent, A. E. Rogers. Notice was served on Mr. Rogers and subsequently Mr. Rogers retired from the service of the Companies and left the country. At the trial of the suit, the plaint was amended and Mr. Rogers's name was omitted from the title of the suit which was proceeded with against the two Companies. It was held by Mukerjee and Roe, JJ., that the plaint as originally framed was in contravention of Or. 29 r. 1 of the Code. It was argued that the suit was in essence brought against the two Companies and that the Plaintiffs mentioned the name of Mr. Rogers as the person upon whom the process was to be served. With regard to this argument the learned Judges observed as follows:—"There is obviously no foundation for this theory. The suit was substantially against Mr. Rogers, although he was sued in his capacity as joint Agent of the two Companies mentioned. The suit, however, should have been framed as one against the two Companies described by their proper names, as is clear from the decisions mentioned. There is plainly no excuse for the mistaken course deliberately adopted by the Plaintiffs." The question then arose whether in the circumstances of the case the Court below should have amended the plaint by striking out the name of Mr. Rogers and allowing the suit to proceed against the Companies. On this point the learned Judges said as follows:—"In the circumstances of this case, as no question of limitation arises even if the suit be taken to have been instituted against the two Companies on the date when the plaint was allowed to be amended, we are of opinion that the amendment may stand I read the decision of Mr. Justice Mookerjee as containing a strong intimation to the effect that amendment would not have been allowed if any question of limitation arose in the case. In my opinion when there are two known persons in existence and the Plaintiff brings the suit against one of them and afterwards applies to have the other brought on the record as a Defendant on the ground that he all along intended to sue the other and in substance he sued the other, and no question of representation arises in the case, it is impossible to maintain the view that the case is one of misdescription.

I would allow the appeal, set aside the decree passed by the Court below and restore the decree passed by the Court of first instance. The Appellant is entitled to his costs throughout,

Ross, J.—I agree.

Appeal allowed.

(3) 1923 Bom. 452—47 Bom. 785—25 Bom. L. R. 513.
(4) [1923] 2 Pat. L T. 679—64 I. C. 125.
(5) [1871] 15 W.R. 531.
(6) [1915] 43 Cal. 441—31 I. C. 35—22 C. L. J. 241.

1925 PATNA 40

JWALA PRASAD AND KULWANT SAHAY, JJ.

Somar Singh and others—Appellants.

v.

Mt. Premdei Kuer and others—Decree Holders—Respondents.

M. A. Nos. 68 and 74 of 1924, Decided on 4th January 1923, against the Order of Sub. J. 2nd Court Patna D/- 10th March 1923.

✱ (a) *Decree—Execution—Starting point is decree of final Court*

The entire suit which was one for contribution was based upon an Ekrarnama or certain dealings which the plaintiffs alleged were binding upon the estate of defendants as members of a joint Mitakshara family. The foundation of the liability of the defendants was common, though the extent of their liability might have been different, and in the appeal by one set of defendants from the decree by the trial Court the foundation of the plaintiff's claim was involved. The Appellate Court (High Court) dismissed the suit relying upon order 41 rule 33. The Privy Council restored the decree of the trial Court when it was actually time-barred against the non-appealing two sets of defendants on application by plaintiff for execution of the Privy Council decree.

Held: that the order of the Privy Council restoring the decree was final between the parties and the mistake if any in reviving a barred decree could only be rectified by the Privy Council.

Held: further that the decree of the trial Court could not be executed against the non-appealing defendants until the decree became final on appeal to the first appellate Court which however dismissed the suit itself. The starting point for execution therefore began only when the decree was revived by the order in the Privy Council. [P 42, C 2]

✱✱ (b) *Civil P. C. O. 41 R. 33—Appeal from part and by some parties only enables the Court to exercise its power under R. 33.*

Rule 33 of Order 41 of the new Code, enables the appellate Court to deal with the entire decree although the appeal may be as to a part of the decree, and also to give directions in favour of parties who have actually not filed any appeal or objection. In an appeal from a part of the decree by some of the parties the entire decree becomes the subject-matter of the appeal. [P 43, C 2]

✱✱ (c) *Limitation Act, Art 182, Clause (2)—Appeal from part and by some parties brings Article into operation (Case law discussed.)*

In an appeal from a part of the decree by some of the parties the entire decree becomes the subject-matter of the appeal. Article 182, clause (2) would seem to apply where there has been an appeal from a part or whole of the decree, or only when some of the parties to the suit have brought the appeal. [P 43, C 2]

Hasan Imam, A. K. Roy and *Shiveshwar Dayal*—for Appellants.

K. P. Jayaswal and *B. C. Sinha*—for Respondents.

Jwala Prasad, J.—Miscellaneous Appeal No. 68 is by defendants Nos. 2 and 5 to 8 and Miscellaneous Appeal No. 74 is by defendants Nos. 4, 9 to 11. The defendants Nos. 1 and 3 are not parties to these appeals.

The respondents obtained a decree against the aforesaid 11 defendants in a suit for contribution. The decree was passed on the 6th May, 1910, for Rs. 10,672 2-0 on account of principal and Rs. 1,104 12-0 on account of interest, making a total of Rs. 11,776-14-0. The liabilities of the defendants were split up and incorporated in the decree by an order amending the decree, dated the 30th July, 1910 The defendants Nos. 1 and 3 were made liable for Rs 3,985 10-4; defendants Nos. 2 and 5 to 8 for Rs. 3,925 10-4 and defendants Nos. 4 and 9 to 11 for Rs. 3,925 10-4.

Against this decree the defendants Nos. 1 and 3 appealed to the High Court of Calcutta, on the 19th December, 1910. The plaintiffs and the remaining defendants, who are appellants before us, were impleaded as respondents in that appeal. The plaintiffs preferred a cross-objection against the part of the decree whereby their claim was reduced. They had claimed Rs. 15, 60 6-9 on account of principal and interest; their claim was reduced by about Rs. 5.000, more or less. The High Court of Calcutta by its judgment, dated the 19th January 1915, dismissed the entire claim of the plaintiff; their cross-appeal also failed.

The parties to the litigation, both the plaintiffs and the defendants, were members of a joint Mitakshara family, and the claim of the plaintiffs was more or less based upon an Ekrarnama, dated the 13th August, 1907, whereby the rights of the plaintiffs and the defendants or their respective predecessors as between themselves were settled. The High Court hel

that the claim of the plaintiffs to contribution was hopelessly barred and that the plaintiffs failed to show that the monies borrowed from Ganga Prasad, which were the subject-matter of the litigation, were used to pay off the joint debts.

The plaintiffs appealed to His Majesty in Council, and the decision of the High Court was set aside by the order of His Majesty-in-Council, dated the 21st December, 1920 The operating portion of that order runs as follows:—

"(1) That this appeal ought to be allowed, the decree of the High Court of Judicature at Fort William in Bengal, dated the 19th day of January, 1915, set aside without costs and the decree of the Court of the Subordinate Judge of Patna, dated the 6th day of May, 1910 restored and.

(2) That there ought to be no costs of this appeal,"

On the 27th April, 1921, the High Court directed the aforesaid decree of His Majesty-in-Council to be sent down to the lower Court for execution. Thereupon the decree holder on the 3rd August, 1922, presented an application in the Court of the Subordinate Judge of Patna for executing the said decree of His Majesty-in-Council against all the defendants.

There were three sets of objections filed against the execution of the decree by the aforesaid three sets of judgment-debtors respectively. These objections were overruled by the Subordinate Judge by his order, dated the 10th March, 1923. The defendants Nos. 1 and 3 have not challenged the order of the Subordinate Judge. The other sets of the defendants have come to this Court in appeal. Their petition in the Court below raised various objections; but in the present case we are concerned only with one objection of theirs, namely, that the execution of the decree in question is barred by limitation. This objection is common to both the appeals, and consequently one judgment will be sufficient to dispose of both of them.

The objection is a short one. It is said that the decree of the Subordinate Judge was passed on the 6th May 1910, declaring separate liabilites of these appellants in two cases, *viz.*, Rs. 3,925-10-4 to be paid to the plaintiff by each set of defendants; that these sets of defendants had not preferred any appeal to the High Court and the separate decrees against them embodied in one decree of the Court below became final; that the execution of the portions of the decree against these sets of defendants should have been levied within three years of the 6th of May 1910, the date of the decree, and that no execution was levied nor was any step taken to advance execution of the decree against these appellants. Hence it is urged that the decree against them became barred by lapse of time long before 19th July 1915 when the High Court dismissed the plaintiff's claim, and that the order of His Majesty-in-Council simply restores the decree of the Subordinate Judge and the execution is virtually in respect of the decree passed by the Subordinate Judge and the effect of the order of His Majesty-in-Council is to revive the decree which, as stated above, was long before barred. Now it has not been disputed in this Court that the respondents are executing only the order of His Majesty-in Council and that the order fastens the liability of the claim of the plaintiff on all the defendants including the appellants before us; but it is said that it could not have been contemplated nor could it be the result of the order of His Majesty-in-Council to revive the decree of the Subordinate Judge which was barred as against these defendants, the appellants before us. It appears to me that we are not competent, nor was the Subordinate Judge competent who was executing the decree in question, to go behind the order passed by His Majesty in-Council. That order may be right or wrong; but we have to take it as it is, and the only duty of the Courts in India is to give effect to the order in question and, as stated in the concluding portion of the order, to punctually observe, obey and carry the same into execution. The grievance of the appellants, if any, could be rectified by His Majesty-in Council alone, and the remedy as recommended in the case of *Premlall Mullick* v. *Sumbhoo*

Nath Roy, (1) was to approach His Majesty-in-Council and to get the mistake, if any, rectified. This course has not been so far adopted, and the order of His Majesty-in Council remains unimpeachable. The appellants were impleaded as respondents in the appeal before His Majesty-in-Council and it was their duty to urge before His Majesty-in-Council to absolve them from the liability of the decree of the Subordinate Judge upon the ground that it was barred by limitation. That decree was challenged in appeal by defendants Nos. 1 and 3; in that appeal the present appellants were also impleaded as parties and were made respondents. The plaintiff preferred cross-objection to the decree and prayed that the entire claim should have been decreed against all the defendants and that the Subordinate Judge was wrong in modifying the claim and reducing the same. In this way the whole suit of the plaintiff was involved in the appeal. The plaintiffs did not accept the decree of the Subordinate Judge as a final decree and therefore were not bound to enforce it. They wanted their whole claim and until that was determined in the appeal in the High Court of Calcutta they were not at all required to execute the decree in question.

I have already briefly set out the scope of the suit and the point involved in the appeal in the High Court. The entire suit was based upon an Ekrarnamah or certain dealings which the plaintiffs alleged were binding upon all the defendants as members of a joint Mitakshara family. The foundation of the liability of the defendants was common, though the extent of their liability might have been different, and in the appeal the foundation of the plaintiffs' claim was involved. That was the scope of the appeal, and the result confirms the view, for upon the hearing of the appeal their Lordships of the Calcutta High Court did not confine themselves to the decree passed against defendants Nos. 1 and 3, but dismissed the entire claim of the plaintiff. This, to my mind, arose upon the particular facts of the case and upon the appeal and the cross appeal before the High Court and upon the fact that all the contending parties were before the Court either as appellants or as respondents. Therefore, as a matter of fact the whole decree was before the Court and the finality of it was not determined until the appeal was disposed of. Apart from this the High Court had full seizin of the appeal and under Order 41 rule 33 of the Civil Procedure Code it had full power to pass such decree, in favour of all or any of the respondents or parties whether they were actually before the Court or not, as the justice of the case required. This provision in the Code is new, but it has given effect to the principles from time to time enunciated by learned Judges in dealing with cases that came before them where they found that it was their incumbent duty as a Court of Appeal to do full justice to the case and to the parties involved in the case whether all of them were before the Court or not. Therefore the plaintiffs were not required to execute the decree before it became final: in other words, before the appeal in the High Court was determined. After the High Court of Calcutta dismissed the appeal, the plaintiffs had no decree in their favour to execute until His Majesty-in-Council upheld their claim.

The learned Counsel on behalf of the appellants has cited a number of authorities in support of the proposition that the Subodinate Judge's decree against the present appellants could be executed inasmuch as their liabilities under the decree were specified: *Ganga Kuar* v. *Kesar Kuar* (2), *Mashiat-un-nissa* v. *Rani* (3), *Raghunath Prasad* v *Abdul Hye* (4), *Christiana Benshaun* v *Benarashi Prasad Chowdhury* (5), and *Dhirendra Nath Sarkar and others* v. *Nischintapur Company* (6).

The earliest case of Allahabad was *Mashiat-un-nissa* v. *Rani* (3), in

(1) [1895] 22 Cal. 96.

(2) [1904] 1 A. L. J. 409.
(3) [1889] 13 All. 1—(1890) A. W. N. 207 (F. B.)
(4) [1886] 14 Cal. 26.
(5) [1914] 19 C. W. N. 287—22 I. C. 685.
(6) [1916] 22 C. W. N. 192—36 I. C. 398—26 C. L. J. 118.

which two learned Judges (Brodhurst and Mahmood, JJ.) took a different view. The other case reported in *Ganga Kuar* v. *Kesar Kuar* (2), was a decision by Knox, J. who, while he felt that there was a sharp difference of opinion upon the question thought that he was bound by the decision, in *Mashiat un-nissa* v. *Rani* (3). He does not give any reason of his own to support his view. On the other hand, a Division Bench of the same Court in *Badi un-nissa* v. *Shamsuddin* (7), distinguished those cases upon the ground that all the parties were not impleaded in the appeal in those cases. Sir John Edge, C. J., referring to those cases says.

"but in these cases all the parties to the suit were not parties to the various appeals from the decree in the suit."

In the case decided by Sir John Edge, C. J., the decrees passed in favour of the plaintiff in respect of the pre-emption with respect to two of the villages were no longer involved in the subsequent appeals up to the High Court by the plaintiff with respect to two other villages, yet it was held that the execution to enforce the decree with respect to the first two villages was not barred, inasmuch as the decree did not become final until the appellate decree of the High Court was passed. This case is indistinguishable from the present one and the learned Counsel for the appellants concedes that. The case of *Raghunath Prasad* v. *Abdul Hye* (4), was distinguished, if not overruled, in the Full Bench case of *Gopal Chunder Manna* v *Gosain Das Kalay* (8), The case of *Christiana Sons Law* v. *Benarshi Prasad Chowdhury* (5), was similarly distinguished in *Satish Chandra Chowdhury* v. *Girish Chandra Chakravarty* (9).

The case of *Kristnama Chariar* v. *Mangammal* (10), dealt with all the cases, and upon a review of them and of the law on the subject distinctly came to the conclusion that a decree is not barred even with respect to the portion against which no appeal had been preferred until the appeal against the other portion of the decree is finally determined.

The Full Bench cases of *Gopal Chunder Manna* v. *Gosain Das Kalay* (8) and *Kristnama Chariar* v. *Mangammal* (10), were based under Article 179 of the old Limitation Act but shortly before the present Limitation Act was passed in 1908, and most of the reasonings advanced there would seem to anticipate the law as at present stands embodied in the new Code of Civil Procedure and the Limitation Act, both of which were passed in the year 1908 Rule 33 of Order 41 of the new Code, as observed above, enables the appellate Court to deal with the entire decree although the appeal may be as to a part of the decree, and also to give direction in favour of parties who have actually not filed any appeal or objection. In this way under the present Code of Civil Procedure in an appeal from a part of the decree by some of the parties the entire decree becomes the subject-matter of the appeal. Article 182, clause (2).

"the date of the final decree or order of the appellate Court, or the withdrawal of the appeal."

would seem to apply where there has been an appeal from a part or whole of the decree, or only when some of the parties to the suit have brought the appeal. It does not in any way qualify or restrict the final decree or order as is sought for by the appellants. The case of *Ranjit Prasad Tewari* v. *Ramjatan Pandey* (11), will to some extent also support the view.

It would thus appear that the plaintiff's right to execute the decree is not at all barred.

The view taken by the learned Subordinate Judge is therefore correct, and we dismiss the appeals with costs.

Kulwant Sahay, J.—I agree.

Appeals dismissed.

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(7) [1895 17 All. 103—(1895) A. W. N. 20.
(8) [1894] 21 Cal. 591—2 C. W. N. 356 (F. B.)
(9) [1920] 47 Cal. 813—60 I. C. 915.
(10) [1902] 26 Mad. 91 (F. B.)

(11) [1917] 1 Pat. L. W. 197—37 I. C. 839—(1917) A. I. R. C. C. 113.

1925 PATNA 44

JWALA PRASAD, J.

Mahabir Prasad and others—Plaintiffs—Appellants.

v.

Shyam Behari Singh and others—Defendants—Respondants.

Stamp Reference in F. A. of 1923, Decided on 2nd April 1924.

(a) *Court Fees Act S. 7. (IV) (c)—Where a mere declaration will give full relief further declaration is redundant and asking therefor will not make suit one for declaration with consequential relief—Court Fees Act, Sch II, Art 17 (3) Act.*

A consequential relief can be insisted upon only when the plaintiff will not get any redress by having merely a declaratory decree. For instance, where the property is in possession of the defendant, the Plaintiff will not be allowed to seek merely a declaration of his title but must pray for recovery of possession as consequential relief. But where a mere declaration is sufficient to give the plaintiff full relief, a further declaration will be deemed to be redundant; and the act that the plaintiff asked for a redundant relief will not alter the nature and scope of the suit and make the suit one for a declaration with consequential relief. [P 46 C 2]

Where the suit is for declaration that certain transactions diminishing defendant's share in joint family property so as to save it from attachment and sale in execution of plaintiffs' decree, were void and for declaration of plaintiffs' right to realize their decree from the property, the latter relief is unnecessary and the suit is only a suit for declaration and not for declaration with consequential relief. It falls within Sch. II Art 17 (3) and not S. 7 (IV) (c) of the Act. [P 47 C 1]

Sivshwar Dayal—for Appellants.

Lachmi Narayan Singh, Govt. Pleader—for the Crown.

Judgment—This is a reference to me as a Taxing Judge to determine the Court fee payable upon the memorandum of appeal.

The Plaintiffs are the Appellants. The Defendant No 1 had executed a mortgage bond in their favour on the 27th February 1914 hypothecating the properties of the joint family consisting of Defendants Nos. 1 to 6. Defendants Nos. 1 and 2 are brothers; Defendants Nos. 3 to 6 are sons of Defendant No 2; Defendant No. 7 is the mother of defendants Nos 1 and 2; Defendant Nos. 8 and 9 are wives of Defendants Nos. 1 and 2 respectively and the Defendant No. 10 is the father's sister's son of Defendants Nos 1 and 2. On the 18th June 1918 the Plaintiffs commenced an action to enforce the mortgage, impleading Defendants Nos. 1 to 6 as parties to the suit.

The decree was, however passed only against Defendant No. 1 upon ground that no legal necessity for the debt was established. The decree was a personal decree and was dated the 17th of June 1919. The Plaintiffs levied execution of the decree and sought to sell the right, title and interest of defendant No. 1 in the family properties The execution was resisted by Defendants Nos. 3, 8 and 10. The objections of defendants Nos. 3, 7 and 8 were founded upon a certain partition decree in Suit No. 81 of 1918. The suit was instituted by Defendant No 3 alleging himself to be the adopted son of defendant No. 1. In the partition the shares of the different members of the family in the property were ascertained. Defendants Nos. 7, 8 and 9, the mother and wives of defendants Nos. 1 and 2 got certain shares in lieu of maintenance under the Hindu law. Defendant No 3 also got a share out of what was allotted to Defendant No. 1 as his adopted son Thus, the share of defendant No 1 was considerably disminished. Even this diminished share was disposed of by a sale deed, dated the 30th January 1914, executed by him and Defendant No 2 in favour of defendant No. 10 The aforesaid distribution of the shares in the properties to the different members in the family and to Defendant No. 10 was before the plaintiffs' decree was put in execution. Defendant No. 10 put in an objection and the property sold to him was exempted from the sale under O. 21, r. 58 of the Civil Procedure Code. Similarly, the shares allotted to Defendants Nos. 3, 7 and 8 were exempted from the liability of the Plaintiffs decree in a proceeding instituted under S. 47 of the Civil Procedure Code.

The Plaintiffs, therefore, instituted the present suit by presenting their plaint in the Court of the Subordinate Judge, Patna. In the plaint the following reliefs were claimed:—

It may be adjudicated and declared that the deed of absolute sale, dated the 30th January 1919 executed by Defendants Nos. 1 and 2 in favour of Defendant No. 10 is altogether a nominal and colusive document without consideration, that it has not at all been made operative up to this time, that Defendants Nos. 1 to 6 are still in joint possession of the properties covered by the said deed and that the said deed is by no means a genuine document.

It may be further adjudicated that the partition suit No. 54 of 1918 filed on behalf of Defendant No 3 was got filed by Defendant No. 1, that Defendant No 3 is by no means the adopted son of defendant No. 1, that he partition has no at all been made over the up to this time, that the entire estate of Defendant No. 1 is still joint and that Defendant No. 1 is still in possession thereof jointly with Defendants Nos. 2 to 6.

It may also be adjudicated and declared that Defendant No. 1 fraudulently took the aforesaid measures after the decree in favour of the Plaintiffs was passed, with a view to diminish his share also to evade payment of the decree amount payable to the Plaintiffs and that the Plaintiffs are not bound by the same."

On the adjudication of the above points, it may be declared that the plaintiffs are entitled to realize their decree from the estate of Defendants Nos. 1 to 6 by attachment and sale.

The plaint was filed on a stamp paper of the value of Rs. 10 under schedule 1, article 7 of the Court Fees Act treating the suit as a declaratory one.

The peripatetic Stamp-Reporter objected to the Court-fee paid and reported that the, suit was not only for a declaration but for a declaration and consequential relief, and consequently the Court-fee leviable was *ad volerem* under section 7 clause (4) (*c*) of the Act. The Subordinate Judge before whom the plaint was presented however, disagreed with the view of the Stamp-Reporter and held that the Court-fee paid was sufficient.

The preliminary issues were disposed of by the Subordinate Judge on the 14th May 1923, and the other issues were disposed of on the 11th June 1923. As a result of the final decision of the Subordinate Judge the Plaintiffs' suit was decreed as against Defendant No. 1 and dismissed as regards Defendants 2 to 6 and 8 to 10.

The plaintiffs filed an appeal before the District Judge of Patna upon the ground that the suit was valued at Rs. 2,100 only. The District Judge held that the Court-fee paid was insufficient and that the fee payable was *ad valorem*. He accordingly ordered the Plaintiffs to value the property, to pay Court-fee upon the subject matter of the suit and to make up the deficiency within a certain time. Assessing the value upon the principle laid down by the District Judge, the Plaintiffs valued the appeal at Rs. 5,100, which made the appeal incompetent in the Court of the District Judge and entertainable only by this Court. Accordingly, the memorandum of appeal was taken back from the Court of the District Judge, and has now been presented to this Court

The Stamp Reporter is of opinion that the court-fee payable is *ad valorem* under S. 7, clause (4) (*c*). The Taxing Officer, however, is doubtful as to the view taken by the Stamp-Reporter and seems to be inclined to take the view that the Court-fee paid is sufficient, treating the reliefs as being only declaratory.

It is remarkable that the Taxing Officer was the District Judge at the time when the memorandum of appeal was presented in the District Court and at that time he was of opinion that *ad valorem* Court-fee was leviable. He says that upon further consideration and upon the law having been placed before him he has now changed his opinion.

The decision of the question depends upon the scope of the plaintiffs' suit and the reliefs claimed by them. The plaintiffs want to have it declared that the properties in suit belong to defendant No. 1 and that the other defendants have no interest therein. Accordingly, they pray for reliefs Nos. 1, 2 and 3. On account of the circumstances disclosed in the execution proceedings, the plaintiffs had to set forth those circumstances in their plaint and also in the reliefs. Those are the circumstances upon which defendants Nos. 3 7, 8 and 10 base their claim to the property: but the reiteration of those facts and circumstances in the reliefs do not alter the real nature and scope of the reliefs. The plaintiffs will be entitled to proceed against the properties in execution of their decree against defen-

dant No. 1 only when defendant No. 1 has a subsisting interest therein and the other defendants have no interest. It is conceded by the Stamp Reporter as well as the learned Government Pleader that reliefs Nos. 1 to 3 are merely declaratory. It is, however, contended that relief No. 4 is in the nature of consequential relief. The plaintiffs want it to be declared that they are entitled to realize their dues from the estate of defendants Nos. 1 to 6 by attachment and sale of the interest of defendant No 1 only. It was conceded before the Subordinate Judge that the plaintiffs have no right in execution of the personal decree against defendant No. 1 to proceed against the shares of defendants Nos. 2 to 6 and that the relief is merely directed against defendant No. 1 only, I will quote from the decision of the learned Sub. Judge on this point:-

"The prayer No 4, as it is worded, means that the plaintiff wants to proceed against the estate of all the defendants jointly, as he does not say therein that he may be declared to be entitled to proceed against the right, title and interest of defendant No. 1 only in the joint estate. He cannot proceed against the shares of defendants 2 to 6. The learned Pleader for the plaintiff, however, says at the very most he wants to proceed against the right, title and interest of defendant No. 1 only. Taking this to be so, let us see if he can begin to hotchpot the properties which have been released in favour of defendant No 10 or allowed in favour of defendants 2 to 6."

Therefore that relief was confined in the Court below against defendant No. 1 only. A number of authorities have been cited on both sides It is not necessary to refer to all of them. The following only may be cited: *Kesavar Appu Ramakrishna Reddi* v. *Kotta Kota Reddi* (1), *Harihar Prasad Singh* v *Shyam Lal Singh* (2), *Bibi Phul Kumari* v. *Ghanshyam Misra* (3), *Dondo Sakharam* v *Govind Babuji* (4), *Aisa Sadika* v. *Siddu Settar* (5), *Ganeshi Lal* v. *Beni Pershad* (6) and *Zinnatunnessa* v. *Govinda Nath* (7).

(1) [1907] 30 Mad 36=1 M.L.T 311=16 M. L.J. 458 (F.B.)
(2) [1913] 20 C.L. 615=21 I.C. 401.
(3) [1908] 35 Cal. 202=35 I.A 27=7 C.L.J. 36=12 C.W.N 161=10 Bom. L.R. 1=5 A. L.J. 10= 7 M.L.T. 618=2 M.L.T. 506=14 Bur. L.R. 41 (P.C.)
(4) [1888] 9 Bom. 20.
(5) [1913] 17 C.L.J, 30=18 I.C. 633.
(6) [1911] 1 P.L.R. 1911=9 P.L.R. 1911=9 I.C. 673=22 P.W.R. 1911.
(7) [1903] 30 Cal. 788.

The other cases have all been referred to in these cases. I have gone through the cases very carefully and I am of opinion that the principle laid down in *Harihar Prasad Singh* v. *Shyam Lal Singh* (2) would not apply to the present case. In that case the plaintiff prayed for a declaration—(1) that a decree amounting to Rs. 2,794 and odd should be declared forged, illusory and unfit for execution; and (2) that the family property valued at Rs. 7,000 was not liable to be sold in execution of the decree. It is conceded by the Stamp Reporter that this is a converse case to the present one. In the present case the plaintiff has obtained a decree against the defendant No. 1 on payment of full Court-fee and he would be entitled to sell the property if the defendant No. 1 has got any right, title or interest therein. He need not in the present case seek any further relief such as has been claimed by him in relief No. 4 for a declaration that,

"They are entitled to realize their decree from the estate of defendants Nos. 1 to 6 by attachment and sale."

In the case of *Zinnatunnessa* v. *Govinda Nath Mukherjee* (7), it was considered sufficient that a suit in which the only prayer was to have it declared that a certain decree is ineffectual and inoperative against the plaintiff was held to be a sufficient prayer to give the plaintiff relief and the plaintiff need not have prayed for a consequential relief.

The case of *Ganeshi Lal* v. *Beni Pershad* (6) has reviewed all the authorities on the subject. It would seem that consequential relief can be insisted upon when the plaintiff will not get any redress by having merely a declaratory decree; for instance, when the property is in possession of the defendant, the plaintiff will not be allowed to seek merely a declaration of his title but must pray for recovery of possession as a consequential relief, and where a mere declaration is sufficient to give the plaintiff full relief a further declaration will be deemed to be redundant; and the fact that the plaintiff asked for a redundant relief will not alter the nature and scope of the suit and would make the suit one for a

declaration with consequential relief. The present is a case where relief No. 4 in the plaint is a mere surplusage, for upon the declarations made under reliefs 1 to 3 the plaintiffs would be entitled to attach and sell the right, title and interest of defendant No. 1 in the property in suit. On the other hand the granting of relief No. 4 will not at all improve the position of the plaintiffs for they would not be entitled to get the property unless defendant No. 1 has interest therein The decision of their Lordships in the case of *Bibi Phul Kumari* v. *Ghanshyam Misra* (3) is instructive.

I would, therefore, hold that the relief should be treated only as a declaratory and the Court-fee should be charged under Schedule II, Article 17, of the Court-Fees Act.

✱ 1925 PATNA 47

DAS AND ROSS, JJ.

Harihar Prasad Narain Deo—Petitioner.

v.

Maheswari Prasad Narain Deo—Opposite Party.

Civil Revision No 348 of 1923, Decided on 28th March 1924, from a decision of Sub. Judge of Patna, D/- 21st July 1923.

(a) *Civil P. C., S. 151- Prohibition by positive law—Civil P. C., O. 22R 3.*

S. 151 cannot confer jurisdiction on Court to do what is prohibited by positive law.

Where a judge has passed an order as to court fees,

Held that his successor could not alter that order save in cases of arithmetical or clerical error or on review. [P. 47 C. 2]

✱ (b) *Court fee--Devolution of interest pending suit.*

The devolution of interest pending the suit can make no difference in the court fee to be paid. [P. 48 C. 1]

Hasan Imam S. M. Mullick, Jafar Imam and P. K. Mukherjee - for Petitioner.

Sultan Ahmad and S. N. Bose—For Opposite party.

Ross, J.—This is a suit by a younger brother against his elder brother for partition. The defence was that the property was an impartible raj. An issue was raised as to the sufficiency of the court fee. The subordinate Judge before whom this suit originally came decided this issue in favour of the plaintiff holding that the suit was one for partition only. No appeal was made against this order. In the meantime the elder brother died and his sons were substituted in his place as his representatives. The plaintiff moreover sold a portion of the property to other persons who were added as plaintiffs. The suit then came before another Subordinate Judge who took up the question as to the sufficiency of the court fee again and decided that the plaintiff was bound to pay an *advalorem* court fee. It is contended on behalf of the plaintiff in the present application that the Court had no power to pass this order. The learned subordinate Judge has referred to the decision in *Chandramani Koer v. Baijoo Narain Singh* (1) that was a case where there was an application for review and it is conceded by the learned counsel on behalf of the petitioner that there is power to review an order of this kind on an application properly made; but in the present case there was no application for review. The learned Counsel for the opposite party relies on section 151 of the Civil procedure Code. It is true that a reference to that section was made in the decision referred to above although the reference was unnecessary as there had been an application for review of judgment. Order 20 rule 3 lays down that the judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by S. 152 or on review; and "judgment" is defined in S. 2 of the Code to mean the statement given by the Judge on the grounds of a decree or order. Clearly therefore this judgment, for it is a judgment, could not be altered save as provided by S. 152 or on review. It is clear that S. 51 cannot confer jurisdiction on the Court to do what is prohibited by positive law.

(1) [1919] 4 P. L. J. 57 = 49 I. C. 442.

Section 152 refers merely to clerical or arithmetical errors and it is of no assistance in the present case. In my opinion therefore the learned Subordinate Judge had no jurisdiction to alter the order of his predecessor in the way he has done.

It was further argued however on behalf of the opposite party that inasmuch as there are now added plaintiffs who have taken a transfer of part of the property, the nature of the suit has been altered and the Court is entitled to consider whether the purchaser plaintiffs are in possession, and if they are not, to demand an *advalorem* Court fee. In my opinion the devolution of interest pending the suit can make no difference in the Court fee to be paid. These plaintiffs come in the interest of their vendor, the original plaintiff, and their position is identical with his

I would therefore allow this application and set aside the order of the Subordinate Judge. The petitioner is entitled to his costs. Hearing fee five gold mohurs.

Das J.—I agree.

Application Allowed

✱ 1925 PATNA 48

BUCKNILL AND ADAMI, JJ.

Rameshwar Singh—Petitioner.

v.

King Emperor—Opposite Party.

Cr. Rev. No 126 of 1924, Decided on 25th March 1924, from a decision of S J, of Bhagalpur, D/- 4th February 1924.

✱ *Penal Code, S. 161 and 116—Offer of illegal gratification.*

A mere offer to pay an illegal gratification to a public servant is an attempt to bribe; actual money or other consideration need not be produced at the time the offer is made.

[P 49 C 1]

G. C. Pal—for Petitioner.

Asst. Govt. Advocate—for the Crown.

Bucknill, J.—This was an application in Criminal Revisional Jurisdiction made by one Rameshwar Singh who was convicted on the 21st of January last of an offence against the combined provisions of Ss. 161 and 116 I. P C. (abetting the taking by a public servant of an illegal gratification) by a Magistrate of the First Class of Bhagalpur; he was sentenced to rigorous imprisonment for a period of 18 months and in addition to pay a fine of Rs. 250 and in default of payment thereof to a further period of three months rigorous imprisonment. An appeal to the Sessions Judge of Bhagalpur was dismissed on the 4th of February last.

The petition in revision which was admitted by this Court on the 20th ultimo has now come before us.

The facts as put forward by the prosecution in this case were very short and simple A certain Writer Sub Inspector to the Superintendent of Police at Bhagalpur named Babu Benai Kumar Mozumdar is the real complainant. According to his account, at about 6 a m. on the 28th of October last, he was engaged in fishing in the river close to his residence and, whilst so engaged, his cook came to him and informed him that the Mohunt of a certain temple known as Boorhanath wished to see him. The complainant went to his garden and found three persons standing there one of whom was subsequently ascertained to be the petitioner. The petitioner asked the complainant whether he had in his possession the police diaries which referred to what is known as the Shankund murder case which was then before long to be tried; and, on the complainant stating that these diaries were in his possession, the petitioner then stated that if it was possible for the complainant to supply him (the petitioner) with copies of these diaries he (the petitioner) was willing to pay a bribe of Rs. 3,000 for copies of those papers. The Sub-Inspector appears to have made light of this suggestion and to have replied laughingly that he could not possibly do what was asked. The three persons (including the petitioner) with whom he (the Sub-Inspector) had been talking then went away. The Sub Inspector made no secret at all of what had taken place and indeed shortly afterwards told a gentleman named Shantosh Kumar

Ray, who was fishing with him, all about the matter. He also gave an account of this suggestion which had been made to him and to various other people; and, on the following Monday, he told the Head Clerk of the Police Office and indeed the Deputy Superintendent of Police and eventually the Superintendent. It would seem that his superior officers took a more serious view of the matter than he had done and it would seem that, until he had been so instructed by them the complainant himself would not have thought of making any formal complaint in connection with the occurrence.

However, on the 5th of November at about 2 p.m. the Sub-Inspector saw the petitioner standing on the verandah outside the Court of the Magistrate who was then engaged with the Shankund murder case and who was, it may be added, the Magistrate who tried the present case. The Complainant, on seeing the petitioner, then asked Sub-Inspector Abdul Quddus of Shankund Police Station, who was standing with him, who the petitioner was and where he lived and was told then that he was a resident of a certain village in the Bhagalpur district and that he was a relation of one of the accused in the murder case which was then being dealt with.

After getting this information the complainant on the 6th of November eventually filed a complaint before the Court or the Subdivisional Officer; and the petitioner was in due course tried and was convicted as I have already mentioned.

Now the learned Vakil who has appeared for the petitioner here has raised several ingenious points; of these, two are legal points and the third is one of a three-fold character which relates to the facts.

The first point which the learned Vakil has raised is that the circumstances which are detailed by the prosecution do not disclose any offence. He suggested that, as there is no allegation that any actual money or other consideration was produced at the time when the proposition was made to the complainant by the petitioner there was no attempt to bribe. He contends that, in order that any offence contemplated by the provisions of S. 161 I. P. C. should have been effected, something more than a mere statement, that if a public servant would do something which he should not do in the discharge of his official duties he would be given an illegal gratification, must be shown. I do not however think that this is so. In the case of *Rex* v. *Samuel Vaughan* (1) it was there held quite clearly that a mere offer to pay an illegal gratification to a public servant was an attempt to bribe; and I do not think that this proposition of law which was laid down so long ago as the year 1769 has ever seriously since been disputed.

The second point with which the learned Vakil has dealt must be divided into three heads. Of these the first is the suggestion that between the evidence of the complainant and of his servant who informed him that certain persons were waiting to see him there is a material discrepancy; for the complainant is alleged to have said that his servant had informed him that the Mohunt was waiting to see him; whilst the servant himself states that he informed his master that it was the cook of the Mohunt who wanted to speak to him (his master.) An examination of the evidence which was given by the complainant's servant disposes of this point altogether; for what he says is "I conveyed the message to my master that the Mohunt of Boorhanath wanted to see him and so had sent a man to call him".

The second point on the facts which has been urged before us by the learned Vakil is perhaps somewhat stronger. He contends that the whole case as to identification rests solely upon the evidence of the complainant; and he complains that, although it was suggested at the trial that there should be a test identification in order to ascertain if the complainant could identify the person who had been arrested, this petition was rejected without any reason. It must at once be stated that the complainant's cook (who was the servant who called him to see the three men who had come to see his (the cook's master) was unable

(1) 98 Eng. Rep. 308.

to identify any of the three men who had called as being the petitioner; but although it is, therefore, in a sense, correct to say that the evidence of identification of the petitioner as being the person who had made this offer of a bribe was confined to that of the complainant himself, yet, what took place afterwards indicates to my mind, very strongly, firstly, that there had been such an offer thus substantiating the main truth of the story and, secondly, that the complainant was able to pick out and identify the petitioner in such a manner (and did in fact do so) that any idea of the necessity for a further test identification would have been absurd. It is clearly proved that the complainant pointed out to Sub-Inspector Abdul Quddus an individual on the verandah of the Court house as being the person who had offered him the bribe; that he did not know at the time who he was and that he asked for information as to his identity. It was on the information received relative to his queries that the complaint was eventually filed against the present petitioner.

The third point to which the learned Vakil alludes is relative to the defence which was put forward. It was suggested that the whole story told by the Sub Inspector was false and an endeavour was unsuccessfully made at the trial by the petitioner to prove an *alibi* by the testimony of two witnesses. This *alibi* was believed by neither Court and the circumstances under which the complainant, immediately or shortly after what is alleged to have taken place, told numerous persons about the occurrence and the fact that he evidently had not the slightest intention of taking any proceedings against the petitioner (whose conduct he seems to have regarded as somewhat ridiculous) seem to me to show that there was no motive of *animus* moving in the mind of the complainant against the petitioner. No reason was suggested as to why the witnesses who purported to provide for the petitioner an *alibi* should be believed or why this Court should come to a decision on that question different to that at which the two previous Courts had arrived. It was said that there were two witnesses as to *alibi* whereas there was but one witness as to the petitioner's presence at the time when the offer of the bribe was made. There is nothing remarkable in a bribery case in such a state of affairs and the credence which may have to be attached to the one or the other of the stories does not depend simply upon the numbers of the witnesses. As I have said, the circumstances which took place after the alleged occurrence are of such a character as to my mind to show without any reasonable probability of doubt that the story which the complainant has told throughout has been a truthful one.

The third point which was put forward by the learned Vakil relates to the question of sentence. He points out that under the first portion of the provisions of S. 116 I.P.C. a person who is convicted of abetment of an offence punishable with imprisonment can only be punished with a term of imprisonment which shall not be more than *one quarter* of the longest term provided for the offence in respect of the abetment of which the person is convicted. He also points out that in the second portion of S. 116 it is provided that if the abettor or the person abetted is a public servant *whose duty it is to prevent the commission of such offence*, the abettor can only be punished with *half* the longest term of imprisonment which is provided for the substantive offence. It will be observed that in this case the maximum term of imprisonment provided for an offence against the provisions of S. 161 I.P.C. is three years and that in this case this petitioner has been sentenced to 18 months' rigorous imprisonment that is to say he has been sentenced under the latter half of the proviso of S. 116 I.P.C. It is contended that this is an illegal sentence. It is suggested that what is meant by the latter part of S. 116 of the Indian Penal Code is that it is only in the case of a public servant whose special duty it is to prevent the commission of certain offences that the punishment provided under the latter half of S. 116, as distinguished from the lesser punishment provided under the first half of that

section, is applicable. The question is one which is based upon the suggestion, made by the learned Author Dr. H. S. Gour in his work "The Penal law of India" at page 655, 2nd Edition, that the half of the longest term of imprisonment provided for the offence of the abetment of which the individual concerned has been convicted is only applicable where the abetment is of a public servant whose duty *in his capacity as such public servant* is to prevent the commission of the very offence abated; and he quotes a case in which where a prisoner was tentatively approaching a Civil Surgeon to see if he would accept a bribe and the Civil Surgeon stopped him from making further advances, it was held that the offence of abetment was complete but was one punishable under the first half and not under the latter half of S. 116; and this was so because the Civil Surgeon although undoubtedly a public servant, was not one whose duty it was as a public servant to prevent the offering of bribes Unsupported apparently by authority the principle has been suggested by the learned Author of the work in question as applicable to the offer of a bribe made to a police officer on the ground that bribery is not a cognizable offence nor was one which it is the specific duty of a public officer to prevent. Presumably however in the case of cognizable offences even the learned Author of this book would agree that the second half of the section might be put into operation. The matter need not be further discussed here because, in view of the position which I think should be adopted with regard to the sentence, the question is not one which need here be decided. The affair here was evidently of a very tantative and not highly important nature. The matter was indeed by this police officer himself regarded as too insignificant to be worth any serious consideration and in the words of the learned Magistrate. "The Sub-inspector simply laughed over this offer and replied that it was not his habit to give copies of police papers in his custody"; and indeed, later, he sesms to have told this story round amongst his friends almost as a good joke. That he was perhaps wrong in taking this nugatory view of what had taken place I have no doubt; but I think that under the circumstances the sentence is unduly severe.

Whilst therefore seeing no ground for altering the conviction in this case, I have come to the conclusion that sentence should be reduced to one of rigorous imprisonment for six months. The fine will stand.

Adami, J.—I agree.

Sentence reduced.

✱ 1925 PATNA 51

ADAMI AND BUCKNILL, JJ,

Jehal Teli—Appellant.

v

King Emperor—Opposite Party.

Death Reference No. 6 of 1924, and Criminal Appeal No. 43 of 1924, Decided on 1st April 1924, from an order of J. C. of Chota Nagpur.

✱ (a) *Criminal P. C., S. 288—Amendment of 1923—Magisterial depositions can be used in a trial if they are evidence within Evidence Act.*

Evidence duly taken before a Magistrate can be used for all purposes in a trial Court so long as the evidence is evidence within the meaning of the Indian Evidence Act. The view that S. 288 can only be utilised in such cases as the Evidence Act specifically provides is wrong as that Act has no such special provisions On the other hand, to hold that S 288 can be utilised in all cases except those in which the Evidence Act directly prohibits such use, would render the amendment of 1923 quite useless. [P 53 C 1]

✱ (b) *Criminal P. C., S. 288—In the absence of evidence showing the preferability of evidence given before a Magistrate—Convictions should not be based on it when it differs from evidence given at the trial—Criminal Trial.*

Unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilized in support of a conviction. Case Law reviewed. [P 53 C 1]

Muhammad Yunus—for Appellant.

Sultan Ahmed, Govt. Advocate—for Opposite Party.

Bucknill, J.—This was a reference made by the Judicial Commissioner of Chota Nagpur (sitting at Palamau) under date the 5th instant (No. 6 of

1924) under the provisions of S. 374 of the Code of the Code of Criminal Procedure. With it is coupled an appeal from jail (No. 43 of 1924). The matters relate to a man named Jehal Teli, of about 20 years of age, who was convicted of having murdered his wife by cutting her throat on the night of the 29th 30th of November last. He was sentenced to death by the Judicial Commissioner on the 27th February last.

[His Lordship dealt with the facts of the case and the evidence therein and proceeded:—]

Now it has been urged by the learned Counsel who appears for the appellant firstly that under the provisions of S. 288 as it at present exists, it is not possible for the evidence of a witness duly recorded before a Magistrate to be used at a trial except in such cases as are specifically provided for by the Indian Evidence Act of 1872. He further maintains that, even if such evidence could be utilized, it cannot be depended upon by itself for the purposes of a conviction. S. 288 was the subject of certain alterations by the Code of Criminal Procedure Amendment Act of 1923. It used to read,

"The evidence of a witness duly taken in the presence of the accused before the committing Magistrate may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case."

It now reads,

"The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII, may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act of 1872."

What Mr. Yunus urges is that the addition at the end of the section prohibits the use of evidence taken before a Magistrate as evidence at a trial except in such cases as are specifically provided for by the Indian Evidence Act. On the other hand the learned Government Advocate (who appears here for the Crown) was inclined to urge the opposite view; namely that the addition of the words in question meant that evidence taken before a Magistrate can always he utilized at a trial except where the Indian Evidence Act specifically prohibits its being so utilized. It is certainly difficult to understand exactly what the amendment of the section intended to effect; but it may be interesting to observe that S. 249 of Act X of 1872 (the old Criminal Procedure Code) ran as follows:

"When a witness is produced before a Court of Session or High Court, the evidence given by him before the committing Magistrate may be referred to by the Court if it was duly taken in the presence of the accused person, and the Court may, if it thinks fit, ground its judgment thereon, although the witness may at the trial make statements inconsistent therewith."

S. 288 of Act X of 1882 was the same as to the present section without the amendments introduced by the Act of 1923. In my opinion neither of the suggested constructions which are tentatively put forward by the learned Government Advocate and by Mr. Yunus can properly be accepted. There were, as will be shown by the cases to which I will refer presently in dealing with the second legal point, difficulties felt by the Courts with regard to how far the evidence taken before a Magistrate should be relied upon. There were also difficulties which were in the minds of legislators as to whether the evidence of a witness given before a Magistrate in cases in which there had been no cross examination should be capable of being utilized at a trial as a substitute for the contradictory evidence which he gave at the trial. To suggest, however, that evidence duly taken before a Magistrate can only be utilized at a trial in case where the Indian Evidence Act specifically authorizes its use is, to my mind, a mistake. There are only certain sections in the Evidence Act which could in any way be regarded as even remotely dealing with this subject but none have any direct bearing. S. 32 deals only with certain instances where statements made by a person who is dead or cannot be found or who has become incapable of giving evidence or whose attendance cannot be produced without an amount of delay and expense which under the circumstances of the case appears to the Court unreasonable are admissible. This section clearly has no

connection with S. 288 of the Code of Criminal Procedure because one of the terms of S. 288 is that the witness is produced and examined at the trial, The same remarks apply substantially to S. 33 of the Evidence Act. S. 145 of the Evidence Act only refers to the utilization in his cross-examination of a previous statement made by a witness and has clearly no bearing on S. 288 of the Code of Criminal Procedure. Similarly, too, S. 155 merely contemplates the impeachment of the credit of a witness by proof of a former statement whilst S. 157 only contemplates the corroboration of a witness's evidence by a former statement under certain circumstances. There is indeed in the Indian Evidence Act nothing at all which permits the use of evidence taken before a Magistrate as evidence at a trial. The suggestion, therefore, made by Mr. Yunus that S. 288 can only be utilized in such cases as the Indian Evidence Act specifically provides, cannot be maintained for the Indian Evidence Act has no such special provisions. Similarly, too, with regard to the suggestion of the learned Government Advocate that S. 288 can be utilized in all cases except those in which the Indian Evidence Act directly prohibits such use ; here, again, if this is the proper construction, the amendment of 1923 was quite useless : for there is no such prohibition in the Evidence Act at all. What, however, I think is really meant by the amendment introducing the Indian Evidence Act is that evidence duly taken before a Magistrate can be used for all purposes in a trial Court so long as the evidence is evidence within the meaning of the Indian Evidence Act or, in other words, that Magisterial depositions can be utilized in a trial Court as of evidential value only if the matter contained therein is, according to the rules of evidence laid down in the Indian Evidence Act, of evidential value For example to give a simple concrete illustration :— If mere hearsay evidence was contained in a magisterial deposition it would not, simply because it was so contained, be capable of being utilized by a sessions Judge as of evidential value at the trial. Mr. Yunus further suggests that the amendment may also contemplate that the evidence taken before a Magistrate can only be used at the trial subject to the procedure laid down in the Indian Evidence Act. I should think that this contention is probably correct but it is, after all, merely an expression in other terms of the construction which I have already indicated as being the proper one to be placed upon S. 288 as it now stands. I am, therefore, of opinion that S. 288 as it now stands does not prevent the Sessions Judge in this case from utilizing the Magisterial depositions to which I have already referred.

The next and more important question which arises is as to how far it is possible to base a conviction upon evidence given before a Magistrate when the evidence given at the trial differs from it and is exculpatory of the accused. This question gave rise to an interesting discussion but, after persual of several cases, the principle emerging appears to be quite clear ; and the learned Government Advocate and the learned Counsel who has appeared for the appellant are now practically in agreement with regard to this principle. It is perhaps desirable to refer to these cases in some short detail.

In the case of *Queen-Empress* v. *Amanullah* (1) the accused was charged with murder ; the Sessions Judge however, considered that the evidence given before him by the witnesses for the prosecution was false ; but he nevertheless, convicted the accused, acting under S. 249 Cr. Pro. Code and relying on the evidence which had been given by the same witnesses before the committing Magistrate. It will be observed that the Section of the Code as it then stood (I have given it *in extenso* above) was a good deal more explicit than it is at present. But, even so, it was held that the discretion conferred by that section should only be exercised upon substantial materials rightly before the Court and reasonably sufficient to guide the judgment of the Court to the truth of the matter and not upon mere speculation or conjecture; and that,

(1) [1874] 21 W. R. 49.

although, under the section, a Judge might base his judgment on the evidence given before the Magistrate in the presence of the accused, it is only in cases where there are special and particular reasons for considering the evidence given before a Magistrate to be honest and true and when that evidence is to a certain extent corroborated by independent testimony before himself that the Judge should act upon the section. This case gives the basis of the principle which has always afterwards been applied by the Courts and the reason for the principle is not far to seek. If a witness is prepared to swear before one Court one thing and then swear before another Court another thing contradictory to the first, it is obvious that he is not a person upon whose word any reliance can really be placed, and it would, equally obviously, be impossible and unsafe to convict an accused upon the testimony of such an untruthful individual *unless* there was in existence some other evidence of material value which would go to show clearly which of the conflicting statements made by the witness was in fact true.

In *Queen Empress* v. *Dan Sahai* (2) it was held that section 288 of the Code of Criminal Procedure is not to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the committing Magistrate's record and to treat it as evidence before the Court itself without putting to the witness whom the Court proposes to contradict by his statement made before the committing Magistrate the whole or such portions of his deposition as will afford him an opportunity of explaining his meaning or denying that he had made any such statement. In the case before us it will be observed that the witnesses concerned were allowed to be treated as hostile in the trial Court; so that the animadversion upon the Judge's conduct in the case of *Queen Empress* v. *Dan Sahai* (2) has here no application.

In *Queen Empress* v. *Jadub Das* (2) it was held that it is not safe to convict an accused person on his retracted confession standing by itself uncorroborated; or on the statements of witnesses brought in as evidence under S. 288, without independent corroborating testimony; nor can these two be joined together and held as mutually corrobarating each other so as to justify a conviction based on them.

In *Queen Empress* v. *Dorasami Ayyar* (4) it was held that S, 288 was intended to enable the Court to read the previous evidence given by a witness before a committing Magistrate as substantive evidence in a case at the trial, where for the purposes of justice, the adoption of such a course is found necessary by a Judge. In that case, however, it may be pointed out that there was independent evidence sufficient to warrant the conviction apart from the evidence brought in under S. 228 of the Criminal Procedure Code.

In *King-Emperor* v. *Bhut Nath Ghose* (5) it was held that where the Sessions Judge used as evidence under S. 288, the statement which a witness made before the committing Magistrate but which he repudiated at the sessions and attributed to improper influence in the course of the investigation, and the circumstances were such that the Sessions Judge could not properly rely on either of these statements, he did not show a proper discretion in allowing the former statement made before the Magistrate to be treated as evidence. This case, although expressed in somewhat different language, proceeds substantially upon the same lines. In that case the witness concerned was the only person who testified to certain facts; this he did at the Magisterial enquiry; but he repudiated that evidence at the trial; it was held that the Judge should not have relied upon either of his statements as neither was corroborated by other testimony.

In the case of *Emperor* v. *Dwarka Kurmi* (6) the same principles are again applied. In that case the accused was sentenced to death for the

(2) [1885] 7 All. 862.
(3) [1900] 27 Cal. 295=4 C. W. N. 129.
(4) [1901] 24 Mad. 414.
(5) [1902] 7 C. W. N 345.
(6) [1906] 28 All. 683=3 A. L. J. 852=4 Cr. L. J. 61=(1906) A. W. N. 187.

murder of his uncle. Certain witnesses who had stated before the committing Magistrate that they had seen the accused striking the deceased withdrew their statements before the Court of Sessions and gave evidence exculpating the accused. The Sessions Judge, however, admitted in evidence the statements of these witnesses made before the committing Magistrate and it was held that he was right in so doing. There was there, however, also other evidence sufficient to the minds of the learned Judges to prove that the accused had committed the murder.

In *Emperor* v. *Maruti Joti Shinde* (7) the circumstances and the positions were again very similar. In that case two boys, when examined before the committing Magistrate, stated that they saw the accused committing the offence for which he was tried. At the trial, however, before the Sessions Judge, they gave an entirely different version of the affair. It was held that it was open to the Sessions Judge to use the statements made before a Magistrate as substantive evidence. It was, however, pointed out that before the evidence taken before the Magistrate can be substituted for that given in the Sessions Court there must be very good reasons shown why it should be preferred; and, in that particular case, there was other evidence which was of corroborative character.

I think, therefore, that the principle is quite clearly settled by this line of cases that unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilized in support of a conviction.

Now, in this case, the learned Judicial Commissioner thinks that the principal witnesses (who are, of course, the accused's relatives) are now endeavouring to shield him; this may be so and is very likely so but it is still a matter of conjecture. One of the crucial points is, of course, whether the appellant slept with his wife in the room where her dead body was found or whether he slept outside; but certainly, on that point, there is no evidence at all other than the two conflicting stories which have been given by the witnesses: there is no other testimony either one way or the other.

[His Lordship then referred to the evidence and proceeded:—]

Sinister though this case is, and although there lies some ground for suspicion against the appellant, I am bound to say that it does not appear to me that there is sufficient evidence to justify a conviction. The appeal must be allowed, the conviction and sentence set aside and accused released.

Adami, J.—I agree.

Conviction quashed.

(7) 1922 Bom. 108=45 Bom, 97=23 Bom. L. R, 820=22 Cr. L. J. 636.

1925 PATNA 55

ADAMI AND BUCKNILL, JJ.

Jamuna Singh and others—Petitioners.

v.

King Emperor—Opposite Party.

Cr. Revision No. 93 of 1924, Decided on 11th March 1924, from a decision of Offg.S.J. of Saran, D/-28th January 1924.

Criminal P. C., S. 439—Revision — Failure to examine important witness.

Revision was allowed on the ground of omission to examine important defence witness without sufficient cause. [P 57 C. 1 2]

K.B. Dutt and *B. P. Sinha*—for Petitioners.

Asst. Govt. Advocate — for Opposite Party.

Bucknill, J. — This was an application in criminal revisional jurisdiction made by ten persons who were originally all convicted on the 17th December last by a Magistrate of the first class at Chapra, of various offences and sentenced to various terms of imprisonment, in connection with an assault upon a man of the name of Raghunath Singh. This

Raghunath Singh was the complainant in the case. From the decision of the Magistrate an appeal was preferred to the Sessions Judge of Saran but was dismissed on the 28th January last. It is unnecessary and under the circumstnces would perhaps be undesirable, that I should dilate upon the facts which led up to this accusation being made against the present applicants. The matter has now come before this Court on a very simple point in revisional jurisdiction.

The position during the trial was that one of the two persons who were stated in the story for the prosecution to be the ringleaders of the affair was the second applicant whose name is Nageswar Prasad. This man who is said to be a petty landholder of some little importance in his neighbourhood asked permission to call a certain witness on his behalf in order to show that he (the applicant) was at the time when the offence was alleged to have been committed, not present there but was actually in Calcutta. This individual whose testimony it was thus sought to be obtained was Mr. R. H. M. Rustomji of 20 Ballygunje Circular Road Calcutta, and it is admitted that he is a mercantile gentleman of some position and importance. Now it is quite true that apparently, in the written statement which this applicant filed in the first instance, he did not therein state that he proposed to urge in his defence a plea that he was not present at the assault, but he did mention this gentleman in his list of witnesses and it seems clear from the explanation which is now given by the Deputy Magistrate that this gentleman Mr. Rustomji could not attend the Court. On the 27th November, which was I gather, the first day upon which the defence opened its side of the case, it is clear that this applicant put in a petition asking that this Mr. Rustomji might be examined on commission on the ground that he was ill. Now the Deputy Magistrate states :—

"It is true that a petition was filed on the 27th November 1923 to examine the *alibi* witness, Mr. R. H. M. Rustomji of Calcutta, of one of the accused persons, namely Nageswar Prasad on commission. but as the case was important I thought his attendance in Court was absolutely necessary." "The certificate about his illness did not suggest by which date he could undertake the journey of coming over to Chapra and the accused did not insist for another date to produce him. I had therefore no other alternative but to reject the application for his examination by commission."

I think that perhaps the Deputy Magistrate took an incorrect view of his powerlessness. The letter which was couched in very courteous language written by Mr. Rustomji to the Deputy Magistrate was of such a character and was accompanied by a medical certificate of such a character that I should have thought it spoke for itself. It says that he regretted that he was unable owing to ill health to undertake a railway journey and therefore could not attend the Court and the medical certificate stated that he was suffering from a week heart and a painful internal malady. Under these circumstances and as the Deputy Magistrate thought so that this gentleman was a very important witness, I think that the proper course would have been that some effort should have been made to ascertain (either by telegram or by correspondence and either undertaken on behalf of the Court or undertaken by the applicant himself) as to whether it would within a reasonable time be possible for this invalid gentleman to come to Chapra and if not, then reluctantly to come to the conclusion that it was necessary that his evidence should be taken on commission owing to his inability to be present at the place where the case was being decided. But all that the Deputy Magistrate did at that time so far as I can gather, was simply to note in the order-sheet :— "Rejected Filed". He gives no reason there for such rejection and he certainly does not indicate that he contemplated either giving the applicant another chance of ascertaining when and if this gentleman could attend or of assisting further through the Court the applicant to ascertain those facts as to the possibility of attendance and as to the necessity of taking the evidence on commission. I am bound to say that as the matter stands I should have felt that the applicant might consider himself somewhat hardly treated. There does occur however a circumstance which may be explicable but which does not

seem to have been well explained by the learned counsel who appears for the applicant. It does not seem that any question about this witness was referred to at the trial, because the Deputy Magistrate does not refer to it himself in his decision. That may perhaps be, because he having rejected the petition, there was nothing more for him to say, but what does seem noticeable and inclines one perhaps to consider that there may be something in what the learned Assistant Government Advocate suggests, namely that the evidence of this gentleman would not be of much value in that in the ground of appeal to the Sessions Judge this point does not seem to have been included and that the Sessions Judge himself does not in his judgment mention it at all. It is, however, put in the forefront of the application in revisional jurisdiction made to this Court. I am bound to say that on general principles I think that this man was entitled under the circumstances to have the evidence of this gentleman taken. Whether it would have been of any value to him it is impossible to hazard any confident conjecture, but that he thought it was and that the Deputy Magistrate himself thought that Mr. Rustomji was an important witness appears to be quite clearly the case. The question as to how far the evidence of this Mr. Rustomji might have affected others of the applicants other than the applicant himself is one which perhaps needs at a later stage very careful consideration. It is quite obvious that, if the prosecution story which puts as the leader of an affray of an assault an individual whose presence at the scene of the alleged occurrence is conclusively disproved it cannot but throw serious grounds of suspicion upon the whole of the prosecution story, and I should not be prepared definitely to say that in the event of this witness being able clearly to show that this Nageswar Prasad the applicant was not present at all at the scene of what took place but was in Calcutta at that time that such evidence would not militate very seriously against the whole truth of the omplainant's story. Under these circumstances I think that the proper course will be to set aside the decision of the Sessions Judge of the 27th January last and to set aside the judgment of the Magistrate of Chapra of the 17th December last and to order firstly that the evidence of this Mr. R. H. M. Rustomji shall if possible be taken on behalf of the accused Nageswar Prasad Singh. I do not pretend to be able to foresee in what way this evidence can be taken. It may be that this gentleman is now in a position in which he can and will come from Calcutta in order to give his testimony: on the other hand he may be still in such a state of health that a commission will have to be issued to take his evidence in the case at his own home. Secondly, that the Magistrate shall after, if possible, having taken this evidence, re consider in the light of that evidence (if it throws any light at all upon the matter) the case of all those accused who were before him. If he is unable for any reason to take or obtain the evidence of this Mr. Rustomji, I think that it is necessary that his report to that effect and the reason for his failure should be submitted to this Court.

Adami, J.—I agree.

Case remanded.

✱ 1925 PATNA 57

DAWSON MILLER, C. J. AND MULLICK, J.

Sri Kanta Prasad and others—Appellents.

v.

Jag Sah and others—Respondents.

Letters Patent Appeal No. 59 of 1920, Decided on 9th April 1924.

(a) *Evidence Act, S. 115—To oppose joinder of parties precludes objection for non-joinder. Civil P. C., O 34 R. I.—Civil P. C. O. 1. R. 1*

Where defendants in a redemption suit opposed plaintiff's application for joining other part-proprietors of the land in suit, and court therefore rejected plaintiff's application,

Held: defendants afterwards cannot attack the decree on the ground of non-joinder of parties. [P. 58 C. 1, 2]

(b) *T P. Act., S. 60—Part-owner can redeem hole mortgage.*

There is nothing in S. 60 to debar the owner of a part of the equity of redemption from offering to redeem the whole mortgage.

[P. 58, C. 1]

✱ (c) *Escheat—Land does not escheat to Crown unless it is a permanent interest—Otherwise it reverts to the landlords.*

There can be an escheat only of an absolute hereditary *mokarrai* tenure. [P. 59, C. 1.]

Harnarain Prasad—for Appellants.

K. P. Jayaswal and S. Lal—for Respondents.

Mullick, J.—This appeal arises out of a suit for redemption in respect of a small parcel of land which is said to have been the occupancy holding of one Kunj Behari Das and to have been mortgaged by him in 1852 to the ancestor of the defendants. The estate in which the land fell has by reason of successive partitions been parcelled out into a number of other estates bearing different *tauzi* numbers but the land in suit has remained joint and is the property of the proprietors of the various estates which have been carved out of the parent estate. The plaintiffs represent only some of those proprietors and one of the points raised in this appeal is that unless all the proprietors interested in the land are joined this suit for redemption cannot proceed. This point however will be considered later.

Kunj Behari having died without heirs the plaintiffs claim that the occupancy holding has reverted to the proprietors and that they as part-owners of the equity of redemption are entitled to redeem the property from the defendants. [Here his Lordship traced the course of the litigation in the lower courts.]

In appeal before us three points have been taken. The first point is that the proprietors of all the estates who own a proprietary interest in the land in suit should have been joined and that the suit cannot proceed in their absence. It appears, however, that on the 23rd August 1919 an application was made by the plaintiffs to implead the absent proprietors. The defendants opposed that application and on the 8th September 1919 the Munsif declined to grant the prayer. In these circumstances it does not appear to me reasonable that the defendants should be allowed to urge the ground of non-joinder. Seeing that this was a suit for redemption the Court would certainly have added the absent proprietors but for the opposition offered by the defendants. They cannot be allowed to attack the Court for doing the very thing which they wanted it to do.

The next point is whether the plaintiffs are entitled to redeem the whole mortgage. It is said that the defendants are the co-sharers of the plaintiffs in the land in suit and that if the plaintiffs have succeeded to the mortgagor's interest, the defendants too have succeeded to that interest jointly with them to the extent of their share. It is, therefore, contended that the mortgage has been extinguished to the extent of the proprietary interest of the defendants and that the plaintiffs cannot be allowed to redeem the whole mortgage. Now the law on this point is contained in S. 60 of the Transfer of Property Act, and it has been recently explained by the Privy Council in *Mirza Yad Ali Beg* v. *Tuka Ram* (25 C. W. N. 241). There is nothing in S. 60 to debar the owner of a part of the equity of redemption from offering to redeem the whole mortgage. Indeed some earlier cases following *Ahmad Ali Khan* v. *Jawahir Singh* (S. D., N. W. P. 425) have laid down that mortgagor is bound to offer to redeem the whole. The matter is further complicated in cases where the property is joint and indivisible and the transferee of a portion of the equity of redemption cannot point to any defined share as his. The Bombay High Court have held that one of several co-parceners may redeem the whole property leaving it to the mortgagee who has purchased a portion of the equity of redemption to have his rights ascertained and defined in a suit for partition: *Bhikaji* v. *Lakshman* (15 Bom. 27 note) I think, therefore, there can at least be no objection to a suit by a part-owner of the equity of redemption for the redemption of the whole mortgage, and it is for the mortgagee to object to such redemption so that the equities might be investigated. No ob-

jection was however made by the defendants at any stage of the present case in the Courts below; nor was the objection taken in the memorandum of appeal before Mr. Justice Ross or in the memorandum of appeal before us. The ground is now taken for the first time by notice served upon the respondents to day, notwithstanding the rule of this Court which prescribes that additional grounds to a memorandum of appeal can only be taken with the permission of the Court. The ground involves a mixed question of fact and law, and, in my opinion, it is impossible to investigate it at this late stage. The defendants therefore cannot be allowed to urge that a part of the mortgage security has been extinguished and that the decree for the redemption of the whole is wrong.

The third point is the substantial point which was argued before Mr. Justice Ross. It was urged before him that the Crown g t no title to the property by escheat. Mr. Justice Ross found that the p operty was the *brit* tenure of Kunj Behari. The Subordinate Judge in the Court of first appeal had found that the property was the rent free tenure of Kunj Behari Das under the maliks of the village and he apparently considered that such a finding was sufficient to justify an escheat. Mr Justice Ross, however, correctly points out that there could be an escheat only of an absolute hereditary *mokarrary* tenure and that although the tenure here might be hereditary and rent free there was no evidence that it was permanent. Our attention has been drawn to the glossary of terms used in the survey and settlement proceedings in Bihar and Orissa which shows that a *brit* tenure is a service tenure and it is urged that this definition is sufficient to allow an inference of permanency to be raised. In my opinion the inference if any is exactly the other way. A service tenure is not necessarily permanent and until the defendants can show that Kunj Behari held the land in perpetuity they cannot succeed. In our opinion the judgment of Mr. Justice Ross on this point was right and the landlords were entitled to the reversion of the land upon the death of Kunj Behari Das. The decree therefore for redemption should, in my opinion, be maintained.

A point was taken as to that part of the decree which directed the assessment of mesne profits. It was contended that the plaintiffs were not entitled to mesne profits from the date of the suit. The plaint, however, contains an allegation that before the suit th plaintiffs had tendered the redemption money several times to the defendants. That allegation is not denied in the written statements and in the circumstances the plaintiffs are entitled to mesne profits which they assess at Rs. 10 from the date of the suit. The result therefore is that the appeal is dismissed with costs.

Appeal dismissed

⁂ 1925 PATNA 59

JWALA PRASAD AND KULWANT SAHAY, JJ.

Parmeshwar Pandey and another—Defendants—Appellants.

v.

Raj Kishore Prasad Narayan Singh—Plaintiff—Respondent.

F. A. No. 317 of 1921, Decided on 27th May 1924, against a decree passed by Addl Sub. J. of Gaya, D/-10th August, 1921.

⁂(a) *Civil P. C., O. 34. R. 1,—Non-joinder of one or two persons should not defeat suit against parties actually before Court—Mortgage having been made by manager of Hindu joint family, is not bad for non-joinder of one or two members of the family, where others are joined—Hindu Law—Joint family.*

Failure to add one or two persons whose interest may be adjudicated upon should not have the effect of defeating the suit if the Court, in their absence, can deal with the matters in controversy so far as regards the right and interests of the parties actually before it. [P. 60, C. 2, P. 61, C. 1.]

Where the bond was executed by the *kartas* of the family and the suit was for enforcement of the mortgage against the joint family impleading the *kartas* of the family and other members whose existence was known to the plaintiffs.

Held, the non-joinder of two members of family could not defeat the suit against all. [P. 60, C. 2, P. 61, C. 1.]

* * (*b*) *Hindu Law--Joint family--Manager debts by—Creditor should prove necessity for rate of interest as well as for principal sum, as against other Co-parceners.*

When a contract entered into by a head member is sought to be enforced against the other members on the ground of necessity, it must be shown not only that there was necessity to borrow the principal sum but also for the rate of interest agreed upon; in other words, that it was impossible for the *karta* or head member to obtain loan for family necessity at a rate of interest lower than that agreed upon. The question of necessity is one of fact, and as in the case of principal debt so in the case of interest necessity has to be proved by evidence. [P 61 C 2 P 62 C 1]

(*c*) *T. P. Act., S. 61--In absence of special contract otherwise, consolidation in the same decree, of amounts due under several mortgages is illegal.*

Where there is no specific contract on behalf of the parties with regard to consolidation the consolidation of several mortgages and amounts due under them, in the same decree is illegal. [P 63 C 2]

Sultan Ahmed, S. M. Mullick and Kailaspati—for Appellants.

P. K. Sen, R. C. Bhaduri, Guru Saran Prasad, A. Prasad, and Raghunandan Prasad—for Respondent.

Jwala Prasad, J.—This is an appeal against a decree passed by the Subordinate Judge of Gaya, dated the 10th August, 1921, in a mortgage suit. That decree is based upon three mortgages:

(1) dated the 20th July 1916, for Rs. 1,500

(2) dated the 24th March 1917, for Rs. 33,000 and.

(3) dated the 12th November 1917, for Rs. 8,000

The first bond was executed by defendants Nos. 1 to 3; the second was executed by defendants Nos. 1 to 4, the defendant No. 4 being son of defendant No. 2; and the third was executed by defendants Nos. 1 to 5, defendant No. 5 being son of defendant No. 1. Defendants Nos. 6 to 8 are subsequent mortgagees. Defendants Nos. 4 and 5 are minors, Defendant No. 1 it the *karta* of the joint family of defendants Nos. 1 to 5, defendants, 1 to 3 being brothers. In all the three bonds the properties described in Schedules I to VII attached to the decree are mortgaged, and property No. VIII is mortgaged only in the third bond. The defendant Nos. 1 to 3 did not enter appearance. The suit was resisted by defendants Nos. 4 and 5 only, and upon the pleas taken by them in their written statement the following issues were framed in the Court below:—

1. Is the suit as framed maintainable?
2. Is the suit bad for defect of party?
3. Are the bo ds in suit genuine. valid and for consideration?
4. Was the money under the bonds in suit advanced for legal necessity and for the benefit of the family?
5. Were the defendants Nos 4 and 5 born at the time of execut on of the bonds, dated 20th July 1916? Was defendant No. 5 born at the time of the execution of the bond, dated 24th February 1917?
6. Are the rates of interest high and unconscionable? Was there any necessity for such rates of interest?
7. Had the defendants Nos. 1 to 3 authority to mortgage the properties covered by the bond in suit?
"8. To what relief, if any, are the plaintiffs entitled?

All these issues were decided in favour of the plaintiffs and against the defendants, with the result that the entire claim of the plaintiffs was decreed. Defendants Nos, 4 and 5 have come to this Court in appeal.

The appeal is directed against bond no. 2 only. It is urged that the suit is bad on account of two members of the defendants' family, Bootan Pandey and Rambilas Pandey, sons of defendant no. 2 Madho Pandey not having been impleaded in the suit. Their existence came to light in the evidence of Jadu Singh, the last witness on behalf of the defendants, who stated towards the end of his examination-in-chief that Madho Pandey has got three sons Parmeshwar, Bootan and Rambilas. No doubt, in the written statement it was alleged that the suit was bad for defect of parties, but in what manner this was so was not disclosed. There is no reason why the plaintiffs would not have impleaded the said persons as parties if they had knowledge of their existence. It is however, immaterial for the purpose of this case whether they were made parties or not, for the suit cannot be dismissed on that ground alone. The bond was executed by the *kartas* of the family and the suit was obviously for enforcement of the mortgage against the joint family impleading the *kartas* of the family and other

members whose existence was known to the plaintiffs. No doubt, all persons whose rights and interest may be adjudicated upon and determined in the suit ought to be added as parties under Order I, rule 9, read with Order 34, rule 1, of the Civil Procedure Code, but failure to add one or two persons should not have the effect of defeating the suit if the Court, in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. Such was the view taken by this Court in the case of *Sital Prasad Ray* v. *Asho Singh* (1)

It is then said that the defendant No. 4 was in existence at the time when the first bond was executed and that he should have joined in that bond. Similarly, it is said that defendant No. 5 was in existence at the time when the second bond was executed and he ought to have been joined in the execution of that bond. The bonds were executed by the *kartas* of the family and were for family necessities, such as, for payment of antecedent debts *etc.* It was not necessary to join all the members of the family in the execution of the bonds in question. It is not very clear either upon the finding of the Court below or upon evidence as to whether defendant No 5 was born before the second bond was executed. The learned Subordinate Judge having seen the boy is of opinion that he was not more than four years of age. If his estimate is correct, then he was born subsequent to the execution of the second bond. He has, however, not referred to any evidence in the case. The evidence that has been placed upon the point is not convincing. The horoscope of the boy has not been produced. The witnesses on behalf of the defendants are not quite competent to depose to the date of the birth or the exact age of the boy. It is, therefore, difficult to fix the age of the defendant No. 5, and I would leave the matter as it is for, as observed above, nothing hinges upon that matter.

(1) 1922 Patna 651=2 Pat. 175= 1923 P. H. C. C. 326.

Next it is contended that the rate of interest mentioned in the bond is high and unconscionable, and that there was no necessity for agreeing to such a high rate of interest. Defendants Nos. 1 to 5 being the executants of the bond cannot question the rate of interest voluntarily agreed to by them and inserted in the bond in question; but the appellants, defendants 4 and 5, being minors can question the authority of the *karta* or head member of the family to enter into a contract with regard to the rate of interest so as to be binding upon them unless it was shown that the high rate of interest agreed upon was necessitated by the circumstances of the family. In other words, they can throw the onus upon the plaintiffs to prove that the rate of interest agreed to was the proper rate of interest chargeable in the market. There is no evidence on the record as to what was the commercial rate of interest and, therefore, it is contended on behalf of the appellants that the rate of interest mentioned in the bonds should not be allowed. The debts incurred by means of the bonds in question were for the purpose of paying off antecedent debts. Those debts have been detailed in the bonds in question. It would appear from an arithmetical calculation that the debts paid off by the second bond carried interest at the simple rate of interest, *viz.*, Re. 1-2-0 to Rs. 2 *per cent, per mensem.* It would seem that the rate was rising from 1911, and in or about the years in suit the rate of interest rose to 2 *per cent. per mensem.* The law on the subject was reviewed by me in the case of *Mahadeo Prasad* v. *Bissessar Prasad* (2). It will not be profitable to repeat the reasons advanced by me in that judgment. It will be sufficient to say that when a contract, entered into by a head member, is sought to be enforced against the other members on the ground of necessity, it must be shown not only that there was necessity to borrow the principal sum but also for the rate of interest agreed upon; in other words, that it was impossible for the *karta* or head member to obtai a loan for family necessity at

(2) 1921 Patna 71=2 Pat. 488= 4 P.L.T. 707.

a rate of interest lower than agreed upon. The question of necessity is one of fact, and as in the case of a principal debt so in the case of interest necessity has to be proved by evidence. In the circumstances of that case, and for the reasons given by me, I reduced the rate of interest from Re 1-4-0 *per cent per mensem* with six monthly rests to 1 *per cent per mensem* simple rate of interest *vide* also *Ram Bujhawan Prasad Singh v. Nathu Ram* (3).

Therefore, if we were to apply the principle laid down by the Privy Council and referred to above to the facts of the present case, we can at best cut down the compound interest and allow only simple interest at the rate varying from Re. 1-2-0 to Rs. 2, probably the latter- But the rate of simple interest of Re. 1 per cent. per mensem even does not seem to appreciably relieve the defendants of the burden of the debt. The first bond carried interest at Re. 1 per cent. per mensem with six monthly rests; the second bond carried interest at 14 annas per cent, per mensem with eight monthly rests and the third bond carried interest at Re, 1-2-0 per cent. per mensem with three monthly rests. In this case we are concerned only with the second bond the rate of interest wherein is 14 annas per cent. per mensem with eight monthly rests. This loan of Rs. 33,000 was advanced on the 24th March, 1917, and on the date of the suit, the 28th November, 1919, the interest came to Rs. 10,165-6-5 and on the due date fixed for payment by the decree of the interest amounted to a further sum of Rs. 10,610-1-0 calculated from the date of suit up to the date fixed for payment in the decree. The interest allowed according to the bond rate has worked out at a little over 12 per cent. per annum. This is not a high rate of interest in consideration of what used to be the rate of interest on the previous loans mentioned in the bond. The rate of 14 annas per cent. per mensem with eight monthly rests does not appear to be excessive, and, therefore, no case is made out for reducing the rate of interest.

It is then contended that the plaintiff's have failed to show legal necessity for a portion of the loan advanced under the second bond. These sums are: (1) Rs. 2,130 said to have been paid in cash to the executants at the time the bond was executed; and (2) Rs. 713 received in cash also by the executants subsequently, Now, the bond was executed in order to pay off the debts amounting to Rs. 30,870, and Rs. 2.130 was taken in cash. The sum of Rs. 30,000 was left with the mortgagee to pay off the prior debts mentioned in the bond. However, in making actual payments the mortgagee had to pay something more than the sums stated in the bond. The total sum paid by the mortgagee to the creditors is Rs. 22,261 leaving a balance of Rs. 8,609 with him. Out of this he paid to creditor Khub Rai Rs. 700 Rs. 1,025-7-3 to the mortgagors for *tilak* ceremony in connection with the marriage of the daughter of defendant No. 1, and Rs. 93-7-8 was taken by them in cash for expenses, leaving a balance of Rs. 6,790, out of which the mortgagors paid Rs. 6,077 towards the decreed debt of Durga Prasad, and Rs 713 was spent by them.

The learned Subordinate Judge says the object for which the loan was taken was to pay off the antecedent debts specified in the bond, and the creditor is not required to prove that the money advanced was actually applied for those purposes. Therefore he holds that the appellants are not entitled to call upon the plaintiff to prove the necessity for Rs. 731,

As to the cash amount of Rs. 2,130 taken by the mortgagors at the time of the execution of the bond, the learned Subordinate Judge says that a portion of this money was spent for the price of stamp and scribe's fee. The details of these have not been given by the Subordinate Judge, but this would come to Rs. 300 to Rs. 400. There is certainly no proof of this sum having been taken for family necessity. Mr. Sen on behalf of the respondents relies upon the cases of *Sinnachami v. U. A. R. Ramasamy*

(3) 1923 P. C, 37=2 Pat, 285=50 I. A. 14=4 P.L.T. 29=32 M.L.T 129=44 M.L.J. 615=25 Bom. L R. 568=(1923) M.W.N, 382=38 C. L. J, 25=28 C.W.N. 446=18 M.L.W. 767=1 Pat. L. R. 445=4 L, R. P. C. 75 (P. C.)

Chettiar (4), *Nawab Nazir Begum* v. *Rao Raghunath Singh* (5) *Biswanath Pershad Mahta* v. *Jagdip Narain Singh* (6) and *Maharaja Sree Rao Sir Venkata Swetachelpathi Ranga Rao Bahadur Garu* v. *Raja Kaminayani Bangara Kumara Ankappa Nayanim Garu* (7), and contends that the major portion of the debt has been proved to have been raised for the purpose of paying off antecedent debts and family necessity and the want of proof with respect to a small sum of about Rs. 2,000 will not invalidate the debt so as to exonerate the defendants from the liability of the same. We are, however, relieved from entering into that question, for it appears that the appellants are bound to pay the debts in question incurred by their respective fathers. The personal liability of the executants of the bond still subsists inasmuch as the suit for personal liability is not barred by limitation. The learned Counsel, who appears on behalf of the respondents, concedes this point and says that practically there will be no gain for his clients even if it were held that the family necessity with regard to those sums has not been established by the plaintiff. The aforesaid points, although strenuously urged on behalf of the appellants, have towards the close of the case been wholly abandoned for they have seen that no practical good could accrue to them even if those points prevailed. We have, however, thought it desirable to go into those points to give our own decision instead of relying wholly upon the admission of the lawyers appearing on behalf of the appellants. We think that they are perfectly right in the circumstances of the case in having abandoned those points.

The last point urged by the appellants, however, appears to be substantial. This is as regards the frame of the decree. The decree in question has consolidated the amounts due under all the three bonds in suit and has made all the mortgaged properties liable for the same. It must be remembered, as observed above, at the outset, that the properties nos. 7 and 8 were not at all mortgaged in the first and the second bonds. The consolidation of all the debts in the manner that the learned Subordinate Judge has done impedes the right of redemption of the mortgagors. This is contrary to the provisions of Order 34, rule 2, and is also contrary to section 61 of the Transfer of Property Act. There is no specific contract on behalf of the parties with regard to consolidation, and in the absence of such a contract the consolidation is illegal. Mr. *Sen* referred to certain English cases on the point, namely, *John Jennings* v. *Edwin Jordan and John Price* (8). This ruling has no application after the Conveyancing Act was passed in England. S. 17 of that Act purports to abolish the consolidation of mortgages. Similarly, S. 61 of the Transfer of Property Act abolishes the consolidation of mortgages, and we are bound by the Transfer of Property Act in force in this country.

I therefore hold that the decree as framed is illegal and not capable of execution. The decree is accordingly set aside, and a fresh preliminary decree must be prepared in accordance with law. The rate of interest up to the date of grace fixed in the decree of the Court below will be at the bond rate, and the rate of interest after that will be 6 per cent per annum on each bond up to the date of realization.

There should be a direction in the decree that the properties nos. 1 to 6 should be sold first in their serial order and the sale proceeds thereof should be utilized for satisfaction of the debts due under the several bonds in order of their priority, and that properties 7 and 8 along with the share of property 3 in excess of that covered by the first mortgage will be sold last of all, and the sale proceeds thereof should be utilized for payment of the debt, if any, due under the

(4) [1912] 10 M. L. T. 463 = (1911) 2 M. W. N, 539 = 13 I. C. 7 = 22 M.L.J. 85.
(5) [1918-19] 41 All. 571 = 46 I. A. 145 = 36 M. L. J. 521 = 23 C W.N. 700 = 26 M. L. T. 40— 17 A.L.J. 591 = 21 Bom L.R. 484 = 30 C.L.J. 86 = 11 L.W. 188 = 50 I.C. 434 = (1919) M W. N. 498 (P. C.)
(6) [1913] 40 Cal. 342 = 17 1. C. 577 = 17 C. W. N. 1025.
(7) [1912] 35 Mad. 108 = 9 M.L T. 155 = (1911) M.W.N. 101 = 21 M.L.J. 593 = 8 I. C. 860.
(8) [1881] 6 App. Cas. 698.

second and bonds in order of priority. If the sale proceeds of only a few of the aforesaid properties is found to be sufficient to pay off the debts due under the three bonds, the remaining properties will not be sold.

Kulwant Sahay, J.—I agree.

Order.—Our attention has been drawn to certain clerical mistakes in the judgment It appears that properties Nos. 7 and 8 were not at all mortgaged in the first bond but were hypothecated in the two later bonds. It also appears that the share in property No. 2 covered by the second and third bonds is a little less than that mortgaged by the first bond, that is 4 as. 3 dams. 0 cowry, 9 bowries, 1 phoury, 16 reories of property No. 2 is mortgaged in the first bond, whereas 4 annas, 2 dams, 25 cowries, 18 bowries, 3 phoureis 4 reories of property No. 2 is mortgaged in the second and third bonds. The share of property No. 3 seems to be larger in the second and third bonds than that hypothecated by the first bond. The directions given in the judgment will, therefore, be modified as follows.

Properties Nos. 1 to 6 shall be sold first in their serial order and the sale-proceeds thereof shall be utilised for satisfaction of the debts due under the several bonds in order of their priority, and that the properties Nos. 7 and 8 along with any share of property No. 3 in excess of that covered by the first bond will be sold last of all and the sale-proceeds thereof shall be untilised for payment of the debt, if any due under the second and third bonds in order of priority.

Appeal allowed.

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JWALA PRASAD AND KULWANT SAHAY, JJ.

Devendra Nath Ghose and others—Defendants—Appellants.

v

Sambhu Nath Panday and others—Plaintiffs—Respondents.

Appeal from Original Decree No. 23 of 1921, Decided on 28th March 1924, from the Decision of Sub. J., of Dhanbad, D/- 14th August 1920.

(a) *Contract Act, S. 74—Stipulation to pay enhanced interest.*

A stipulation that if default was made in payment of *kishts*, interest at 1 per cent. per month was to be paid and if default was made for four *kishts* successively interest at Rs. 3-2-0 per cent. per month was to be paid was held to be penal but was held to be reasonable compensation. [P 65 C 1]

(b) *Contract Act, S. 74—Explanation—Retrospective effect.*

Though the explanation was introduced only by the Amending Act of 1899, yet inasmuch as it only explains and illustrates the section as it had already been, so as to remove the doubt entertained in quarters, it is applicable to contracts entered into before 1899. [P 65 C 2]

Sultan Ahmad, S. C. Mitra, B. N. Mitra and *A. B. Mukherjee*—for Appellants.

S. M. Mullick and *N. N. Sen*—for Respondents.

Judgment.—This appeal arises out of a decision of the Subordinate Judge of Dhanbad, dated the 14th August 1920, in an action to recover royalty and commission due from Magh 1319 to Pous 1325 B. S. in respect of coal fields in Mauza Tentulia, the coal covering an area of 175 bighas. This property belongs to the plaintiffs and defendants 5 to 9, the plaintiffs having six annas share therein. Defendant No 1 is the representative of lessee of the said property, and defendants 2 to 4 are sub-lessees under defendant No. 1. This appeal has been filed by defendants 2 to 4 and the only question involved in it is as to the rate of interest which the plaintiffs are entitled to get from the defendants. This point is covered by issue No. 3 framed in the Court below and has been decided against the defendants. The plaintiffs claim the interest at the rate mentioned in paragraphs 11 and 13 of the kabuliats (Ext. 5). Those paragraphs are as follows :—

Paragraph 11.

"That whether the said coal is raised and sold or not, I shall have to pay the sum of Rs. 1,750 as annual minimum royalty. I shall pay the said minimum royalty and commission equally in four kshts of the year *i.e.* in the months of Asar, Aswin, Pous, and Chaitra. If I make default in payment of Kishts, I shall pay interest thereon at 1 per cent. per mensem, and if I do not pay the minimum royalty of any year, for four kshts successively I shall pay interest thereafter at Rs. 3-2-0 per cent.

Paragraph 13.

"That I shall pay after every six months the commission, which will be due within the year, according to the account given in the above paragraph 10, i. e., I shall pay the commission which will be due from Baisakh to Aswin within the month of Kartic thereafter and the commission which will be due from Kartick to Chaitra, within the month of Baisakh of the next year. At the time of thus paying the total amount of commission, I shall pay the remaining amount after crediting the amount, which will be paid up to that time on account of royalty. If I do not regularly pay the said excess amount of commission, I shall pay interest at Re. 1 per cent. per mensem, and if I do not pay the amount of commission due for a year within the month of Baisakh of the next year, I shall pay interest on the said unpaid amount at Rs. 3-2-0 per cent. per mensem,"

The appellants contend that the enhanced rate of Rs. 3-2-0 per cent. per mensem mentioned in the aforesaid clauses is penal and the plaintiffs are not entitled to the said rate. This contention is based upon S. 74 of the Contract Act. That section says :—

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or as the case may be, the penalty stipulated for."

The following explanation has been added to that section by the amending Act VI of 1899.

"A stipulation for increased interest from the date of default may be a stipulation by way of penalty."

This explanation has been further elucidated by the said Amendment Act by an illustration being added to the section, namely, Illustration, D which runs as follows :—

"A gives B a bond for the payment of Rs. 1,000 with interest at 12 per cent, at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent, from the date of default. This stipulation is by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable."

The question as to whether an increased rate of interest after a default made in the payment at the original rate of interest is or is not a penalty has been the subject of various decisions. The Full Bench decision of the Madras Court in *Muthukrishna Iyer* v. *Sankaralingam Pillai* (1) has summarised the authorities upon the point and has come to the conclusion that even when no interest is payable until default but interest at an exorbitant rate is payable from the date of default the Court has power under S. 74 of the Contract Act IX of 1872 as amended to treat the latter stipulation as a penalty and award reasonable compensation in lieu of such excessive interest.

Now, interest is payable by way of damage for the loss sustained to the party who advances money to another. This damage may be the subject of an agreement between the parties and at the time when the contract of loan is entered into the parties may fix a consolidated sum or merely a certain percentage on the amount advanced to be paid by the debtor as compensation to the lender on account of his being out of pocket with respect to the sum advanced by him as a loan. The latter way of fixing compensation is commonly known as interest on the loan. This is enforceable in law as an agreement between the parties, but over and above this in order to ensure payment of loan at an appointed time the parties may further agree that an additional sum by way of penalty or an increased rate of interest over and above that originally fixed would be payable by the defaulting debtor in case of breach of the contract to pay at the appointed time. The enhanced rate of interest may be chargeable either from the time the breach is committed or from any prior period. This kind of stipulation is said to be penal, and the creditor cannot as a matter of right enforce it in law. S. 74 in such a case gives power to the Court to interfere with the contract entered into between the parties, by empowering the Court to vary the amount fixed or the increased rate of interest by allowing only reasonable compensation. The section as it originally stood in the Act of 1876 gave rise to doubt as to applicability of the section when the amount of compensation is not named in the contract as a fixed sum but an increased rate of interest on the loan.

(1) [1913] 36 Mad. 219=13 M. L. T. 20—18 I. C. 417=24 M. L. J. 135 (F. B.)

One view was that the section would apply inasmuch as the enhanced rate of interest can be resolved into a fixed sum by a mere arithmetical calculation and thus become a fixed sum named in the contract at the time the agreement is sought to be enforced.' Again doubts were entertained as to whether the section would apply only when the increased rate of interest is payable from a date prior to the date of default or also whether the increased rate of interest is payable only from the date of default and not from a time anterior thereto. There was no serious doubt entertained as to the former stipulation being penal, and the Explanation and Illustration D quoted above were added in 1899 to make it clear that the latter class of stipulation also is penal. These do not purport to make a new change in the law as enunciated in the section as it stood in 1872, but only explain and illustrate it so as to remove the doubt entertained in some quarters. As a matter of fact, the provision in the main section is wide enough to cover the case contemplated in the Explanation and illustration D, not only the enhanced rate of interest becomes by a mere arithmetical calculation a fixed sum at the time the contract is sought to be enforced, and thus becomes the "amount to be paid in case of such breach," but that such a stipulation would clearly come in the words of the section, "or if the contract contains any other stipulation by way of penalty."

Therefore the contention that the Explanation and the Illustration referred to above do not apply to the present case, inasmuch as the kabuliat in question (Ex 5) is dated 19th April 1895, that is to say, much anterior to the Amending Act of 1899, has no force in it. No doubt, upon a plain construction of the clauses in the aforesaid kabuliat it will be manifest that the primary contract is to pay interest at one per cent. per mensem. It is only in case of default for successive four kists in a year that an increased rate of interest, namely, Rs. 3-2-0 from the date of default is payable. This increased rate of interest is to come into operation only when a breach will be committed by the debtor in the primary agreement adverted to above. Therefore, to my mind, it appears that the primary contract between the parties is to pay interest at the rate of one per cent. per mensem and the secondary contract, depending upon certain events, is at an enhanced rate of Rs. 3-2-0 per cent. per mensem. S. 74 does not make a distinction between a primary and a secondary contract, but such a distinction seems to have been maintained and recognized in the various cases referred to in *Muthukrishna Iyer* v. *Sankaralingam Pillai* (1). Under the section, a stipulation for an increased rate of interest from the date of default may be a stipulation by way of penalty irrespective of whether the stipulation happens to be the primary or the secondary contract. I have already observed that this Explanation was added in order to remove any doubt as to the increased rate of interest from the date of default being not considered as a penal clause, for an increased rate of interest prior to the date of default was unquestionably always deemed to be a penalty.

I have therefore no doubt in my mind that the increased rate of interest, *i.e.* Rs. 3-2-0 per cent. per mensem stipulated for in clauses 11 and 13 of the kabuliat is a penal clause. The view is supported by the authorities, both English and Indian, referred to in detail by the Full Bench of the Madras High Court in the case of *Muthukrishna Iyer* v. *Sankaralingam Pillai* (1). Upon a true construction of the Section I have also arrived at the same conclusion, *viz.*, that a stipulation as to increased rate of interest such as the one we are considering is a penal one. But that does not determine the question in hand. The section in the Explanation does not straightaway disallow all stipulations for compensation in the shape of fixed amount or an incraesed rate of interest agreed upon to be payable in case of breach of contract. The section only makes such stipulations penal and empowers the Court to rip up the agreement between the parties and to award such compensation as the Courts consider reasonable in the circumstancas of the case, not excee

ing the increased rate of interest agreed to between the parties. The contract between the parties fixes the limit beyond which no compensation can be allowed. But the Court has power to reduce the compensation mentioned in the agreement of the parties. We are relieved in this case from considering the question further from any other point of view. There is no suggestion that the contract was arrived at on account of undue influence, coercion or compulsion, misunderstanding or misrepresentation. It is admitted that the contract was willingly entered into between the parties. The simple question therefore is whether in this record there is sufficient material for us to hold that the compensation named in the written agreement of the parties, namely, the enhanced rate of interest of Rs. 3-2-0 per cent. per mensem from the date of default is not a reasonable compensation. The parties have left the point altogether in the dark-no evidence of what is the prevailing rate of interest in contracts of this kind has been adduced, nor has any evidence been given as to what is the reasonable compensation ordinarily allowed in the vicinity in respect of defaults committed by a debtor in not punctually paying the amounts of rents and royalties mentioned, in the lease. We cannot, therefore, in this case regard the plaintiff's claim for increased rate of interest as unreasonable compensation for breach of the contract committed by the lesssor.

Mr. Sushil Madhab Mullick contends that the defendants are debarred from raising the question as to enhanced rate of interest being a penalty by reason of the previous decision in a suit between the plaintiffs and the lessee. This contention is based upon Exhibit 7, a judgment of the Subordinate Judge of Purulia, dated the 23rd February 1915. That was a case brought by the plaintiffs against Charu Chandra Mitter predecessor-in-interest of defendant No. 1 the original lessee. The defendants 2 to 4, the appellants before us, were not made parties in that case and the suit was for recovery of royalty and commission from 1314 to 1319. Issue No. 7 related to the point in consideration and ran as follows:—

Issue No. 7...Is the account stated in the plaint correct? Is the term as to payment of future interest by default a penal clause and hence not enforceable? Can plaintiffs get any interes t.?

At the hearing this issue was not pressed by the defendants, and the Subordinate Judge recorded the following finding:—

"The question whether the stipulation of interest claimed is in the nature of penalty was not argued by the defendant's pleader and I fail to see how the clause about interest in the lease is in the nature of penalty. I decide this question against the defendant. Plaintiffs are entitled to interest claimed. *Vide* 21 C. L. J. 79 which reviewed all the cases on the subject that there is no hard and fast rule as to what may or may not be unconscionable or extravagant. In this case the rate of interest is not so and is allowable."

The defendant Charu Chandra Mitter appealed to the High Court and in the appeal (Exhibit 6) the question as to the enhanced rate of interest being penal was not raised. That case was heard analogously with cases brought by other co-sharers of the plaintiffs, and in those suits the lessee and the sub-lessee and the present defendants were also parties and all the cases were heard together and disposed of by one judgment. Mr. Mullick contends that although the defendants-appellants were not parties in that suit, yet they were fully represented by the lessee through whom they claimed and consequently the decision in that case would operate as *res judicata* not only as against the defendants as lessees but also against the sub-lessees. In support of this contention he has referred us to Bigelow on Estoppel, page 158 and the case of *Hamid Ali* v. *Mahommad Nurerjjama Meah* (2).

Mr. Sultan Ahmad, on the other hand, on behalf of the appellants relies upon the case of *Seshappaya* v. *Venkatramana* (3), and says that the view of Bigelow referred to above was not accepted. This case is inapplicable. In our opinion, the appellants derived their title from the original lessees and are bound by the decision against the lessees upon the point This will be so under the principles of *res judicata* enunciated in S. 11 of the Civil Procedure Code.

[The judgment then proceeded to consider matters not essential for this report. The appeal was finally disposed of on terms settled by the consent of the parties]

(2) 1928 Cal. 361.
(3) [1910] 33 Mad. 459=1910 M.W.N. 26—5 I.C. 732=20 M.L.J. 752.

✱ ✱ 1925 PATNA 68

DAWSON MILLER, C. J., MULLICK, AND FOSTER, JJ.

Harihar Prasad Singh and another—Defendants—Appellants.

v.

Maharaja Kesho Prasad Singh —Plaintiff—Respondent.

First Appeal No. 14 of 1921, Decided on 5th June 1924, against a decision of Addl. District J. of Shahabad, D/-1st November 1920.

✱ ✱ (a) *Benami—Presumption exists that purchase is for benefit of person providing purchase money — But presumption is strong or weak according to circumstances and is rebuttable—Trusts Act, S. 82.*

Where property is acquired in the name of one person but the purchase price is paid by another, a presumption arises that the transaction is one for the benefit of the person providing the money. [6 M. I. A, 53, 42 I. A. 202, 45 I. A. 97, 46 I. A. 1, and 1923 Cal 228, Ref. to But apart from the fact that the presumption is rebut able, its strength or weakness can only be gauged by reference to all the surrounding circumstances. [P. 80, C. 1, 2]

Per Mullick, J.—It is true the payment of the consideration money is not everything in a case of *Benami*. But after all it is a question of fact whether the payment of the money was a gift or a transaction for the benefit of the owner of the money. There is no question of presumption or of onus of proof; the matter is simply one of balance of evidence. [P. 88, C. 2; P. 89, C. 1]

Per Foster, J,—Where the cost of acquisition has a double source and is only in part traceable to the plaintiff, the Court should, in the absence of an unambiguous criterion of ownership take into consideration the surrourding circumstances, the position of the parties, and their relation to one another, the motives which could govern their actions, and their subsequent conduct including their dealings with or enjoyment of the disputed property. There is no presumption on either side. 1223 Cal. 228; 35 I. A. 104; 30 All. 258 & 14 M. I. A. 433 Foll. [P. 95, C. 2; P. 96, C. 1]

(b) *Evidence Act, S. 11 — Self-Serving statements are admissible where they make relevant fact highly probable or improboble or where they are* res geestae (Contra Mullick J.)—*Evidence Act, S. 21.*

Where the question is whether a person is a *benamidar* or real owner of property:

Per Dawson Miller, C. J—Even self-serving statements made by the person are admissible under S. 11 if they render fact in issue highly probable or highly improbable.

Per Mullick, J—Admissions made by the person in his own favour are not admissible.

Per Foster, J.—Where the statements are made by the person in the course of his instructions to his local agent who assists him in acquiring the property they are admissible as *res gestae.* [P. 96, C. 1

(c) *Lower Burma Land and Revenue Act (II of 1876), S. 56—Only claims against Government are cognizable by Revenue Courts—Claims between rival proprietors or cultivators are cognizable by Civil Court.*

The claims and disputes referred to in the Lower Burma Land and Revenue Act, (II of 1876), over which the Civil Courts have no jurisdiction but which are under the sole jurisdiction of the Revenue Courts, relate only to claims against Government and not to disputes between rival proprietors or cultivators. [P. 84, C. 1]

✱ ✱ (d) *Possessory Title—Evidence of payment of revenue and receipt of rent is* prima facie *evidence of hereditary title to* zamindari *but does not prove heir-ship to the last holder.*

The proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *prima facie* evidence of an estate of inheritance in the case of an ordinary zamindari. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir. 1 I. A. 268. [P. 85, C.2]

But the mere fact that the plaintiff is in possession and pays Government revenue for the estate will not prove that he is the nearest heir of the last holder and if the property is not an accretion to the Raj, he cannot succeed only upon his possessory title. [P. 93, C. 1]

✱ ✱ (e) *Impartible Estate—Income—Savings—Property acquired by savings is separate property of the holders.*

The income of an impartible estate is not so affected by its source that it should be assumed to form an accretion of the estate and property acquired by savings from the income of the impartible estate does not become a part of that estate but remains the separate property of the holder. 1923 P. C. 59 Foll. [P. 86, C. 1]

✱ (f) *Limitation Act, S. 10—Applicability to constructive trusts.*

Per Dawson Miller, C. J.—Where a person directs another to acquire property for him (the person directing) and furnishes some money for the purpose, but after some time he withdraws from the venture completely but the person directed continues his exertions and entirely as their result, acquires the property, there is only a constructive trust and S. 10 does not apply. [P. 86, C. 2; P. 87, C. 1]

Per Mullick, J.—There is no trust at all in such a case and limitation begins to run from the date of the withdrawal of the principal.

✱ (g) *Adverse Possession — Reversioner — Limitation Act, Art 144.*

If the plaintiff's title to the propert commences from the death of the previou full owner, limitation begins to run against

him from that date notwithstanding the estate may be in the possession of the last full owner' low under a will which h had no power to make. [P 87 C

★★ (*h*) *Appeal—Lower Court's finding on facts is not to be disturbed merely because a different view is also possible—The lower Court's finding can only be disturbed by proof of its being wrong.*

Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then inasmuch as the appeal is in the nature of a re-hearing the decision should be reversed; if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the Court below. If all that the appellant can show is nicely balanced calculation which lead to the equal possibility of the judgment on either the one side or the other being right, he cannot succeed. (1896) 1 Q. B. 38 and *Savage* v. *Adam* W. N. 95, 109. Foll. [P 88 C 1]

★★ (*i*) *Limitation Act, S. 10—Express trust can be proved by inferences from conduct of parties and without express declaration—(Contra Foster, J.)—Trusts Act, S. 5.*

Per Mullick J—It is not necessary that an express declaration should be proved. Inferences can be drawn from the conduct of the parties sufficient to establish an express trust. (Contra Foster, J.) [P 89 C 2]

★★ (*j*) *Limitation Act, S. 10—Applies to trust of land to be acquired in the future.—The absence of any property at the date of creation of the trust does not affect the applicability of S. 10.*

It is open to a person to create a trust empowering another to go to a certain place for the purpose of acquring land for him and the land so acquired would become vested in the trustee from the moment of its acquisition and the trust would fasten to that land exactly as if it had been vested in the trustee at the moment of the creation of the trust. [P 89 C 2]

★★ (*k*) *Trusts Act, S. 5 — Trust for the purpose of acquiring property for the benefit of the settlor—Settlor allotting certain sum of money for the purpose—Trust reserving power to settlor, to revoke trust after the money is spent—Trust is valid and the refusal to further finance the work is valid revocation—If afterwards the trustee by his own exertions acquires the property, no trust attaches to it and the beneficiary can't claim it—Trust Act, S. 78—Evidence Act, S. 115.*

Per Mullick, J.—Where a person asks another to acquire a certain property for his benefit *i.e.*, for benefit of the settlor and allots a sum of money for the purpose but reserves to himself the power of revoking the trust after the amount is spent, the trust is a valid one and his refusal after the amount is spent, to further finance the work is a valid revocation of the trust; and where, without any lack of good faith, the trustee relying on the abandonment by the beneficiary acquires the property for his own benefit, no trust attaches to it. *Keech* v. *Sandford* (1726) Case Temp King, 61 Dist. 1 Yn. C. 98, 11 Irish Equity 2 Referred to. [P 91 C 2, P 92 C 1

Pet oster, J.—A authorises B his agent to take up a speculative business project, and allots a sum of money for an experimental trial thereof. When after four years the money is exhausted, A refuses to furnish further expenses. B instead of relinquishing the project as he might, without consequent loss to himself or further loss to A, proceeds with it. After 12 years of heavy expenditur of money with a great risk of loss B, and after his death his son, attain success, and the adventure becomes profitable. Twelve years after this, during which the profits have been increasing year by year, A's heir comes into Court and claims the whole property with all past profits minus B's capital outlay. In such a case the agency ceases on the principal's implied determination thereof by refusing to furnish further expenses. After a principal has refused to indemnify an agent in the future in a speculative business commited to that agent, that principal cannot be heard to say that the agency subsisted. *Keech* v. *Sandford* and Ch. L. C. 635 and 19 Beavon 356, 19 Ves. 144, 13 L.J.Ch. 238, De G m. and Cr. 787, Dist. McNaughten's Select Cases in Ch. 29, 1900 A.C. 293 and 2 H and T. W. 224 Foll.

(*l*) *Burma Laws Act—Alienation of land leased from Government.*

Where land is leased from the Government, in the absence of any provisions for forfeiture and re-entry, the transfer or legacy of the grant is not void. The transferee or legatee may perhaps be ejected by the Government; but it does not follow that the transferee or legatee acquires title to the land. [P 92 C 2]

(*m*) *Evidence Act, S. 43—Judgment between third parties.*

A judgment between the plaintiff and third parties is not admissible though the facts found therein may support plaintiff's title disputed in the present suit. [P 93 C 1]

★★ (*n*) *Appeal—When trial Court's opinion as to witness depends not on honesty of witness but on reason not acceptable to appeal Court, trial Court's finding on fact can be disturbed.*

It is with great hesitation that an appeal Court differs with the trial Court on its estimate of witnesses whom the trial Court has had an opportunity of seeing; but where the opinion of the trial Court depends not upon the honesty of the witness but upon reasons which the appeal Court cannot accept, it is obviously the duty of the appeal Court to record its disagreement with the trial Court and to set aside the findings of fact arrived at by it, [P 94 C 1, 2]

★ (*o*) *Contract Act, S. 2 (d)—Compromise of doubtful right is enough basis for agreement—Contract Act, S. 25.*

If an agreement is entered into upon a supposition of a right or of a doubtful right it shall be binding. The compromise of a doubtful right is a sufficient foundation for an agreement. 1 Atk. 2, Foll. 5 H.L. 85 Dist. [P 94 C 2]

* * (*p*) *Trusts Act, S. 88—Applicability.*

Per Mullick and Foster, JJ.—A trustee who relies on abandonment of the trust by the beneficiary and acquires property by his own exertions need not hold it as a trustee but may hold it for his own benefit. *Keech* v. *Sandford* Dist. [P. 98 C. 2]

(*q*) *Contract—Agreement—Where terms are being negotiated and a document is contemplated to be signed, parties are not bound till the signing of the document. But in absence of intention to sign such document the principle does not apply.*

Where parties are negotiating as to the terms of an agreement and it is contemplated that a written document shall eventually be signed everything which takes place until the document is finally signed amounts merely to negotiation. But where at the time of agreement it was not contemplated that any document should be signed, the principle does not apply. [P. 83, C. 2]

(*r*) *Limitation Act, Arts. 140 and 141—Possessory title.*

A Plaintiff who relies solely on his possessory title and cannot prove his title to succeed to the last holder of the estate cannot invoke the aid of Art. 140 or 141. [P. 93, C. 1]

Hasan Imam, P. C. Manuk, A. Sen, B. B. Lal, Jafar Imam, S. N. Palit, Parmeshwar Dayal, P. C. Ray, Rajendra Prasad, Shiveshwar Dayal, Mahabir Prasad and *Awadh Behary haran*—for Appellants.

Asutosh Mukerji with *S. Sultan Ahmad, Rai Guru Sharan Prasad* and *Anugrah Narain Sinha*—for Respondents.

Dawson Miller, C J.—The suit out of which this appeal arises was instituted on the 29th April 1917 by the respondent, the present Maharaja Bahadur of Dumraon, as plaintiff, claiming possession of an estate in Burma of considerable value and a house and garden in Dumraon in this province together with an account of the income and disbursements of the property and other subsidiary reliefs.

The defendants, who are the appellants in this appeal, are Rai Bahadur Haribar Prasad Singh and his minor son Chandradeo Prakash Singh. The second defendant is added as he is joint in estate with his father but he took no active part in the circumstances out of which the suit arises, and in referring to the defendant or appellant in this judgment the first defendant alone will be indicated.

Shortly stated, the ground upon which the plaintiff's claim to the Burma property is based is that it was trust property acquired and held by the defendant's father Rai Bahadur Jai Prakash Lal as trustee for the Dumraon Raj of which he was the Diwan during the life-time of the late Maharaja Sir Radha Prasad Singh Bahadur and that the defendant, as his father's legal representative, acquired the same in the capacity of trustee for the Raj on his father's death in 1897. The plaintiff claims that he is entitled not only to posssession of the property but to the profits arising therefrom since its acquisition in the year 1889. The property claimed in Dumraon consists of (1) a dwelling house and out houses described in schedule C of the plaint and (2) a garden with certain buildings erected thereon unconnected with the house aforesaid, and described in Schedule D of the plaint. With regard to the former it is alleged that the house and outhouses were constructed partly on *khas* land of the Dumraon estate and partly on pieces of adjoining land purchased from time to time by the Raj in the name of Jai Prakash Lal as a suitable residence for the Diwan, and that the same were constructed, repaired and maintained solely at the expense of the Raj. As to the garden with the buildings therein described in Schedule D, the allegation is that they were laid out and built on *khas* land of the Raj and adjoining pieces of land purchased by the Raj in the name of Jai Prakash Lal and that all the cost of erection and laying out and maintaining the buildings and garden were paid from the Raj treasury for the use of the Diwan and guests of the Raj. It is not now contended that Jai Prakash Lal was a trustee in respect of this property. Both the Burma estate and the Dumraon property have been in possession of the defendant since his father's death in 1897.

Different considerations arise with regard to the Burma estate and the house property in Dumraon and these will have to be considered separately.

It will be convenient to deal first with the Burma estate. The main

issues for determination with regard to this estate may be divided broadly into three heads ;

"(1) was the property acquired by Jai Prakash for his own use or as trustee for the Raj. (2) did the plaintiff and the defendant compromise the claim to the Burma estate in the year 1914, and (3) is the plaintiff's claim, if any, barred by limitation.

These are the main issues in the case but certain subsidiary issues have been framed arising therefrom. There are also further issues which raise the question of the plaintiff's title to the Dumraon Raj itself and his right to sue for the properties in suit as well as the jurisdiction of the Court to entertain the claim for the property in Burma.

A vast amount of evidence, oral and documentary, was placed before the trial Court, some of it irrelevant, a larger portion having a very slight bearing upon the relevant facts in issue and some of it quite worthless, while the examination and cross-examination of some of the witnesses has been carried to inordinate lengths. The result of this has been materially to lengthen the trial and to increase the difficulties of the appellate Court by making it necessary to wade through a mass of unimportant detail in endeavouring to weigh the material evidence in the case.

The learned District Judge of Shahabad before whom the case came for trial arrived at the conclusion that the land was acquired by Jai Prakash Lal and vested in him as trustee for the Raj and that the defendant as his representative was bound by the trust and was precluded, by S. 10 of the Limitation Act, from pleading limitation. There is no direct evidence of the creation of a trust, nor indeed in the plaint is it alleged that the Burma property ever vested in Jai Prakash Lal. The allegations in paragraphs 8 and 9 of the plaint are to the effect that the Diwan was deputed by the late Maharaja to proceed to Burma and apyly for and secure a lease of the land for the Raj using, if necessary, his own name as applicant for the lease ; that so acting and using his own name he made the application which was granted and that the Dumraon Raj, thenceforth became the proprietor of the said land and entered into possession thereof through its servants. There was no direct allegation in the plaint that Jai Prakash Lal ever became a trustee of the property for the Raj, and the case now relied upon that the property was vested in him would appear to be negatived by that part of the plaint which I have referred to. The case as made would appear to be the ordinary case of a *benami* transaction in which the *benamidar* acquired no interest in the property. The case is, however, somewhat complicated by the fact that when the grant was eventually made in the year 1896 Maharaja Sir Radha Prasad Singh was dead, and Jai Prakash Lal was one of his executors under his will, a fact which is referred to in paragraph 12 of the plaint, which states that the lease was executed by the Government of Burma in the name of the said Rai Jai Prakash Lal Bahadur, who was then the executor and trustee under the said will and was then in charge of the Dumraon Raj. The suggestion therein contained apparently is that Jai Prakash Lal at that date took the lease as executor and trustee of the late Maharaja. In the particulars ordered to be filed under paragraph 8 of the claim the plaintiff has further stated that Jai Prakash Lal was not only the agent and *Diwan*, but was on terms of trust and confidence with the Maharaja Radha Prasad who reposed the fullest confidence in him, and that in pursuance of the arrangement mentioned in this paragraph and the settlement mentioned in paragragh 9 of the plaint, Jai Prakash took the lease of the land in his own name as set out in paragraph 12. The particulars given under paragraph 9 of the plaint state that in pursuance of the arrangement mentioned in paragraph 8, Jai Prakash took possession for and on behalf of the Dumraon Raj and continued to be in such possession and that he kept a man of the name of Lalu Ram Pande in charge of the Burma property.

The fourth and fifth issues framed in the case before trial were as follows :—

(4) Did Rai Bahadur Jai Prakash Lal act

as agent, servant or trustee of Maharaja Sir Radha Prasad Singh Bahadur or of the Dumrao Raj in the matter of the acquisition of the said property and possession thereof?

(5) Did Rai Bahadur Jai Prakash Lal acquire the property in his individual capacity? If so having regard to his position in, and connection with, the Dumraon Raj are the defendants entitled to retain possession of it?

Notwithstanding the somewhat vague language in which the plaint is couched the questions whether Jai Prakash Lal was in fact a trustee for the Raj in the acquisition and possession of the Burma property and whether the defendant was entitled in such circumstances to plead limitation were fully dealt with before the learned Judge at the trial.

As already stated there is no direct evidence as to the creation of the trust, and the main question on this part of the case is whether the inferences drawn by the learned District Judge from the evidence are correct.

He further found that no settlement of the dispute between the plaintiff and the defendant as to the Burma property had been arrived at in 1914 as alleged by the defendant. On the other important issues in the case he also found in favour of the plaintiff. From this decision the defendants have appealed.

The story of the acquisition of the Burma estate, which I shall first deal with, begins in the year 1889 when Maharaja Sir Radha Prasad Singh Bahadur was the proprietor of the Dumraon Raj. His *Diwan* at that time was Rai Bahadur Jai Prakash Lal, the father of Rai Bahadur Harihar Prasad Singh, the present defendant and appellant. Jai Prakash Lal served the Dumraon Raj in one capacity or other since the year 1859, when as a young man of about 19 or 20 years of age he was appointed tutor to Radha Prasad Singh, then the heir to the Dumraon estate. By his ability and industry he had risen to a position of trust and responsibility in the Raj affairs and at the time when the story opens he was, as *Diwan*, second only in importance to the Maharaja himself. He had also held important pulic offices. He had been Chairman of the Dumraon Municipality on more than one occasion and in 1884 he was appointed a member of the Bengal Legislative Council. It is on record that by his skilful management he had materially increased the revenue of the Raj and brought it from a position of financial embarrassment to one of great prosperity. He was also instrumental in carrying out works of public utility. His public services were recognised by the Government of India a few years later when in 1892 he was made a Companion of the Order of the Indian Empire. His relations with the Maharaja appear to have been those one might expect to exist between a capable and faithful servant and a generous master. His services were recognised and rewarded by the Maharaja from time to time by grants of *Mukarrari* and *ticca* leases which added considerably to his income. It is important to bear these matters in mind as they appear to me to afford some guidance in determining the proper inferences to be drawn from the proved facts relating to the transactions which form the subject of enquiry in this case. There is nothing to suggest that in his dealings with the property acquired by him in Burma there was any attempt to conceal anything from the Maharaja, and indeed the evidence points, I think, conclusively in a contrary direction. It may not be out of place here to refer to the evidence of some of the witnesses who speak to his character and attainments. Mr. Sharfuddin, a former Judge of the Calcutta and Patna High Courts, said the Maharaja had great faith in him. He was the directing hand in the affairs of the Raj. Mr. Skrine, the Collector of Shahabad, who knew both the Maharaja and Jai Prakash Lal intimately, says that he was the maker of the estate. The Maharaja very often expressed in conversation with him his implicit confidence in the *Diwan*. He trusted him in everything. He further says he considered him one of the most able Indians he had ever met. He had an extraordinary knowledge of English and a great capacity for affairs and he was entirely devoted to the Raj. He also described the Maharaja, to use his own

words, as "one of nature's gentlemen." He says he was extremely ignorant but had a good deal of common-sense. He explains this later by saying that his ignorance was that of matters relating to literature, history and geography but he knew a good many things that Jai Prakash Lal did not know. Pramotho Nath Chatterji, a retired officer of the Bengal Judicial Service who was Munsif of Buxar from 1890 to 1893, says the Maharaja had implicit confidence in his intelligence, ability and honesty and adds that the Maharaja was a shrewed nobleman and all important matters had to be done with his orders. The Maharaja himself in a speech attributed to him and delivered on the 26th October 1890, at what has been described as the Samad meeting, which will be referred to again later, described the *Diwan* as not merely a manager but higher than that, an institution with a tradition behind him, and in his will executed in 1893 the Maharaja appointed him co-executor together with the Maharani. The passage is worth quoting as it states not merely his opinion of the *Diwan* but also of the Maharani, a lady whose actions at a later period have a considerable bearing upon the questions now under discussion. He says: "I hereby appoint my wife Maharani Beni Prasad Kuer who, though a *pardanashin* Hindu lady, is to my knowledge possessed of great intelligence and capacity for business and who I consider is fully competent to maintain the position and dignity of my Raj and family to be executrix, and my *Diwan*, Rai Jai Prakash Lal Bahadur, who has during the last fifteen years very honestly and successfully managed my Raj and the estates belonging to me and by whose faithful exertions and co-operation I have been able to bring it to its present state of efficiency, executor of this my will." He also directed the executor and the executrix to give his daughter in marriage to some suitable person if she should be unmarried at his death. The expression of his confidence and regard for his *Diwan* is a remarkable testimony to his integrity. The evidence also shows that the Maharaja and his *Diwan* were on terms of intimate personal friendship. The *Diwan* during the Maharaja's illness had attended assiduously to his personal comforts, an incident to which the Maharaja bore warm testimony in his speech at the Samad meeting. This close friendship continued for 40 years and there is no suggestion that any incident ever occurred to mar the relations which existed between them. It is true that Jai Prakash Lal owed much to the generosity of the Maharaja, but it is equally true that the Maharaja and his estate owed much to the efficiency, faithfulness and loyalty of the *Diwan* as the Maharaja also testified in the speech referred to. Such then were the relations existing between the two persons whose conduct we have to consider in determining the first and most important issue in this case. The evidence seems conclusive that the late Jai Prakash Lal was a man of integrity.

The Government of India have from time to time considered schemes for relieving the congested areas of Northern and Central India by emigration, and in the beginning of 1889 in furtherance of a scheme formulated in the previous year for the relief of the congested areas of Bihar, then part of Bengal, several of the leading *zemindars* and other influential persons were invited to interest themselves in the matter by taking grants of waste land in Burma on easy terms with a view to bringing them under cultivation and settling tenants thereon from the surplus population of this province. Previous schemes, and in particular one attempted in 1874 whereby some 7,000 emigrants from Bengal were settled in Burma holding direct from Government. had proved a failure. On the present occasion, as appears from the report of Mr. Nolan (Ex. 714) and other sources, the scheme proposed was to make the grants to capitalists and *zemindars* willing to undertake the settlement of Indian *raiyats* who would hold under the grantee and not direct from Government. It was part of the scheme that the grants should be made only to approved applicants.

Amongst other officials who were entrusted by the Government to further the objects of the scheme was Mr. Finucane, Director of the Department of Land Records and Agriculture in Bengal. Extracts from the official papers relating to the scheme were circulated by him at or about the beginning of 1889 to the following noblemen and gentlemen of Bihar, namely, the Maharajas of Darbhanga, Hathwa, Dumraon and Bettiah, the Secretary of the Bihar Indigo Planters' Association, Rai Jai Prakash Lal Bahadur and Raja Rameshwar Singh of Darbhanga, (the present proprietor of the Darbhanga Raj and brother of the then Maharaja). Mr. Finucane was deputed to go to Burma taking with him the gentlemen who were approached, or their agents, for the purpose of viewing the land on the spot and forming an opinion whether it would be suitable for the purpose. It appears from the official correspondence and from Mr. Finucane's report to the Government of Bengal dated the 26th June 1889 (Ex. 723) after his return from Burma, that these gentlemen had been requested to say whether they would be willing to accompany him to Burma or to depute agents in order to see the lands available to settlers and to ascertain on the spot whether it would be profitable for them to undertake the work of promoting emigration as a commercial speculation. The response was not very encouraging. Jai Prakash Lal and Mr. Hudson, Secretary of the Bihar Indigo Planter's Association, alone of those approached, accepted the invitation and in March 1889 they proceeded with Mr. Finucane on the expedition. Jai Prakash Lal took with him, as appears from Mr. Finucane's letter to the Government of Bengal dated the 4th March 1889 (Ex. 716), some of his raiyats in order to see whether suitable land was available of which he might take settlement and bring it under cultivation. Mr. Walker of the firm of Gisborne & Co., of Calcutta, who were interested in indigo, was also a member of the party but did not apply for a grant. In the previous year a grant of 30,000 acres had been made to Mr. Mylne, an Indigo planter of Bihar, and this eventually turned out a profitable investment. Jai Prakash Lal was also a personal friend of Mr. Finucane, who in all probability was acquainted with his financial position. Mr. Noyee, who was at the period in question an Assistant to the Deputy Commissioner of Rangoon engaged in the Revenue Department, and who met Mr. Finucane and Jai Prakash Lal in Burma in connection with the Government scheme, states that Mr. Finucane himself vouched for Jai Prakash Lal to the Government as a suitable applicant for a grant. He was probably in a position to know, but his information would appear to have been based rather on inference than from any direct knowledge. That Mr. Finucane, however, had contemplated Jai Prakash Lal as a prospective grantee and that he was approved of as such by the Government may be presumed from the fact that not only the Maharaja, his employer, but Jai Prakash Lal himself had been requested to proceed to Burma, or send an agent, with a view to acquiring a grant. None of the Diwans or Managers of the other Maharajas who were invited appear to have been approached personally at that time. The same inference may I think be drawn from other letters of Mr. Finucane, for example, on the 16th October, 1889, in writing to the Government of Bengal (Ex. Z 1956) in reference to a Government subsidy to the British India Steam Navigation Company to enable them to carry emigrants to Burma at reduced rates, he says:

"Any emigrants whom landholders such as Jai Prakash Lal, Messrs Mylne and Thomson or others may wish to take to Burma would as a matter of course be carried at the reduced fares".

In a letter addressed by Mr Finucane to the prospective grantees enclosing the official papers and dated the 11th February 1889 (Ex. 715) he says:

"The Manager of Dumraon Raj, Rai Jai Prakash Lal, has agreed to accompany me to Burma in March or April next taking with him some of his raiyats in order to see whether the lands available would be suitable for Biharis and whether it would be desirable for capitalists or others to take land in that province as a commercial speculation on the

terms suggested in these papers. It seems obvious that with good land available in Burma and a redundant population in Bihar it ought to be financially a sound undertaking for gentlemen of means and influence in Bihar to acquire lands in Burma which must in the future be of great value. My object in now addressing you is to enquire whether you would be willing to send an agent to Burma with me with a few *raiyats* in the same way as Jai Prakash Lal proposed to do to see the country and land available for themselves with a view to your or their taking up any such land or causing it to be taken."

I have referred to this because a point was made on behalf of the respondent that Jai Prakash was not a person of sufficient affluence to merit the confidence of the Government to the extent of entrusting him with a grant in Burma on his own account, but that if he was merely an agent of the Maharaja the confidence reposed in him could easily be accounted for. I may say at once that throughout the transactions which subsequently took place whereby Jai Prakash applied for and obtained the grant of 15,000 acres in his own name, which is the subject of this suit, I have been unable to discover a scrap of evidence which points to the fact that the Government considered that they were dealing with him not as the real grantee but merely as the agent of the Maharaja. The learned District Judge states that there can be no doubt that the Government looked upon Jai Prakash as the representative of the Raj in this matter. I have looked in vain for any evidence which supports this finding. In two or three instances in the voluminous correspondence with the Government officials Jai Prakash Lal is described as the *Diwan* of the Dumraon Raj, a title which he was generally given even in his own private correspondence. Otherwise I can find nothing which supports the learned Judge's view. In Mr. Finucane's report of the 26th June 1889 (Ex. 723), already referred to, and which sets out in detail what happened during his visit to Burma the following passages occur:—

"Rai Jai Prakash Lal Bahadur proposed to return to Rangoon (from Mandalay) by rail visiting *en route* the Toungoo, Pyinmana and Shegywin districts to the Deputy Commissioners of which Districts he had been furnished with letters of introduction. The result of his visit was that he applied for a grant of 15,000 acres in the Toungoo district and obtained it on terms somewhat similar to those on which land was granted to Messrs. Mylne and Thompson in the neighbouring district of Shegywin and he proposed to take a larger area of 50,000 acres in another district Pyinmana".

"On our return to Rangoon Rai Jai Prakash Lal and I discussed with Messrs. Fryer and Hodgkinson the terms upon which grants of land might be made to Rai Jai Prakash Lal in the Toungoo and Pyinmana districts which he had visited. It was arranged that a grant be made to him in the Toungoo district on the terms specified in his application".

On the other hand, whilst speaking of another grant made to Chuni Lal, the report says:

"Whilst we were in Burma the agent of Chuni Lal, a Banker from Chapra, applied for and obtained a grant of 15,000 acres in the Shegywin district".

The learned District Judge was impressed by the fact that Mr Finucane, in his letter to the Government of Bengal, dated the 4th March 1889 (Ex. 716) says.

"The most practicable way to test the feasibility of the suggestion contained in Mr Nolan's report would be to take some representatives of capitalists to Burma to show them the lands which may be available for settlers from Bihar and Bengal."

But it must be remembered that in the invitations sent not merely to the Maharaja but to Jai Prakash Lal the request was that they should either go themselves or send representatives and it cannot be presumed that Jai Prakash Lal went in a representative capacity. Whether he could aptly be described as a capitalist seems doubtful. What his available resources in cash were at that time is not proved. We only know that in the Raj Bank known as the *kothi kalan* there stood to his credit at the time of his death, some 8 years later in 1897, a sum of over 2½ lakhs of rupees. We also knew from ledger account of *kothi kalan* for the year 1300 F. that his balance at the end of the previous year, (September 1892) was Rs. 1,66,000 (Ex. 1737 B). What his actual balance was in cash in the year 1889 there is nothing to show. The plaintiff has not produced the *kothi kalan* books for that period. I think it may be safely assumed that his available cash at that time was not inconsiderable. His yearly income from the *mukarrari* leases which he then held was about Rs. 10,000 to Rs, 12,000 and his salary as *Diwan*

was at that time Rs. 1,500 a month, or Rs. 18,000 per annum. This appears from the *parwana* (Ex. Z 197) granting him *ticca* leases in lieu of Rs. 1,000 of his previous monthly salary. His annual income therefore may be taken in round figures at about Rs. 30,000 at that time. It increased shortly afterwards by the grant of *ticca* leases. But although he was not a capitalist he was in an excellent position for influencing the emigration of cultivators and labourers from Bihar. Moreover he was a man of considerable repute in Bihar, and it is not a violent assumption to suppose that the Government might well be willing to avail themselves of the assistance of a man in his position to carry out the scheme of emigration. Although he was not a man of great affluence, he possessed at least the other qualifications necessary to promote the scheme and make it a success and his financial resources were by no means negligible. Moreover, the terms upon which the grant was to be made required no large immediate outlay. The land was to be revenue free for 12 years after which the revenue was to be Rs, 1,000 increasing by two successive stages to Rs. 4,000 at the end of the 26th year, the maximum rate after the 33rd year being never more that 8 annas per acre and in one event less. The expenses of clearing the land so as to make it cultivable and of settling tenants thereon were to be borne by the grantee. It is reasonable to suppose, however, that with proper management and when a sufficient number of tenants had been settled, the income from the estate would begin to meet the expenses until finally, as a commercial venture, it would be a profitable investment as it eventually turned out to be. It appears from Mr. Nolan's report that it would be sufficient to proceed on a small scale at first. He says the cost of clearing the jungle over an area of 15,000 acres and establishing a hamlet of 50 families thereon would be Rs. 8,000 including half the cost of buildings and clearing the holding and finding the tenant in stock. If the whole of this expense should be undertaken by the grantee another Rs. 6,250 should be added. His figures appear in his report at page 2694 of the record. After this expense should be incurred some return would be coming in from the rents of the tenants. It is probable therefore that the prospect was not such as to deter a capable manager even if his means were limited.

What the Maharaja's attitude was with regard to the acquisition of land in Burma appears from the evidence of some of the witnesses who discussed the matter with him. This evidence, which I shall deal with later, goes to show that he was not inclined to burden himself with the responsibility of a commercial venture of this sort so far from home when he had over 5,00,000 acres of his own in the Dumraon Raj, much of it waste land upon which he could direct his energies. At the same time it is quite possible that he was ready and willing to assist the Government scheme without any hope of ultimate gain. This he could do in two ways, either by taking a grant himself or by contributing to the initial expenses of a venture undertaken by his *Diwan*. I shall revert to this aspect of the case later when dealing with the evidence of the witnesses who speak about the Maharaja's attitude. It would be more convenient at present to deal with the facts adduced in evidence relating to the acquisition of the Burma grant. Jai Prakash Lal having agreed to accompany Mr. Finucane went from Dumraon to Calcutta, on two or three occasions between the end of January and the middle of March, 1889 and was in communication with the Government officials. The Maharaja himself was also in Calcutta during a part of this period. In fact, on the 1st March, he was invested with the insignia of a Knight Commander of the Indian Empire and on the 13th March, both he and the *Diwan* returned from Calcutta to Dumraon. On the following day the *Diwan* again left for Calcutta, and on the 16th accompanid by Mr. Finucane and the rest of the party they embarked at Calcutta for Rangoon. It appears that Jai Prakash had with him a sum of Rs. 2,400 which he had taken from h rivate ccount with the Raj ban

for the purposes of the journey some days earlier. A sum of Rs. 1,000 was also drawn from the Raj treasury in the name of Bhawani Singh and this money was apparently at the disposal of the *Diwan*. Seven persons, most of them Raj servants, accompanied Jai Prakash Lal from Dumraon on the expedition. In addition to two tenants of his own there were Ganga Sahai Misser, a Government servant in charge of the Raj experimental farm, Munshi Debi Prasad, a senior officer of the Raj, second in command to the *Diwan*, Lalu Ram Pande, an ex-policeman engaged as a Rai servant by Jai Prakash in the previous year, Ramuter, a Raj *Tahsildar* and Mahesh Singh, a sowcar. They also had some personal servants and cooks. They arrived at Rangoon on the 21st. Jai Prakash accompanied by some of the others proceeded up-country to Mandalay and after viewing the locality of the proposed grants he returned to Rangoon at the beginning of April. At Rangoon after a conference with Mr. Finucane and some officials of the Burma Government he signed an application in writing for a grant of 15,000 acres in the Toungoo district and left by steamer on the 5th April for Calcutta, leaving behind Lalu Ram Pande as his representative on the spot. He left with Lalu Ram a sum of Rs. 850 for his immediate expenses.

There are certain facts in connection with the application for the grant which it is important to bear in mind. The terms upon which the grant would be made were discussed between Jai Prakash Lal, Mr. Finucane, Mr. Fryer, the Financial Commissioner of Burma; and Mr, Hodgkinson, another Government official. A rough draft of the application addressed to Mr. Fryer, the Financial Commissioner, has been produced (Ex. Z 339). This contains marginal notes by Mr. Fryer pointing out certain matters which the Chief Commissioner would or would not object to. It must have been either discussed with or submitted to Mr. Fryer for consideration and advice before the formal document was prepared. A second draft (Ex. Z 202) was then prepared incorporating the alterations suggested by Mr. Fryer, It is in the handwriting of Munshi Debi Prasad and is dated 5th April 1889. With the exception of a few unimportant alterations it corresponds with the document finally prepared on the same day and signed by Jai Prakash Lal before he left Burma. There is, however, one significant alteration in this draft made in th handwriting of Jai Prakash Lal. In the draft as prepared by Debi Prasad the description and address of applicant are written under the space left for his signature and read thus "*Diwan* of the Dumraon estates in Shahabad, Bengal." This is struck ou and in Jai Prakash's handwriting the words "Rai Bahadur of Dumraon in Bihar" are substituted. The inference we are asked to draw by the appellant from this alteration is that Jai Prakash was anxious to make it clear that the application was being made by him in his individual capacity and not as *Diwan* of the Dumraon Raj. I think the inference is a reasonable one to draw, for I can see no object in amending the description, which was accurate enough, if in fact his application was being made in the capacity of agent for the Maharaja. Jai Prakash was a business man. He would not make the alteration unless he thought there was some importance attaching to it. The plaintiff relied upon Debi Prasad's draft as showing that he at least thought it was to be Raj property. Debi Prasad is dead and cannot give evidence but from his letter (Ex. Z 1670) written to Lallu Ram Pande not long afterwards he uses language which seems to show that at that time at all events he considered the grant to be the personal affair of *Diwan*. The application began by stating that the applicant, following the suggestion of the Lieutenant Governor of Bengal, had accompanied Mr. Finucane and inspected several places in Burma between Rangoon and Mandalay to see what would be most suitable for settlement of emigrants from the surplus population of the Dumraon Raj extending over large parts of Bihar and the North West Provinces and Oudh. He considered the Pyinmana district most suitable but in

the short time at his disposal could not obtain sufficient information as to the quantity and exact locality of the land there available. He accordingly reserved his application for land in that district for a future time and begged to apply for the present for a grant of 15,000 acres (6,000 acres in the Zeyawadi and 9,000 in the Minbon circles) in the Toungoo district on certain terms set out in the application. The land was to be revenue free for 12 years and after that period revenue was to be at the rates already mentioned in an earlier part of this judgment, and at no time was the land to be assessed at more than two thirds of the rate current in the neighbourhood. The applicant was to have the option of surrendering up to the end of the fifth year without penalty ; thereafter up to the end of the 12th year on paying a penalty of Rs. 100 for every 10,000 acres for every year the grant should have been held minus the first five years. He was to have a perpetual transferable title but liberty to transfer up to the 12th year was subject to the Government's approval of the transferee. Ninety per cent of the cultivators were to be emigrants from Bihar, Chota Nagpur, and the North West Provinces and Oudh. There were other conditions which are not very material. The application ends by expressing a hope that in view of the expenses which will have to be incurred by him, the grantee, the Chief Commissioner will sanction a grant on the above terms and recognise his right of precedence for a further grant of 50,000 acres hereafter in the Pyinmana District on more liberal terms.

We have been asked to draw various inferences from this document. In the first place it is suggested that the reference to a future grant of 50,000 acres indicates that this could not have been a private venture of Jai Prakash Lal's and that this is supported by the further reference to the settlement of the emigrants from the surplus population of the Raj. On the other hand the appellant relies upon the fact that one of the conditions provided that the tenants might come from other parts of Bihar besides Dumraon and that the wording of the last clause indicates that the grantee himself was the person who would be responsible for the expenses. He further relies strongly upon the description of the applicant as amended by Jai Prakash Lal himself to show that the application was made on his own behalf. I consider that the only safe inference that can be drawn from this document is that as between himself and the Government of Burma Jai Prakash Lal intended to apply and did apply for a grant to himself in his own name. What private arrangement, if any, there may have been between himself and the Maharaja, there is nothing in the document to indicate. At the same time, unless there was some such private arrangement which it was intended to keep secret, the application itself and the alteration of the description of the applicant show that it was an application on his own behalf.

I now propose to deal with the incidents that occurred after the 5th April, 1889, when Jai Prakash Lal left Burma, and especially the incident of the 1st June, following, when the Maharaja by a *Parwana* of that date authorised the expenditure from the Raj treasury of a sum of Rs. 25,000 by Jai Prakash Lal on the Burma colonisation scheme. On the 14th April, the *Diwan* arrived back in Dumraon. There ensued a voluminous correspondence between Lalu Ram Pande who had been left behind in Burma and the *Diwan* which continued until the latter's death in 1897. This Lalu Ram Pande had been engaged by Jai Prakash Lal in the previous year and given employment in the Raj service on the recommendation of certain friends who had taken an interest in him. He was apparently a man of some strength of character who had been suspended from the Police service for arresting, presumably without justification, a European in circumstances which gave rise to some discussion in the newspapers at the time. Whether he was justified or not need not be discussed. His suspension was not due to any act reflecting upon his honesty. From this correspondence it is clear beyond all

doubt that Lalu Ram Pande regarded Jai Prakash Lal as his master and the proprietor of the Burma grant. It is equally clear that Jai Prakash Lal never gave him any reason to suppose the contrary, and his wages were thenceforth paid by Jai Prakash Lal and no longer out of the Raj treasury. There are serveral instances on record where servants were transferred from Raj service to Jai Prakash's personal staff or *vice versa*. After his return from Burma certain money was forwarded by Jai Prakash Lal to Lalu Ram and certain expenses in connection with the Burma venture were incurred and these were paid out of Jai Prakash Lal's private account. After the 1st June, when the Maharaja issued his *Parwana* authorising the expenditure of Rs. 25,000 and up to the 27th July, certain further monies were forwarded to Lalu Ram from Jai Prakash's private account the sums thus expended amounted in all to just under Rs. 2,200. With the exception of two small items of Rs. 20 and Rs. 50 these are said by the respondent to have been recovered eventually from the Rs. 25,000 sanctioned by the Maharaja and placed at the disposal of the *Diwan* for the Burma scheme. There has been considerable dispute as to whether these sums were in fact recovered from the fund of Rs. 25,000 or not. The matter is not absolutely free from doubt but I think the effect of the evidence as revealed by the accounts which are somewhat complicated is that except the two small sums mentioned the expenses were in fact recovered from the fund placed at the *Diwan's* disposal. I shall revert to this point later when dealing with the accounts which require consideration for other purposes. At the same time I confess the matter does not appear to me to be one of great import. What is in my view much more important to remember is that during the two months which elapsed after the application and before the grant was sanctioned by the Maharaja and for a short time afterwards the expenses, such as they were, amounting roughly to Rs. 2,200 were provided but out of the *Diwan's* private account. If they were subsequently recovered from the fund of Rs. 25,000 placed at his disposal it does not appear to me materially to affect the matter. The fund was at his command for the Burma scheme and it was reasonable that he should exhaust that fund first even for the expenses already incurred, keeping in reserve his private resources until they should be required.

It is unnecessary to refer in detail to the letters which passed between Lalu Ram Pande and Jai Prakash Lal. Their effect is as above stated Perhaps the last letter written before the 1st June, namely, on the 1st May, from Jai Prakash Lal to Lalu Ram may be usefully referred to. After giving certain instructions as to the work to be carried out which was of an experimental nature and promising to send more money by the next mail, he adds: "I am not a rich man. Money will have to be spent very economically and carefully. No doubt there will be much waste in the trial but caution would be necessary." The learned District Judge has referred to many other instances in this correspondence which I think show beyond any possibility of doubt that Jai Prakash Lal and Lalu Ram, his agent on the spot, treated the grant as that of Jai Prakash himself. This correspondence went on as already stated during the life time of Jai Prakash and was continued after his death by his son, the defendant. If the grant had been applied for on behalf of the Raj it is highly improbable that Jai Prakash Lal would write in this strain emphasising the need for caution in expenditure as his resources were limited. If he was merely acting as the agent of the Maharaja it is to my mind inconceivable that he would have written in such terms.

I now return to the *Parwana* of the 1st June, 1889. On that day the Maharaja issued a *Parwana* addressed to Jai Parkash Lal authorising him to spend out of Raj Treasury for the colonisation of Burma a sum of Rs. 25,000. The document is written in the *Persian* script and much controversy has arisen as to the correct reading of a certain word in the document. The disputed word according

to the appellant is *Ayanat* which means help or assistance, according to the respondent the word is *Injanib*, an honorific form of the first person singular "I" and frequently used in such documents. If the appellant's reading is correct it would indicate that the money was in the nature of a gift or contribution towards a scheme in which the Maharaja was not directly interested. If the Plaintiff's version be accepted it merely means that the Maharaja authorised the expenditure of Rs. 25,000 of his own money upon the Burma colonisation scheme and except for the inference to be drawn from the fact that he was providing money for this purpose it leaves the question of ownership at large. I shall deal later with the question of the proper reading of this word in the light of the expert evidence of which there was a great deal, but accepting for the present the conclusion arrived at by the learned District Judge that the word was *Injanib*, it becomes necessary to determine the proper inference to be drawn from the fact that the Maharaja contributed a sum of Rs. 25,000 towards the expenses which had necessarily to be incurred before the land could be rendered cultivable. I use the word contributed advisedly, because when this money was expended the Maharaja ceased to contribute any further and the subsequent expenses were all paid from Jai Prakash's private account or after his death, by his son. This transaction is the sheet anchor of the respondent's case. The argument is that where property is acquired in the name of one person but the purchase price is paid by another a presumption arises that the transaction was one for the benefit of the person providing the money. Such cases are common in India where *Benami* transactions are recognised. As a general proposition of law the principle enunciated may be accepted. In support of the general proposition the following cases were cited; *Gopee Krist Gosain* v. *Ganga Prasad Gosain* (1) *Bilas Kunwar* v. *Desraj Singh* (2). *Nrityamoni Dasi* v. *Lakhan Chander Sen* (3). *Raja Deo* v. *Abdulla* (4). *Gur Narayan* v. *Sheo Singh Lal Singh* (5). *Promode* v. *Madan* (6). But apart from the fact that the presumption is rebuttable, its strength or weakness can only be gauged by reference to all the surrounding circumstances. The present case differs from these in which the principle has been applied where the purchase price of property taken in the name of A has been paid by B. Here there is no question of paying the purchase price of land conveyed. The nature of the transaction required that money should be expended before a formal grant could be obtained. The grantee was in the meantime allowed to take possession and began clearing the *jungle*. The distinction may not be a very broad one but I think it is of some importance especially when it is remembered that it was not the whole but only a portion and a minor portion of the initial expenditure which was contributed by the Maharaja.

Whilst it is true that in determining questions of *Benami* it is most material to ascertain the source from which the purchase money comes most of the cases in which the principle has been applied were free from complications. Where other relative circumstances exist they must always be considered. In *Ram Narain* v. *Muhammad Hadi* (7), a case having certain features in common with the present, Sir Richard

(1) [1854-57] 6 M. I. A. 53=4 W. R. 46=2 suther 13=1 Sar 493 (P. C.).

(2) [1915] 37 All. 557=42 I. A. 202=19 C. W. N. 1207=29 M. L. J. 335=2 L. W. 830=18 M. L. T. 248=13 A. L. J. 991=30 I. C. 299=17 Bom. L. R. 1006=22 C. L. J. 516=1915 M. W. N. 757 (P. C.).

(3) [1916] 43 Cal. 660=20 C. W. N. 522=24 C. L. J. 1=30 M. L. J. 529=(1916) 1 M. W. N. 332=20 M. L. T. 10=33 I. C. 452=3 L. W. 471=18 Bom. L. R. 418 (P. C.).

(4) [1918] 45 Cal. 909=45 I. A. 97=16 A. L. J. 576=5 P. L. W. 83=1918 M. W. N. 406=22 C. W. N. 891=8 L. W. 163=35 M. L. J. 46=45 I. C. 770=24 M. L. T. 62=28 C. L. J. 192=20 Bom. L. R. 851 (P. C.).

(5) [1919] 46 Cal. 566=46 I. A. 1=17 A. L. J. 66=36 M. L. J. 68=9 L. W. 385=49 I. C. 1=23 C. W. N. 521 (P. C.).

(6) 1923 Cal. 228=36 C. L. J. 396=27 C. W. N. 305.

(7) [1899] 26 Cal. 227=26 I. A. 38=3 C. W. N. 113=77 Sar. 425 (P. C.).

Couch in delivering the judgment of the Judicial Committee pointed out that the source from which the funds came, whilst a very important fact, was not the only criterion. In that case the defendant had been in the service of the plaintiff and his father for many years managing their estates successfully and had some claim upon their generosity. The property in suit had been purchased in the defendant's name and paid for by the plaintiff, who claimed that the purchase was a *farzi* transaction. The defendant had been allowed to remain in possession taking the profits for a period of 9½ years. Their Lordships considered that in spite of the fact that the purchase price was paid by the plaintiff, the relationship between the parties and the fact that the defendant had been allowed to remain in possession for several years supported the defendant's case that the property was purchased for him as a recognition of his services. In considering this question it is perhaps pertinent to ask why a person in the position of the Maharaja should on this occasion be anxious to enter into a *Benami* transaction, a practice which, so far as is known, was certainly not his habit. The reason suggested is that he was a reluctant participator in the scheme, which he merely entered into to please the Government without any hope of profit, and, if he should eventually wish to retire, his prestige would not suffer thereby if the ostensible grantee should be his *Diwan* and not himself. I am not prepared to find that the Maharaja was less solicitous of his *Diwan's* good name than of his own, but even if his attitude towards the Burma scheme was that above described, there is no reason for presuming that whilst he was willing that his *Diwan* should bear the displeasure of the Government in the one event, he was unwilling that he should reap the profit in the other. The suggestion appears to me to be of too speculative a nature to carry much weight. It is much more important to consider the actions of the parties at the time when the grant was applied for and subsequently.

[His Lordship, in the course of his discussion on the evidence, observed as follows:—]

Father Vander Schueren used to stay at Dumraon frequently as the Maharaja's guest. These occasions were generally during the Christmas holidays when he formed one of the house party. The present defendant was for a time a pupil of his at St. Xavier's College in Calcutta. He had various conversations with Jai Prakash Lal about Burma. On one occasion in particular in December 1889 or January 1890 when a guest of the Maharaja, he asked Jai Prakash whether the Burma property was his own or that of the Raj. Jai Prakash answered that it was his own and at his own risk. Father Vander Schueren who held a good opinion of the defendant's intelligence and capacity was very anxious that his pupil should have a complete University education in India first, and afterwards in England. Jai Prakash Lal, upon whom he urged the expediency of giving his son these educational advantages, said he was afraid that it was not possible, as owing to his own work with the Raj he would not be able to do himself what was needed to make the Burma scheme a success, and he would require his son's help for this. There can be no question as to Father Vander Schueren's veracity and his recollection was not challenged. He was not cross-examined. The learned Judge dismissed this and similar evidence of other witnesses on the ground that it was inadmissible. Now it seems to me that it is most material to ascertain the state of mind of Jai Prakash Lal with regard to the Burma property at or about the time when the grant was being obtained. All the more so is this necessary in the present instance where the plaintiff's claim is based, not upon any direct evidence, but merely upon inferences to be drawn from the conduct of the parties. If Jai Prakash Lal is found stating openly to one of the Maharaja's guests that the property is his and not the Maharaja's, this is, in my opinion, a relevant fact. It is certainly a fact which makes it highly improbable that the Maharaja was the real owner. Moreover he discus-

ses his son's future education and regrets that it will have to be cut short as the Burma property will require his attention. The value of this evidence must depend largely upon the character of Jai Prakash Lal. If he was a scheming and dishonest person such statements would be of little or no value in his favour. Moreover, if in fact the property was that of the Maharaja, it would be idle for Jai Prakash at that period to go about saying that the property was his. It was bound to come to the ears of the Maharaja and he could not hope by such conduct to reap any advantage. If, however, he was honest and had the interests of his master at heart, as the evidence shows, then I consider that such statements made by him in the circumstances existing are of considerable value as showing the improbability of the inference sought to be drawn by the plaintiff and are admissible under S. 11, if under no other section of the Indian Evidence Act. It would be a strange system of jurisprudence which made admissible, in such a case, admissions from which an inference adverse to the person making them might be drawn whilst excluding all other statements tending to shew that the inference sought to be drawn was highly improbable.

[His Lordship continued the discussion of the evidence and observed:—]

I have reviewed at some length the history of the acquisition of the Burma property and the manner in which it was treated by the parties principally concerned. I have dealt with the arguments put forward on behalf of the respective parties arising out of the incidents which occurred during the whole period and I have indicated the conclusions at which I have arrived and the inferences which I think ought to be drawn from the conduct of the parties. From a review of the whole evidence and after giving due weight to the decision of the learned Judge and the arguments adduced on behalf of respondent I am satisfied that the plaintiff has entirely failed to establish his case that the property was acquired by Jai Prakash Lal on behalf of the Dumraon Raj. The conduct of the *Diwan* throughout appears to me entirely inconsistent with that of a person who was merely acting as a *benamidar* or as a trustee on behalf of another. In the first instance he seems to have taken care to make it manifest that he was applying on his own behalf and not as *Diwan* of the Dumraon Raj. Next although the journey expenses may have been paid for or contributed to by the Maharaja, a course which had been followed on previous occasions in somewhat similar circumstances, we find at the outset the *Diwan* spending his own money and sending remittances to Lalu Ram Pande to be spent upon the Burma scheme. The money sanctioned by the Maharaja for this scheme is limited to a definite amount. His very conduct in authorising the *Diwan* by *parwana* to spend Rs. 25,000 or any other sum, upon his own property was an entirely new departure and one which the circumstances of the case do not seem to have rendered necessary. It is significant also that although *benami* transactions are common in India it does not appear that the Maharaja was in the habit of having recourse to this system. The only instance appearing amongst the vast amount of evidence tendered in this case, in which anything of the sort was done, is the acquisition of an insignificant property at an auction sale in the name of a Raj officer who was on the spot and in that case a document was afterwards executed by him in favour of the Maharaja. The Maharaja was undoubtedly under great obligations to his *Diwan*, and that he was fully alive to the fact is clearly shown by the evidence and by the substantial recognition of his services which he conferred upon him on many occasions. The *parwana* itself is consistent with a contribution towards a scheme in which the Maharaja was not beneficially interested and if the disputed word should be read as *ayanat* it points strongly in this direction. The fact that the *Diwan* himself considered the property his own affair and at his own risk is proved conclusively by a body of reliable evidence whilst there is also much evidence to show that the Maharaja himself stated on many

occasions that he was helping his *Diwan* in a scheme which he did not consider likely to be profitable and that he was not himself inclined to take up waste land in Burma. The manner in which the grant of Rs. 25,000 is dealt with and accounted for by the *Diwan* was different from the method of accounting that would have been expected had Burma property belonged to the Raj. Moreover, although up to May 1894, when the Maharaja died, a sum of over Rs. 4,000 had been collected as the rents and profits of the property, none of this was entered in the Raj accounts. It is true that it was re-invested in developing the property, but Jai Prakash had no authority from the Maharaja, if this was Raj money, to invest it in developing the property in addition to the Rs. 25,000. When the Maharaja stopped further payments the first thing we find is that Jai Prakash Lal passes orders that all future payments must come out of his own pocket. From first to last no attempt is made by anybody before the present suit is brought to recover the property for the Raj nor is it ever entered in any book or list of properties appertaining to the Raj. If this was in fact a *benami* transaction it was certainly one which the parties most interested were taking the greatest pains to conceal from third persons, including the Raj servants, but there is no evidence whatever that would point to any sufficient motive for keeping the real facts secret. The Maharaja certainly had an object in helping to find an outlet for relief of the tenantry in the congested areas, but there seems to have been no motive whatever to conceal the fact that he had purchased land for this purpose. If in fact, as was suggested in argument on behalf of the plaintiff, Jai Prakash, after the Maharaja's death, made up his mind to take advantage of the money already spent by the Maharaja and acquired the lease as his own by dishonest methods such conduct was entirely contrary to his previous dealings with the Raj. Moreover, it could not escape the notice of the Maharani that he was treating the property as his own and she was presumably as much aware of the real state of affairs as was her husband before her. And even after Jai Prakash Lal's death and when the property was undoubtedly a valuable one although she went to the length of suing the defendant to recover the comparatively unimportant property comprised in the *ticca* leases which were shortly about to expire, she made no attempt whatever to recover Burma. The only evidence of any importance which indicates a conclusion contrary to that at which I have arrived is that of the Maharaja of Gidhour, in circumstances which I have already described, and the facts connected, with the *Samad* speeches and the tenants' address, reports of which were afterwards circulated with the *Diwan's* sanction and assistance. This evidence is to my mind quite insignificant when weighed in the balance against the other circumstances in the case, and is easily explainable.

My finding on this part of the case makes it unnecessary to consider the other points which were raised on behalf of the appellant, but out of respect to the arguments of the learned Counsel for the appellant, and Sir Ashutosh Mukherji for the respondent, and as this case may go to a higher tribunal I propose to express my opinion upon the other main questions which have been argued at great length before us.

The first of the remaining questions to be dealt with is whether there was a settlement of the dispute between the plaintiff and the defendant in November 1914.

[His Lordship while going into the evidence on the point and holding that there was a settlement by which defendant agreed not to take legal proceedings against the plaintiff for the money due from him and the plaintiff in his turn agreed not to take any legal proceedings in connection with the Burma estate observed :—]

It was urged in argument on behalf of the plaintiff that where parties are negotiating as to the terms of an agreement and it is contemplated that a written document shall eventually be signed everything which takes place until the document is finally

signed amounts merely to negotiation. I quite agree with the general proposition but in the present case the circumstances were exceptional. The agreement was in fact arrived at in September when it was not contemplated that any document should be signed. The object of the meeting in November was not to discuss the terms of the agreement which had already been come to but merely as to whether the Maharajah would at that stage, in view of the suit pending by the Maharani of Rewa, execute a a document and the only reason, according to the defendant's evidence, which I accept, why a document was not at that time executed was that it was unnecessary in view of the agreement already come to and it might prejudice him in the Rewa case then pending. I am satisfied that the settlement alleged by the defendant was in fact arrived at.

[His Lordship concluded his discussion of the evidence and proceeded :—]

A point was taken on behalf of the appellant that the jurisdiction of the Civil Courts to decide a question relating to the possession of land in Burma of this description was ousted by S. 56 of the Lower Burma land and Revenue Act (II of 1876) and that the suit was not maintainable. This point, in my opinion, is without any substance. It has been held on many occasions that the claims and disputes referred to in that Act, over which the Civil Courts have no jurisdiction but which are under the sole jurisdiction of the Revenue Courts, relate only to claims against Government and not to disputes between rival proprietors or cultivators. (See *Maung Naw* v. *Ma Shwe Hmat* (8). *Maung Po Kyaing* v. *Maung Pyi* (9); *The Burma Oil Co. Ltd.* v. *Baijnath Singh* (10).

In view of the decision arrived at on the facts of this case it does not become necessary to discuss the question of limitation raised by the appellant and based upon the assumption that a different state of facts existed. Elaborate legal arguments took place before us based upon a variety of different hypotheses of fact. The defendant by his pleading raised the plea that the suit was barred by limitation. In answer to this the plaintiff relied upon S. 10 of the Limitation Act which provides that,

"No suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property or the proceeds thereof or for an account of such property or the proceeds shall be barred by any length of time."

The learned District Judge, who found that the property was vested in Jai Prakash Lal as trustee for the Raj and that the defendant took as his legal representative, disposed of the matter quite shortly. He discussed the nature and purpose of the trust which he found were ascertainable from the application for the grant and the *parwana*. The object, he says, was to carry out the purpose of the Government in their Burma colonisation scheme and money was placed in the hands of Jai Prakash Lal for that purpose but, if in carrying out that purpose a valuable property was created, it is still impressed with the original trust while it remains in the hands of the *Diwan* or his representatives and they are not, and cannot, be entitled to plead the statute against their *cestuique* trust. He held therefore that S. 10 of the Limitation Act governed the case and that the suit was not barred by time. The matter, however, is much more complicated than this simple statement of the case suggests. In the first place the defendant by his written statement challenged the title of the plaintiff to the Dumraon Raj and consequently his title to sue for any property constituting a part of the Raj. The defendant was not a party to the adoption suit or the compromise arrived at therein on appeal by which the plaintiff established his title to the Raj, and he was apparently prepared to re-open the question of the validity of the adoption and the plaintiff's right as proprietor. The plaintiff when this matter became urgent owing to an application for particulars of his title declined to go into the question of title, electing to stand or

(8) [1915] 8 Bur. L.T. 191—30 I.C. 772—8 L. B.R. 227.
(9) [1916] 10 Bur. L.T. 5—35 I.C. 277,
(10) [1920] 3 U.B.R. 212—59 I.C. 960.

fall upon his possession of the Dumraon Raj acquired by the decree and the subsequent compromise in the adoption suit. His case was that by reason of his possession he had a presumptive title which could only be rebutted on proof of a superior title in some one else, and that as the Burma property was an accretion to the Raj he was entitled to recover it as the ostensible proprietor When this matter came before the Subordinate Judge, who was then in charge of the case, upon the defendant's application for particulars, in view of the plaintiff's attitude in this matter, he refused to make the order asked for but pointed out that in order to avoid any confusion in future it was necessary for the plaintiff to state in clear terms that he was proprietor of the Dumraon Raj by virtue of his presumptive title based on possession and that then he could say that he was entitled to advance his claim to the disputed properties on the ground that they were accretion to the Raj for the reason that they were acquired from the funds of the Raj. He further pointed out that it was in the circumstances open to the defendants to disprove the apparent title of the plaintiff by showing (*a*) that the disputed properties were not acquired out of the proceeds of the Dumraon Raj but by Jai Prakash Lal with his own private funds, (*b*) that the plaintiff is not entitled to the Dumraon Raj but some other person is, and, (*c*) that the defendants have acquired title by adverse possession. The plaintiffs thereupon filed particulars alleging that the Dumraon Raj was an impartible Raj held together as one unit and possessed by only one person at a time and that after the death of the Maharani in execution of the decree made in the adoption suit he obtained possession of the Dumraon Raj and other properties which by subsequent acquisition had become part of the Dumraon Raj and that he was seized in fee and absolutely entitled to the Raj and was in possession thereof by receipt of rent and produce and by paymant of Government revenue. The question of the plaintiff's title was accordingly not gone into at the trial except in so far as it was based upon his possession in pursuance of the decree which was not disputed. It was contended, however, on behalf of the appellant that even if the Burma property was acquired by the late Maharaja through Jai Prakash Lal as his trustee, there was nothing to show that it was an accretion to the Dumraon Raj. If the plaintiff's title to the property in suit depends solely upon his proprietary right to the Dumraon Raj then two questions arise at the outset for determination, first, is his mere possession, in the circumstances stated, *prima facie* evidence of his title sufficient to enable him to sue. This question I think may be answered by reference to the judgment of the Judicial Committee delivered by Sir Barnes Peacock in *Oolaganpa Chetty* v. *Arbuthnott* (11) where it is stated,

"In England proof of the possession of land or of the receipt of rent from the person in possession is *prima facie* evidence of a seisin in fee. In India the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *prima facie* evidence of an estate of inheritance in the case of an ordinary *zamindari*. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir."

These conditions are satisfied in the present case and no proof of a better title having been put forward, I think it must be presumed for the purposes of this case that the plaintiff is the lawful proprietor of the Dumraon Raj. The second question which arises is whether the property, if acquired on behalf of the late Maharaja, is an accretion to the Dumraon Raj. The plaintiff, when the question of particulars was before the court, appears to have assumed that because the property was acquired out of the proceeds of the income of the Dumraon Raj it, therefore, might be presumed to be an accretion to the Raj and that no further proof of this matter would be necessary. By the recent decision of the Judical Committee in *Rani Jagadamba Kumari* v. *Wazir Narin Singh* (12) it was decided that the

(11) [1874] 1 I.A. 268—14 B.L R. 115—7 Mad. Jur. 190—21 W.R. 358—3 Sar. 318 (P.C.)

(12) 1923 P.C. 59=2 Pat. 319=50 I.A. 1=44 M.L.J. 503=37 C.L J. 287=4 P.L.T. 319 =32 M.L.T. 157=25 Bom. L.R. 676=(1923) M.W.N. 460=28 C.W.N. 98=18 M.L.W. 555=4 L.R. P.C. 65 (P.C.)

income of an impartible estate is not so affected by its source that it should be assumed to form an accretion of the estate and that property acquired by savings from the income of the impartible estate does not become a part of that estate but remains the separate property of the holder. In the present case it is shown that the purchase money, or what has been regarded as the equivalent thereof, namely, the Rs. 25,000 and the journey expenses, came out of the Raj treasury, and it may be presumed that this was the savings of the Raj income. This however, in view of the recent decision referred to, would raise no presumption that the property so acquired was an accretion to the Raj and one must consider whether there are any other circumstances which would raise such a presumption. Upon the case made by the plaintiff the property was acquired primarily for the relief of the surplus tenantry of the Raj by providing for them an outlet in Burma and although this argument was not adduced before us in appeal it affords some ground for the conclusion that the Burma property if acquired by the Raj was intended to be an annex or accretion to Raj property. I am not prepared, however, to speculate upon a matter of this sort which does not appear to have been the subject of discussion in the lower court and was not argued before us. The plaintiff's title is confined to his title to the Dumraon Raj and it is not shown nor indeed would he have been entitled to prove, that he is the heir to the Maharaja's separate property. According to the ordinary devolution of separate property amongst Hindus governed by the *Mitakshara* law as in this case, the separate property of the Maharaja would devolve in existing circumstances upon his widow and afterwards upon his daughter and eventually upon his daughter's son, the present Maharaja of Rewa. Some attempt was made to show that whatever interest the Maharani of Rewa had in her late father's estate had been assigned to the plaintiff and that her son the present Maharaja of Rewa, who was then an infant, had joined in this assignment. The plaintiff, however, is claiming not as the assignee of the Maharani of Rewa or her son but as the proprietor of the Dumraon Raj and it was not open to him on the pleadings to assert a title not relied upon. The plaintiff deliberately elected to stand upon his title arising out of his possession of the Dumraon Raj and he ought not now to be heard to allege a different title of which no notice was given and which was not the subject of investigation in the lower court. Moreover, the Maharani of Rewa is dead and the title of her son, assuming that he has any title at all which cannot be determined in this case, has now become vested. At the time when the alleged assignment was made he had no vested interest but merely a *spes successionis* and this cannot be the subject of a valid assignment even had he been of age at the time. Still less could his mother, purporting to act as his guardian on his behalf, bind him by such a transaction and we are told that he is contemplating instituting a suit in connection with the properties of the late Maharaja of Dumraon if he has not already done so.

Assuming, however, that the plaintiff should surmount the difficulties which I have already indicated and that it should be held that the property was acquired on behalf of the Raj and incorporated in the Dumraon estate further difficulties arise in connection with the question of limitation which must depend largely upon the facts as ultimately ascertained. If the property vested, immediately after the application was made or if it vested before the 11th December 1893, when the Maharaja refused to go on with the project, it might be said that Jai Prakash Lal was a trustee for an express purpose within the meaning of section 10 of the Limitation Act and neither he nor his legal representatives could afterwards plead limitation, but an investigation of the facts seems to me to show that up to December 1893 the property now claimed had not vested in anybody. The most that can be said I think is that Jai Prakash had been directed as the Maharaja's agent

to acquire the property the expenses being provided by the Maharaja for that purpose. In December 1893, however, it seems to me that, in any view of the case, the Maharaja withdrew from the venture and his authority to the *Diwan* came to an end. There was no longer any agency and no longer any trust. The *Diwan* was certainly in a fiduciary position, but if after the agency terminated the *Diwan* acquired the property in his own name, the most that could be said would be, if the doctrine of *Keech* v *Sandford* (13) and similar cases applies, that there was a constructive trust in favour of the Maharaja or his representatives and not an express trust or trust for an express purpose within the meaning of S. 10 of the Limitation Act. Both Jai Prakash and the defendant have from the first undoubtedly asserted proprietary right in the property and I think that limitation would run from the date when the property was acquired, certainly not later than the 13th March 1896 when the lease was granted. More than 12 years have elapsed since that time, but it is said that the Maharani was then in possession of the Raj, having a life estate under her husband's will, and that limitation would not run against the reversioner but only against the life interest until the Maharani's death in 1907. If this view is accurate and if the plaintiff was not entitled to sue on the ground that he was a reversioner until 1907 then the suit so far as he is concerned is within time, but in order to determine the date at which the plaintiff was entitled to sue for possession of the Dumraon Raj, that is to say, the date at which his title vested, it becomes necessary, to my mind, to investigate that title and we have not the materials before us in the present suit to enter into these matters. In the adoption suit it was pleaded by the plaintiff that the Dumraon Raj was an impartible estate and that the succession was governed by the rule of lineal primogeniture and further that there was a custom or *kulachar* of the family that no female, whether a widow or a daughter, could succeed to the Raj the widow being entitled only to maintenance. If the plaintiff was entitled to succeed as the next lineal heir in the direct line upon the death of the late Maharaja, then the period of limitation against him would begin to run in 1896, when the late Maharaja died, and the suit would be barred by limitation. It may be that the late Maharaja was entitled to dispose of the property by will giving his widow a life interest. If he was not, then the plaintiff's title became vested on his death. The question of his title has not been investigated owing to the attitude which he adopted on this point before the trial began and it seems to me that it would be useless to enter into a speculative investigation based upon a hypothetical state of affairs contrary to the facts found.

It remains to consider whether the plaintiff has made out his title to possession of the house and garden in Dumraon. The learned Judge dealt with these two properties as though they were one, and pointed out that a considerable sum of money had been spent by the Raj upon the purchase and upkeep of this property and seems to have assumed that these properties were also held on trust by the *Diwan*. It was not argued before us, however, in this appeal that any trust attached to the possession of these properties nor had such a case been established.

[His Lor'ship then discussed and explained the evidence supporting his finding on the point and concluded:—]

In my opinion the appeal with respect to the property both in Burma and Dumraon should be allowed and the plaintiff's suit dismissed. The appellant is entitled to his costs here and in the Court below. The question of the appropriate hearing fee will be considered later.

Mullick, J.—It will be convenient at the outset to give a short history of the principal personages who figure in this case.

[His Lordship gave a short sketch of the lives of the principal personages:—]

(13) [1726] Select Ca. Ch. 61=2 Eq. Cas. Abr. 741.

It will be convenient next to give a short account of the Burma Reclamation Scheme.

[Then His Lordship gave an accoount of the Burma Reclamation scheme and after discussing the evidence observed as follows .—]

With regard to the admissions made by Jai Prakash in his own favour, they also are not proved, and even, if proved, they would not, in my opinion, be evidence. I do not believe that Jai Prakash Lal would select the Munsiff as a proper person for begging charity on his behalf from the Maharaja.

[Then His Lordship after continuing his discussion on the facts and the evidence, observed :—]

Therefore, on a review of the documentary and oral evidence up to the 11th December, 1893, I am satisfied that the learned Judge's conclusion that title rested with the Maharaja and not with Jai Prakash Lal is correct. I believe that Jai Prakash was sent by the Maharaja to Burma, with instructions to take land in his name for the Dumraon Raj and to hold and develop it in trust for the Raj and that the grant of Rs. 25,000 made on 1st June, 1889, was not a gift to Jai Prakash Lal to aid him in developing the property for himself but was a grant for the development of the property of the Dumraon Raj for the Dumraon Raj. I find that on the 11th December, 1893, the Maharaja revoked the trust and declined to pay for the development of the property any longer. Jai Prakash Lal then resolved to pay for the development himself and to assume the rights of ownership as the proprietor of the property. He, however, made one more effort in the presence of Moti Lal Ghosh to induce the Maharaja to continue the project but he was unsuccessful. His subsequent conduct is throughout consistent with the view that he treated the property after December 1893, as his own private property.

[His Lordship after further tracing the course of events till the lodging of the present suit by the plaintiff, continued:—]

In this state of things I am of opinion that the balance clearly preponderates in the plaintiff's favour.

In the absence of an express declaration we can only decide on inferences: but the learned Judge in the court below has made a most exhaustive and careful analysis of the facts and I think that the conclusions which he draws are irresistible. Even if I had been of the opinion that the evidence was evenly balanced and that the one view was just as reasonable as the other, I should not have been justified in appeal in setting aside the finding of the learned District Judge.

The limits within which an Appellate Court may act are stated as follows by Lord Esher in *Colonial Securities Trust Co.* v. *Massey* (14):-

"I have frequently stated this rule, and I think it is well expressed by Lopes, L. J. in *Sevaje* v. *Adam* (*15*). The matter is thus stated;

"where a case tried by a Judge without a Jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the Judge below was wrong, then inasmuch as the appeal is in the nature of a re-hearing, the decision should be reversed; if the case is left in doubt, it is clearly the duty of the Court of Appea not to disturb the decision of the Court below."

With the rule so stated I entirely agree.

To the same effect is Lord Buckmaster's judgment in *Nabakishore* v. *Upendra Kishore* (16). Speaking of the appellant the learned Judge says:

"If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded."

In the present case the appellants have failed to show that the learned Judge is wrong. It is true that the payment of the consideration money is not everything in a case of *Benami* though it was observed by Sir George

(14) [1896] 1 Q. B. 38=65 L. J; Q. B. 100= 73 L. T. 497=44 W. R 212.
(15) W. N. 95.
(16) 1922 P. C. 39=30 M. L. T. 234= 20 A. L. J 22=35 C. L. J. 116=42 M. L. J 253=(1922) M. W. N. 85=26 C. W. N. 392=3 P. L. T. 311=24 Bom. L. R. 346= 15 M. L. W. 417 (P. C.).

Farwell in *Bilas Koer* v. *Desraj* (2) that the criterion in these cases in India is to consider from what source the money comes with which the purchase money is paid. But after all it is a question of fact whether the payment of the money was a gift or a transaction for the benefit of the owner of the money. There is no question of presumption or of onus of proof; the matter is simply one of balance of evidence.

In *Ram Narain* v. *Muhammad Hadi* (7) their Lordships of the Privy Council observed:

"In many, it may be said in most, cases of alleged *Benami* this is a very important fact. But it is not the only criterion. Here it is consistent with the defendant's case which is that the plaintiff purchased the village for him and intended to be a gift in return for his services. In such a case a much more important fact is the actual possession or receipt of the rents of the property."

Here Jai Prakash was admittedly in possession but the evidence justifies the inference that he was in possession as Maharaja Radha Prasad's trustee

As I am unable to agree with the learned Judge's findings on issues 11 and 12 which relate to the question of settlement and which I propose presently to discuss, it is scarcely necessary for me to consider the law bearing upon title; but out of respect to the very elaborate arguments that have been addressed to us by both sides on this part of the case, I will shortly state my opinion.

The first question is whether the suit is barred by limitation, if S. 10 of the Indian Limitation Act applies; and if Jai Prakash Lal and after him the defendants took the property as trustee the bar of limitation is saved. The learned Vakil for the respondent before us states the plaintiff's case thus:—

"The Maharaja Radha Prasad deputed Jai Prakash Lal to Burma to acquire for the Raj in his own name land to be colonized by the tenants of the Raj in furtherance of the Government Colonization Scheme, Jai Prakash Lal applied for and acquired the land.'

Specific purpose:—Acquisition of land for Raj for colonization."

The sprcific purpose is a matter of inference and I have already found that the specific purpose alleged by the plaintiff is established. It is not necessary that an express declaration should be proved. In England inferences drawn from the conduct of the parties have been held sufficient to establish an express trust and I think the same principle should apply to trusts for a specifie purpose within the meaning of Section 10 of the Indian Limitation Act.

On behalf of the appellants it is next contended that there never was any property in 1889, and it certainly was not vested in Jai Prakash Lal by Maharaja Radha Prasad in consequence of any trust created between them.

Now with regard to the existence of the property, it is contended that no property came into existence before the 17th April, 1890, when for the first time information was given to Jai Prakash's agent Lallu Ram that the lease was ready for signature. It is suggested that before this date Jai Prakash Lal was in temporary occupation of waste land and that he was liable to eviction. I am unable to see how this argument affects S. 10 of the Limitation Act. It was open to Radha Prasad to create a trust empowering Jai Prakash Lal to go to Burma for the purpose of acquiring land for him and the land so acquired would become vested in the trustee from the moment of its acquisition and the trust would fasten to that land exactly as if it had been vested in the trustee at the moment of the creation of the trust. In the present case the evidence is that the trustee Jai Prakash Lal obtained possession of the greater portion of the land when he obtained permission to cut the timber on it; that is, on 29th January, 1890, (Ext. 29) and 20th February, 1890, (Ext 31). But I think Lallu Ram took possession even earlier. On the 14th November, 1889, Lallu Ram reports to his master that he has selected a piece of waste land at the Pyu Railway Station and that the demarcation had cost Rs. 235 and that the survey would cost Rs. 3,750. I think he was in possession from this date but even if he was not then he certainly was in possession

on the 20th Feb. 1890. Apparently his intention was to extend to the south of the Pyu river, but this was not allowed and only land to the north of the river was given. Certain lands belonging to the village of Tangan were also subsequently excluded, but nevertheless there was a large area put into his possession in the year 1889, and I cannot see how the argument as to there being no land in existence can be accepted.

The suggestion is perhaps that Jai Prakash Lal had no interest in the land at all till the lease became ready for signature. But this argument is not maintainable as he was put in possession under the terms of the draft application. The contention that the draft application gave no title because it was approved by the Financial Commissioner and not the Chief Commissioner does not carry weight because from the marginal notes on the draft application, it would appear that the Financial Commissioner was in communication with the Chief Commissioner before the final application was approved. There is also evidence that Mr. Finucane and Jai Prakash Lal had an interview with the Chief Commissioner before starting for Mandalay. Some of the terms in the application were no doubt altered afterwards; but that was done by consent between the parties to the transaction and the various acts of possession were clearly referable to the final contract of 1896 In my opinion the Government of Burma could not have resisted an action for specific performance at any time after April, 1889.

If therefore. Jai Prakash Lal went to Burma as Radha Prasad's trustee then Radha Prasad became the beneficial owner of all the properties which Jai Prakash acquired as such trustee and he was entitled to the benefits of all the contracts made by Jai Prakash in regard to the properties. The trust fastened in all after-acquired properties and these became vested in the trustee at the various times when they were so acquired. The defendants having come into possession as heirs of the original trustee are also bound by the trust. Neither their possession nor their father's can be adverse to the settlor or his representative.

What the position would have been if the plaintiff had been unable to prove that properties had become vested in Jai Prakash for a specific purpose it is scarcely necessary to discuss. In England an agent or a person in a fiduciary capacity if he acquires property during the continuance of that relationship is bound to hold the property in trust for his principal and cannot take any advantage from it for himself. He is an express trustee and is incompetent to plead the statute of limitation. It is contended that in India the law is different and scope of S. 10 of the Limitation Act is more restricted. Possibly that may be so, but the question does not arise. If Jai Prakash took the land at all under authority derived from his master he took it as a trustee within the meaning of S. 10. The section does not require that the trust should be proved by an express written or oral declaration I think it may be inferred from circumstances.

The next question is what title must the plaintiff prove. District Judge's order dated the 9th January, 1920, shows that the position which the plaintiff took up in the Court below was that he was in possession of the Dumraon Raj and under S. 110 of the Indian Evidence Act such possession was a good title against the defendants until the defendants could show a better title. The Court declined to amend the issues so as to let in proof of the plaintiff's title as the heir of Radha Prasad.

It is now contended by the defendants that the plaintiff cannot be permitted to put in evidence the judgment in the adoption suit for the purpose of showing his succession by inheritance to Radha Prasad's estate. Now there are two judgments of the Suddar Dewani Adalat which show that the Dumraon Raj is an impartible estate. I think in this case it is unnecessary to require further proof of that fact, and if the Burma property is an accretion to the Raj, it is sufficient for the plaintiff who is in possession of the whole Raj to rest his case on his possessory title.

Now, I find that in the plaint it is asserted that the Burma property is a part of the Raj. As the defendants were contending that the Burma property was not acquired by Radha Prasad at all, the case that it was the self-acquired property of Radha Prasad and that it had not been incorporated with the Raj was never made in the Court below. There is also evidence that the initial expenditure on the property came out of the Raj funds. The account for this money was kept in the Raj and part of the correspondence relating to the property was conducted with the assistance of the Raj establishment. It was asserted in the presence of Radha Prasad and Jai Prakash at Samad's meeting and in the tenants' adress, and later in the *Karn mas* and in Jai Prakash's *sarbasva* that the property belonged to the *reasat* (estate) and no contradiction was made either by the settlor or the trustee. The omission on the part of Radha Prasad to mention the property in his will and the subsequent omission by Maharani Beni Prasad and the plaintiff are points in favour of the appellants, but on the whole my opinion is that the evidence although meagre is sufficient to establish that the Burma property was incorporated with the Dumraon Raj. The decision rests on a question of fact, namely, intention, and at this distance of time it would be unreasonable to expect better evidence to prove that Maharaja Radha Prasad did intend to treat this property as his self-acquired property. Therefore if the Burma property is a part of the impartible Raj, the plaintiff, who is in possession of the remainder of the Raj, has a good cause of action for the recovery of the property and it being trust property within the meaning of S. 10 the defendants cannot plead limitation.

The next question is whether the plaintiff's title is liable to be defeated by the order of Radha Prasad, dated the 11th December, 1893 There was no express pleading to this effect in the written statement and indeed the defendants could not very well have asserted that Jai Prakash was the exclusive proprietor of the Burma property, and at the same time taken the alternative plea that Jai Prakash was a trustee and that Radha Prasad revoked the trust. The estoppel pleaded by the defendants was of a totally different kind, namely, that the plaintiff was incompetent to sue in consequence of an agreement made in September 1914.

But although the question of the revocation of the trust does not arise out of the written statement I think the Court is bound to take notice of it if the facts on the record establish it.

There is no question of surprise here and it is a point which is vital to the case.

Now it is contended that the doctrine laid down in *Keech* v. *Sandford* (13) precluded Jai Prakash from taking the benefit of the grant for himself. In *Keech* v. *Sandford* (13) the lessors had refused to renew the lease in favour of an infant *custui que* trust and thereupon the trustee took the renewal for himself. It was held that he could not retain the benefit and being a trustee must hold the lease for the benefit of the infant *cuestui que* trust. But here the question is whether the trust was not revoked. Was it an imperfect trust or was it a trust in respect of which the settlor had reserved to himself the right of revocation? If the property was not vested in the trustee at any time and the settlor retained the control over it or over the funds for developing it, then it was not a perfect trust. If, however, the settlor handed over the property to the trustee, subject to the condition that he would be competent to revoke the trust after the Rs 25,000 were spent, then it was a perfectly valid trust and the only question for consideration would be whether the order of the 11th December, 1893, was a valid revocation. In my opinion the answer is in the affirmative. In this connection the cases on abandonment of contracts of partnership are helpful. In *Prendergast* v. *Turton* (17) several partners started to work a mine; the plaintiff subscribed his share but refused to subscribe more, and the other partners continued to sink their money on it and eventually made the mine

(17) 1 Y. & Coll. C. C. 98.

profitable. The plaintiff then came forward with a claim and it was held that he was not entitled to succeed.

In *Rider* v. *Walsh* (18) the principle was applied to a building speculation. We have already seen that the Burma venture was a highly speculative project and if it had been a case of partnership between Radha Prasad and Jai Prakash I think the refusal of Radha Prasad to go on with the venture would have constituted an abandonment. Reasoning on the same principle the refusal here would amount to a revocation of the trust. It has been urged that Radha Prasad may have been content to take the risk of a forfeiture of the grant or the grant may have been of value to him even without the expenditure of more capital and the trustee was not justified in taking for himself the benefits that had up to then accrued and expending his own money and treating the whole property as his own. The matter has to be judged upon the facts. The income from the crops grown was only Rs. 956 in 1893 and the whole of it and more was required for the development of the land. In 1895 Lallu Ram was carrying on with money borrowed locally and if no further capital was going to be expended the land cleared was valueless. We have seen that clearances rapidly relapsed into *jungle*, and if Jai Prakash Lal had reported that he was not going to spend any more money the grant would most assuredly have been forfeited by the Burma Government. In the circumstances he was justified in thinking that the trust had been revoked. There was no lack of good faith, for the Maharaja had from the outset disliked the project and I do not think it was necessary for Jai Prakash to first surrender the grant and then apply for a fresh grant as exclusive owner.

Therefore limitation began to run against Radha Prasad from the 11th December, 1893, and was not suspended by his death or by the possession of Maharani Beni Prasad as executrix, legatee and life tenant.

Assume, however, that there was no abandonment in law, then Jai Prakash remained a trustee till his death and after his death Hariji dealt with the property as trust property and was not entitled to plead limitation. It has been contended that Hariji's possession was adverse to Maharani Beni Prasad, there was no express trust within the meaning of S. 10 and Jai Prakash was merely an implied trustee. Even then, however, Jai Prakash being executor could not be in adverse possession. But that will not help the plaintiff. He must show a cause of action either under Article 140 or Article 141 or Article 144 and this he cannot do.

Having definitely undertaken to rely upon his possessory title only, it is not competent to him to adduce evidence to prove any of the facts necessary to establish a title which gives him a cause of action for the application of these articles.

It was next contended that the Burma Laws Act makes a transfer of the grant invalid and therefore the legacy also was invalid and therefore Beni Prasad acquired no title to the property and that Raj Rajeshwari succeeded to the Burma property on Radha Prasad's death and time began to run against him form 1894 and that the present suit by the plaintiff is barred. The answer to this is that in the absence of any provisions for forfeiture and re-entry the transfer of the grant is not void. The Burma Government could have perhaps ejected Maharani Beni Prasad if she had taken possession of the Burma property, but it does not follow that Maharani Beni Prasad had acquired no title to the land by the will of her husband.

The question was also raised whether under the Lower Burma Land and Revenue Act (II of 1876) a suit would lie at all in the Court at Arrah and our attention was drawn to issue No. 13. The learned Judge, in my opinion, was right in deciding the issue in plaintiff's favour. The provision in the Land and Revenue Act in question only applies to a suit between the Government and the grantee or any person claiming under him and does not affect a suit to which Government is not a party in which no question as to the status of land-

(18) 11 Irish Eqity 22.

owner is in controversy. In a suit between a settlor and his trustee no question arises which the Revenue Court can decide.

Let us next examine the position if the Burma property is not an accretion to the impartible Dumraon Raj. In that case the property will descend first to Maharani Beni Prasad and then to her daughter the Maharani of Rewah and then to the latter's son Maharaja Gulab Singh. The plaintiff's possessory title will not assist him in establishing a cause of action against the defendants and he must have recourse either to Articles 140, 141, or 144 as stated before.

Unless the plaintiff can rely upon the facts found in the adoption suit there is no evidence in the present suit to establish the plaintiff's title to Radha Prasad's separate properties. On behalf of the plaintiff it is suggested that the judgment in the adoption suit should be accepted as evidence under S. 43 of the Indian Evidence Act. I do not think either S. 43 or any other section will make this judgment between other parties admissible against the defendants. It may be said that it is a matter of great hardship to the plaintiff that in every suit for recovery of land appertaining to the separate estate of Radha Prasad he will have to prove his title by inheritance; but the defendants are entitled to take this defence however technical it may be and to run the risk of being mulcted in costs in the event of being defeated on the issue. The mere fact that the plaintiff is in possession and pays Government revenue for the Dumraon estate will not prove that he is the nearest heir of Radha Prasad; and therefore if the property is not an accretion to the Raj, he cannot succeed only upon his possessory title.

The other objection raised by the defendants in this connection is that assuming that the plaintiff has proved a *prima facie* title as the heir of Radha Prasad, the Maharani of Rewah had a preferential right to the Burma property and therefore the suit must fail. The plaintiff seeks to reply to this by showing that in the suit instituted in August 1914, against the plaintiff, the Maharani of Rewah claimed the whole Dumraon Raj from the plaintiff and that although her son, the present Maharaja Gulab Singh, was not a party when the suit was first instituted he was brought upon the record before the compromise decree. By the compromise both the Maharani and her son gave up all claim to the Dumraon estate. It is contended by the plaintiff that so long as this decree stands neither the Maharani nor Gulab Singh can challenge the plaintiff's title. The defendants reply that the decree in question is a nullity in so far as it purports to deal with Gulab Singh's interest for he was then a mere reversioner whose chance of succession could not form the subject of any bargain. I think if the decree so far as Gulab Singh was concerned was a nullity, the argument of the defendants would prevail. But in my opinion the decree has to be shown to be a nullity and for ought we know there may have been many circumstances proved at the trial of the Rewah suit which would make the decree voidable and not void; for instance the Maharani may have been representing the whole estate, or the compromise may have been for the benefit of the estate and not for the personal advantage of the limited owner or there may have been legal necessity. I think that as the defendants do not claim through the Maharani of Rewah they are not entitled to challenge a decree which is voidable and not void.

It was contended by the learned Counsel for the appellants that if S. 10 of the Indian Limitation Act does not apply then Article 142 applies and that the plaintiff cannot rely on Articles 140, 141, and 144. It is true that the manner in which the plaint has been drafted assists this argument; for the plaintiff did not in the plaint rely upon his title as reversioner at all. His case was that his predecessor was in possession of that property through his servants and Jai Prakash was a *Benamidar* and that he had been dispossessed by Jai Prakash. It was only when the matter came to be discussed by reason of the defendants' asking for particulars that a case of

trust such as is contemplated by S. 10 of the Indian Limitation Act was disclosed. The plaintiff's present case is that Jai Prakash was not a mere name-lender and that Radha Prasad was never in direct possession and that this is not a case for recovery of possession after dispossession or discontinuance of possession. Whatever may be said of the earlier stages the parties have gone to trial on a case of trust and it is too late now to seek to apply Article 142.

My view of the case is that the plaintiff is entitled to the benefit of S. 10 of the Limitation Act and to recover the Burma property from the defendants as an accretion to the Dumraon Raj but for two circumstances which stand in his way : (1) the abandonment on the 11th December, 1893, and (2) a settlement made with Hariji on or about the 20th August, 1914.

[His Lordship discussed the evidence relating to the settlement between the parties and in the course of the discussion observed :—]

The learned Judge has not hesitated to believe Mr. Sinha whenever he is in conflict with the plaintiff; but the reason he gives for not coming to the conclusion that there was a completed settlement is that Mr. Sinha was an unsatisfactory witness and that he talked too much. In his evidence I have been able to discover only one inaccuracy, namely where he stated that on his arrival in India in September, 1914, he heard from Hariji that the Burma dispute had already been settled. On reading the whole deposition it is clear that this was a mistake. But I can see nothing in the witness's evidence which otherwise supports the finding of the learned Judge that Mr. Sinha's memory is not to be trusted. Mr. Sinha was for sometime a Journalist and possesses a remarkable command over the English language and it is to be expected that he understands the meaning and effect of the words he has used and on his deposition as recorded, there can be no possible doubt that the plaintiff and the defendant were "*ad litem*" with regard to the settlement.

It is with great hesitation that an appeal Court differs with the trial Court on its estimates of witnesses whom the trial Court has had an opportunity of seeing; but where the opinion of the trial Court depends not upon the honesty of the witness but upon reasons which the appeal Court cannot accept, it is obviously the duty of the appeal Court to record its disagreement with the trial Court and to set aside the findings of fact arrived at by him.

[His Lordship again discussed evidence and observed :—]

The result is that on a careful review of the evidence given on this part of the case, I am satisfied that the plaintiff's allegation that there were three completed contracts between him and the defendant made respectively in August, 1914, November, 1914, and May, 1915, all of which were successively broken by the defendant cannot be accepted. On the other hand, the contract alleged by the defendant, namely, that made on the 29th September, 1914, and ratified between the 19th and the 21st November, 1914, should be held to have been proved. It is a good defence to this suit and the plaintiff must fail.

I do not think there is any difficulty in regard to the law applying to this part of the case. The contract that in consideration for the monies paid by Hariji the plaintiff relinquished all claim to the properties in Burma is a complete defence in this suit. The plaintiff cannot be heard to say that the consideration was bad. The case of *Stapilton* v. *Stapilton* (19) is authority for the proposition that if an agreement is entered into upon a supposition of a right or of a doubtful right, it shall be binding The compromise of a doubtful right is a sufficient foundation for an agreement. The case of *Jordon* v. *Money* (20) has no application nor is it necessary for the defendants to have recourse to any principle of estoppel.

It was contended by the learned Vakil for the respondent that it is necessary to show that specific performance of the contract could have been obtained in the Court of the Subordinate Judge at Arrah at the

(19) 1 Atk. 2.
(20) 5 H.L. Cas. 185—23 L.J.. Ch. 865.

time when the present suit was institute[1] and that the necessary requisites had been established by the defendants; possibly the objection might be a good one if it were necessary for the defendants to rely upon estoppel; but as they have founded their case only upon contract the defence is a good one.

The plaintiff's claim to the properties in schedules C and D is set out in paragraphs 13 and 14 of the plaint which run as follows:—

Para 13:

"The buildings and out-houses and other erections described in the said Schedule C, were constructed partly on *khas* land of the Dumraon estate and partly on pieces of adjoining lands purchased from time to time by the Raj in the name of the said Rai Jai Prakash Lal Bahadur for a suitable residence of the Raj Dewan, and the same was constructed, repaired and maintained solely at the expense of the Raj and the price even of furniture and cost of library in the building were also paid from the Raj treasury."

Paragraph 14:

"The garden with buildings described in Schedule D, was laid out and built on *khas* land of the Raj and the adjoining pieces of land were purchased by the Raj in the name of the said Rai Jai Prakash Lal Bahadur and all costs of erections and laying out and maintenance of buildings and garden were also paid from the Raj Treasury for use of the Diwan and guests of the Raj. The plaintiff states that said properties set out to Schedules B, C. and D, formed and still form part of the said Dumraon Raj."

The cause of action is stated in paragraph 17 to be that defendants are now wrongfully asserting that they are entitled to hold possession of the properties in their own behalf and the relief claimed in paragraph 19 is possession of the said properties with mesne profits.

The learned Judge has declined to award mesne profits but he has made a decree for possession and for an account of the sums expended by the defendants or their predecessor on the properties specified in Schedules C and D such sums to be credited to the defendants.

[His Lordship then discussed the evidence relating to the matter and continued:—]

The decree of the learned Judge, therefore, as to the lands in Schedules C and D will be set aside.

There remains the question of limitation. With regard to the house and garden, there is no question of accretion or trust. It is admitted that the properties are within the impartible Raj. It is alleged that Jai Prakash was in possession of these properties as a Raj Officer and after his death Maharani Beni Prasad was in possession as a Hindu female. The plaintiff, in order to show that the suit is within time, must apply Articles 140 or 141, that is to say, he must prove his title to succeed to Radha Prasad's estate; his possessory title will not be enough. His suit must therefore fail.

The result, therefore, is that in my opinion the appeal should be decreed with costs in both Courts.

Foster, J.—I first deal with the appeal in respect of the property "B" of the plaint ordinarily described as the Burma property.

[His Lordship in the course of his discussion on the facts and the evidence, observed as follows:—]

It is important at the outset to have some clear principles as to the relevancy of the acts and declarations of parties in a complicated case like this. The learned Judge finds that Jai Prakash Lal after the end of 1893 bore the burden of the expenditure in developing the property. The result of that expenditure and the Maharaja's previous expenditure was the grant of 1896. The grant itself by its covenants imposed, on penalty of forfeiture, a further heavy expenditure. This was met by Jai Prakash Lal and his son the defendant. All this expenditure is in a sense the cost of acquisition, analogous to purchase money. But for that expenditure, property "B" of the plaint would not have been acquired or retained. So the cost of acquisition has in this case a double source, the Raj Treasury and Jai Prakash Lal's purse. I take it that I am bound, in view of the high authorities which I shall presently quote, to hold that where the cost of acquisition is only in part traceable to the plaintiff, the Court should in the absence of an unambiguous criterion of ownership take into consideration.

"The surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions, and their subsequent conduct including their dealings with or enjoyment of the disputed property."

This rule has its application to every important controversy in this case. The effect of it is that there is no legal presumption on either side. I venture to borrow these principles from the judgments in *Promode* v. *Madan* (6) *Dalip* v. *Chaudhurain* (21) and *Mt. Amiroonnissa* v. *Mt. Ashrafoonissa* (22).

[His Lordship in continuing the discussion on the evidence observed :—]

One thing we do know that the day before the Maharaja made his grant by *parwana* of Rs. 25,000 Jai Prakash Lal in giving his instructions by letter to Lalluram Pande the manager in Burma as to the opening of experimental farms on the property, warned his agent that he, Jai Prakash Lal, could not afford a rich man's expenditure. I take this to be part of the *res gestæ* at the time when Jai Prakash Lal assumed control of the enterprise. I am using the words *res gestæ* as signifying declarations and circumstances which constitute or accompany and explain the fact or transaction in issue, the formulated issues in this particular instance being Nos. 3, 4 and 5. The whole correspondence of the month of May 1889, appears to me to be valu ble as illustrating the motives actuating Jai Prakash Lal when he first assumed possession. It also explains his mental attitude when before that date he sent to Burma money from his own funds.

[His Lordship then resumed his discussion on the evidence and then continued :—]

My conclusions, so far as the Burma property is concerned, are in effect much the same as the case presented by the defendant in his written statement. Reverting to the plaintiff's case, I doubt whether even as it stands it could be made, in the circumstances now proved, the basis of a decree in a Court governed by principles of equity. Let us assume that there was the relationship of principal and agent between the Maharaja and Jai Prakash Lal in this Burma enterprise at its inception in 1889. Sir Ashutosh Mukherjee, in the course of his learned argument here on behalf of the respondent, stated what authority or mandate he wished us to apply to this agency : it was he urged, a direction to Jai Prakash Lal to acquire for the Raj in his own name land to be colonized by tenants of the Raj in furtherance of the Government colonization scheme and he added that when Jai Prakash Lal in pursuance of the authority applied for and acquired land, that land became affected by a trust as soon as it had an existence legally recognizable by demarcation. If this agency be now assumed, we must not omit to take into consideration the firmly proved facts that in the latter half of 1893, the Maharaja notified to Jai Prakash Lal that he would spend no more money on the speculation, being convinced that the trial of the last four years had proved it to be a bad investment, where upon Jai Prakash Lal on the 11th December, 1893, assumed responsibility for the financial burden in future, and thereafter he and his son put their own money, labour and skill into the enterprise, and bore the entire risk of loss. These facts are concisely and forcibly summarised in paragraphs 9 and 21 of the written statement and in the latter paragraph there is a definite plea of estoppel :—

"For years this defendant and his predecessor-in-interest have born the entire risk of loss and all responsibilities in connection with the said speculation, and the said Maharani Beni Prasad Kuari as well as the plaintiff with full knowledge of all circumstances allowed this defendant and his predecessor to act as aforesaid as full owners without claiming any interest therein ; and in such circumstances the defendant submits that the plaintiff is estopped from alleging or contending that the Burma, properties did not belong to the defendant."

In consequence of this plea the issues raised were :—

"12 (*a*) Are the allegations made and contained in paragraph 21 of the written statement of the defendant Rai Bahadur Harihar Prasad true ?

"(*b*) If so, is the plaintiff estopped and debarred from alleging or contending that the said preperty does not belong to the defendant ?

(21) [1908] 30 All. 258=35 I. A. 104=10 Bom. L.R. 600=12 C.W.N. 609=14 Bur. L.R. 151=4 M.L.T. 141 (P.C.)

(22) [1871] 14 M I.A. 433=17 W.R. 259=3 Sar. 58 (P.C.)

Such an issue as this is usually dealt with in treatises of law under the topic "Acquiescence." (Halsbury's Laws of England, 13, pp. 166-168) or "Laches" (Lindley on the Law of Partnership); but in my opinion it falls within the comprehension of S. 115 of the Indian Evidence Act. I am assuming the existence of an agency. and also assuming that the plaintiff is the heir and representative in this matter of Sir Radha Prasad Singh Maharaja of Dumraon. On the facts taken as proved or assumed I state the case thus :—

"A authorises B his agent to take up a speculative business project and allots a sum of money for an experimental trial thereof. When after four years the money is exhausted, A refuses to furnish further expenses. B instead of relinquishing the project—as he might without consequent loss to himself or further loss to A—proceeds with it. After 12 years of heavy expenditure of money with a great risk of loss B and after his death his son attain success, and the adventure becomes profitable. Twelve years after this, during which the profits have been increasing year by year, A's heir comes into Court and claims the whole property with all past profits minus B's capital outlay."

I am of opinion that the agency ceased in 1893 by the principal's implied determination thereof, for I do not see how after a principal has refused to indemnify an agent in the future in a speculative business committed to that agent, that principal can be heard to say that the agency subsisted. S. 207 of the Indian Contract Act provides that an agency may be revoked by implication. At any rate the agency was determined in this case by the principal's death in May 1894. After this therefore there was no fiduciary relationship subsisting between the parties, so far as the acquisition of the Burma leasehold which took place in 1896 was concerned. (I have already expressed the opinion that the duties of Jai Prakash Lal as executor did not extend to the Burma enterprise.) The absence of a fiduciary relationship excludes such cases as *Hart* v. *Clark* (23); where also, be it noted, the plaintiff from beginning to end insisted on his legal rights, though refusing to countenance his co-sharer's method of raising the requisite capital. There was in that case no intention shown of abandoning the undertaking. I am also excluding as quite unnecessary for the purpose or this argument the English Equity doctrine as to stale demands. As I said before, this question of estoppel can rest on S. 115 of the Evidence Act :—when one person has by his omission intentionally permitted another to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any, suit between himself and such person or his representative to deny the truth of that thing. The "thing" in this instance is the abandonment by the Maharaja of the Burma enterprise. After the 11th December 1893,—I choose this date for sake of certainty—Jai Prakash Lal considered that henceforth he and the Maharaja were strangers, so far as the Burma enterprise was concerned; and that belief on the part of Jai Prakash Lal and his son was the natural result of the acts and omission of the Maharaja and his representatives.

After excluding the case of *Hart* v. *Clark* (23), and cases which were dismissed expressly on the ground of stale demand such as *Senhouse* v. *Christian* (24) referred to in *Norway* v. *Rowe* (25) *Prendergast* v. *Turton* (26), and *Clegg* v. *Edmondson* (27), I am left with such authorities as *Cowell* v. *Watts* (28) *Jekyl* v. *Gilbert* (29) and *Palmer* v. *Moore* (30) which as the learned Editors of the Eighth Edition of "Lindley on the Law of Partnership" observe, are cases not so much of laches as of estoppel or agreement to release These cases show abandonment either expressed or clearly implied by the acts of parties and in my opinion rest upon general principles of law, and in no way upon the special law of partnership. In *Cowell* v. *Watts* (28) the plaintiff and defendant agreed to take land for improving it and letting it upon building

(23) 6 H.L.C. 633.

(24) 19 Beav. 356.
(25) 19 Ves. 144=12 R. R. 157.
(26) 13 L.J., Ch. 238.
(27) 8 De.G.M.&G. 787=26 L.J., Ch. 673=3 Jur. (n.s.) 299.
(28) 2 H. & T. W. 224=19 L.J., Ch. 455.
(29) Mc. Naughten's Sel. Cas. Ch. 29.
(30) [1900] A.C. 293=69 L.J., P.C. 64=82 L.T. 166.

leases. A long lease was granted in the name of defendant. There was no written agreement of partnership. The defendant acted quite independently of the plaintiff, excluding the plaintiff's cattle from the land ; he mortgaged it and with the proceeds built upon it. The plaintiff though aware of all this did nothing. The suit brought after eighteen months was dismisssed on the ground that the plaintiff had by his conduct induced the defendant to suppose that the plaintiff had abandoned the speculation and that the defendant had the sole right to the land. In *Jekyl* v. *Gilbert* (29) two artificers joined in a work, and the customer refused to pay. The defendant requested the plaintiff to join in an action for their dues, but the plaintiff refused whereupon the defendant proceeded alone for his own dues and obtained a verdict. The plaintiff then claimed half of the amount recovered, but the Court held that he was not entitled to any share of it. In *Palmer* v *Moore* (30) a written notice by a joint-holder of a gold mining lease to his co-lessees that he was unable to contribute to the joint expenses and that they might do as they liked with the lease (which be it noted was in part his own contribution) was held to be an abandonment of the beneficial interest therein ; and the subsequent working of the mine by one of such co-lessees out of his own resources was held to be an acceptance of such abandonment. In the first of these three cases there was wilful omission and no more ; in the last two cases there was a definite act of refusal more formal in the third case than in the second. In all there was estoppel ; in the last there was possibly also an agreement to release.

Applying these cases to the present case, I find a clear basis for deciding in the affirmative issues 12 (*a*) and (*b*) quoted above.

With regard to the rule in *Keech* v. *Sanford* 13) it is urged that the land taken by Jai Prakash Lal would even after the revocation of his agency in 1893 remain in his hands affected with a trust in favour of the Maharaja ; and the grant would become trust property as an ingrafture thereon. In my judgment, even if the leasehold property 'B' had been claimed by the Maharani in 1896, just after it came into being, a complete defence could have been made on the ground of abandonment and estoppel, resting as now upon the facts (*a*) the revocation of the agency, involving the countermand of a special trust to make an experiment in reclaiming certain land in Burma (*b*) the acquisition thereafter of the leasehold by Jai Prakash Lal by dint of his open expenditure of time, labour and skill on the colony. So the rule in *Keech* v. *Sandford* (13) would not in the circumstances be applicable

The question of limitation has to be discussed. For this issue I again assume that in April, 1889. Jai Prakash Lal applied for land in Burma as the agent of the Maharaja. But I have found that no agency enured after the 11th December, 1893, or at any rate after the Maharaja's demise in May, 1894. The property 'B' in suit is a lease-hold. Till it came into existence on the 13th March, 1896 ; it could not be the subject matter of litigation, and therefore limitation could not run. When on that date it came into existence, no agency was subsisting. So it can never be said that property 'B' was vested in Jai Prakash Lal as an express trust. A trust, if any, existed, must have arisen out of circumstances other than the direct agreement of parties. It must then be a constructive trust, not exempt from limitation. The adverse possession of Jai Prakash Lal and his son could commence no earlier than the 13th March, 1896, and at that time would avail against the Maharaja only ; it would affect the plaintiff's interest only from the Maharani's death in 1907. The suit was brought in 1917. There is therefore on these facts and assumptions, no bar of limitation. There is no claim in respect of the sum of Rs. 27,750 so possibly it is unnecessary for me to put on record my opinion that such a claim would be barred by article 89 of the Limitation Act.

I find that the suit for Burma property fails ; firstly because there is no cause of action, as the beneficial

interest was from first to last in Jai Prakash Lal and his son ; and secondly because, even if there was an agency, the facts pleaded and proved by the defendant establish an estoppel. As for the plaintiff's right to sue, that, being a general question, will be considered later.

I come now to the question of settlement. It appears to me to be proved by the defendant's own deposition, corroborated as it is by the admissions made before witnesses of very high credit, Sir Ali Imam, Mr. Sachhidananda Sinha and Mr. Justice P. R. Das, that the plaintiff in a private colloquy with the defendant in September, 1914, at Dumraom pro nised not to sue for Burma property in consideration that the defendant should not sue the plaintiff for Rs. 2,21,200 then owed to the defendant ; this contract was amplified in November, 1914, at Dumraon before Mr. Sinha, when the plaintiff added a promise to execute a deed of relinquishment of claim in the form of Exhibit J, in which the consideration was expressed to be the defendant's past services and financial aid in the Dumraon Raj adoption suit.

[His Lordship then discussed the evidence and continued :—]

I hold that the plaintiff's suit is barred on the equitable ground that he for consideration made a promise to relinquish his claim to the Burma property.

I come now to the claim to the house and garden in Dumraon, properties C and D of the plaint.

[His Lordship after discussing evidence, continued :—]

I hold that the plaintiff has not proved his claim, but without prejudice to further question whether these tenancies are subject to payment of rent.

One issue remains to be discussed, whether the plaintiff has a right to sue. I find evidence that the plaintiff is the *gaddinashin* in possession, recognised by the Courts and by Government, and so is *prima facie* in a legal position to claim possession of all properties appertaining to the Dumraon Raj. I am using this term "Dumraon Raj" in the sense of the elaborate definition involved in the first three paragraphs of the will of Maharaja Sir Radha Prasad Singh. The claim in the plaint is based on the assertion that the properties in suit were acquired for the Raj by the last Maharaja, and possessed by him as Raj properties. This is a clear statement of accretion. But I find no satisfactory evidence that the Maharaja intended to amalgamate the property with the Dumraon Raj—apart from the question whether he acquired it at all. This link in the plaintiff's claim is missing, more especially in the case of the Burma property. The plaintiff in this respect has not shown a right of action.

In my opinion the appeal should be decreed with full costs of both Courts.

Appeal allowed.

✱ ✱ 1925 PATNA 99

ADAMI AND MACPHERSON, JJ.

Nageswar Prasad Sharma and others—Appellants.

v.

King Emperor—Opposite Party.

Criminal Appeals Nos. 117, 118 and 119 of 1924, Decided on 7th August 1924 from the judgment of Addl. District Magistrate of Patna, D/- 14th June 1924.

✱ ✱ ***Penal Code, S. 124 A—Principles of construction—Article as a whole should be taken—Single sentences or expressions should not be looked to—Undue importance should not be given to inflated or turgid language—Intention to cause disaffection is necessary—But amount or intensity of disaffection intended to be excited is not material—Class of paper in which article appears and class of people likely to read it are material points—Though the writer's ultimate object may not be offensive, yet his method may incriminate him Conditions at present in India are much more in favour of free expression than about 20 years ago—But the possible effect of a given matter on the class of the present day people who read the same is to be considered—Books and reports intended to educate English public opinion about Indian affairs would come under one of the explanations to the section. To ascribe to Government the intention of dividing and ruling so as to destroy indigenous culture etc., and to state that Government was ruling by brute force are seditious—Though a phrase like "Punjab atrocities" is commonly used by some people, yet, if it is used for generating disaffection, it is an offence***

Court must not look to single sentences or isolated expressions but take the article as a whole and give a full, free and generous consideration and amply deal with it in a fair and

liberal spirit, not picking out objectionable sentences or strong words used, nor should undue importance be given to inflated and turgid language. [P. 102 C. 2]

Court must also look to the real intention and spirit of the article. It has to see whether the general tendency of the article is such as to show an intention to excite the feelings mentioned in the section. The amount or intensity of the disaffection is absolutely immaterial, for if a man excites or attempts to excite feelings of disaffection at all, even in the smallest degree, he is guilty under the section. The class of paper in which the article appears and the class of people among whom it will be circulated are important points. Though the ultimate object of the writer may be unobjectionable, if, in explaining that object, he uses language which is likely to bring the Government into contempt or to excite disaffection S. 124A will apply.

[P. 102 C. 2; P. 103 C. 1]

Conditions at present in India are quite different from those which existed in 1897 and far greater freedom is given to the press now than was given in those days and things which may now be said and written with impunity would have been treated as seditious at the end of the last century. But we have to consider the state of the minds of the people at present and the present conditions and to decide whether this article is now likely to engender feelings of hatred, enmity or disloyalty in the minds of the readers.

[P. 103 C. 1]

A book or report published in England like Ramsay Mac Donald's "Awakening of India" or a despatch of the Secretary of State is intended to inform the public in England of this day about the state of affairs in India' and it can have no intention of causing disaffection in this country or of bringing the Government established in this country into contempt. Those publications would in any case come under one of the two explanations, even if published in India. [P. 103 C. 2]

The ascription to the Government of the object, as a root principle, to divide the races of India so as to strengthen its rule and to destroy the language, culture, trade, commerce, arts and industries by strangling regulations, as well as the description of the Government as a Government which rules by brute force in an arbitrary manner over a people who have no voice in the administration, cannot fail to cause a feeling of disaffection and contempt, if not hatred, in the minds of the Indian reader. [P. 104 C. 1]

Even the adoption of a phrase like the "Punjab atrocities" may be seditious if the intention is to stir up disaffection against Government though that phrase may be commonly used by portions of the public.

[P. 104 C. 2]

P. C. Manuk, *S. N. Sahay*, *B. A. Jamaur*, *S. K. Banerjee*, *S. B. Sinha*, *M. N. Pal*, *R. B. Surma*, *C. C. Das*, *D. P. Sinha* and *Nageswar Prasad*—for Appellants.

Sultan Ahmed and *S. P. Verma*—for the Crown.

Adami, J.—The three Appellants have been convicted by the Additional District Magistrate of Patna under S. 124A of the Indian Penal Code.

Nageswar Prasad Sharma has been sentenced to two years' simple imprisonment and to fine of Rs. 1,000 or in default to six months' simple imprisonment, Ganesh Panre has been sentenced to one year's simple imprisonment, and Hanuman Upadhaya to 18 month's simple imprisonment.

The charge preferred against them and on which they have been convicted is to the effect that in an issue of a paper called the "*Tarun Bharat*" printed at the Jagat Bhandhu Press and published on the 20th January 1924, and by an article entitled "*Bhartika akash men Swatantrata ki gunj*" (The Echo of Freedom in the Indian Firmament), they brought or attempted to bring into hatred or contempt, or excited or attempted to excite disaffection towards His Majesty or the Government established in British India. The paper called the "*Tarun Bharat*" and the Jagat Bhandhu Press are owned by the first Appellant, Nageswar Prasad Sharma, and he has been charged as being the Editor of the paper. Ganesh Panre has also been charged as Editor on the date of the publication, and Hanuman Upadhya has been charged as the Printer and Publisher of the newspaper.

[His Lordship here dwelt on some matters which are not necessary for this report and then went on to discuss the contents of the article forming the subject of the charge.]

The article, as I have stated, is entitled "The Echo of Freedom (or as Mr. Manuk would translate the word 'Swatantrata'—'Home Rule' or 'Independence') in the Indian Firmament." The writer styles himself as a *Tarun* (young man) The first portion has a sub-head, "The success of the diplomacy of the English," and begins with the statement that the Indians have been slaves under the Foreign Rule for centuries. The article sets forth how the English came to India as merchants during the Muhammedan Rule and how the basic principle of their policy was, "by causing

differences between the Hindus and Muhammedans by their 'Divide and Rule' policy" to rule without any obstruction. The Muhammedans, without any blame to themselves, became the handle of the dividing axe and had thereby cut their own legs from beneath them.

Then a Sanskrit Sloka is quoted which likens the King to a prostitute in that his policy is a mixture of truth and untruth, harsh and sweet talk, violence and kindness, greed and liberality, daily expenditure and accumulation of jewels and riches in abundance. This Sloka is followed by the translation which the author of the article would ascribe to it and this translation is correct except that for the words "daily expenditure and accumulation of jewels and riches in abundance" the translation given is "lavish expenditure of money and the plundering of subjects."

The article then proceeds to show that in course of time the policy of creating differences was exposed and the people began to realise that they were the slaves of outsiders and that insults offered to them were not individual but national.

The author gives an account of the effect of the conquest of a nation. He states that the conquerors "tear from its root the language of the conquered nation and establish their own literature and system of administration and to perpetuate their existence, even create wonderful and strangling regulations which destroy trade, commerce arts and industries as well as the nationality of a conquered nation, and by constant subjection to suffering the sense of religion and duty and the sprouts of development of intellect among the conquered are completely blasted and the very lives of the people are converted into a state of slavery on a large scale."

Having given this description of the condition of a conquered race, the article states that this description is applicable to India at the present time. It is stated that India has been ruined in the vortex of the strategy of foreigners. While Rome and the Empires which existed at the time of the glorious era of India still flourish. India is ruined by misfortune and there are still traitors among them who obstruct the progress of the county.

The article states then that the strategy of the "Divide and Rule" policy is that it has brought about quarrels and dissensions in India, and now India, which used to be the fountain head of civilization and the repository of art and treasures, in the course of time has come under the rule of nations of peoples who were barbarians at the time of India's glory.

After stating that the times are changed now, and that the Hindus and Muhammadans have become united and realise the depth of their poverty and ruin under foreign rule, while at every step the Indians have to suffer humiliation and the principle of self-determination is nothing but a farce for them. The writer describes the humiliation that had to be suffered at the time of what is described as "the Punjab atrocities," he shows that it was those very "atrocities" and the partition of Bengal which gave birth to the idea of freedom and stated that in the Punjab "cruelty was shown and at Jalianwalabagh cruel atrocities were perpetrated." The failure of the Indian Mutiny is mentioned and it is stated that since that failure the British Empire has only become more firmly established and since then "India has been emasculated."

Then comes the sentence in the translation to which I have referred and which in my opinion does not represent the true meaning of the Hindu words used. Both the Translators show the sentence "To-day wild beasts tear and devour us and we become a prey to the bullets of the Whites." Now the Hindi words are, "*Aj wah din hai ki jangli pashu hamko chir kar kha jate hain, aur goron ke goli ka shikar bante hain*" It is clear that this sentence can well mean—"This is the time when wild beasts tear and devour us, while they are the sport of the bullets of the white men" The translators have omitted to note that the words "*bante hain*" have not as their subject the word "*Ham*" which does not appear in the sentence but the words "*jangli*

pashu." The reference seems to be to the Arms Act Regulations expressing that while the people of India are unprotected against wild beasts these same wild animals provide sport for the white man's bullet.

After deploring the fact that the whole nation has become impotent, cowardly and lethargic the writer goes on to state "that the martyrs have infused new life into India and volcano has burst forth." Then follow these sentences: "It is a matter of shame for us and we should down ourselves (at the thought) that only one lakh of white men in India are ruling over 31 crores of us Indians in a perfectly arbitrary, irresponsible manner resorting to various political diplomacies in the administration, and are tightening the chain of our slavery by watering the tree of military rule in which we have no voice with the nectar-like water of co-operation. The country now wants to annihilate all the brute force of the foreigners and to demonstrate that India cannot be ruled by the exercise of brute force even for a day." The article then points out that in this century all through the world a struggle is going on for self-defence and then shows how the arbitrary military monarchism in Germany and Russia has been brought to nought, in Germany by the satanic action of Bolshevism forcing the Kaiser to throw away his sword and in Russia allowing the shooting down of the Czar and his family. Finally the article states that India's longing and struggling for freedom is natural, for dependency must bring misery, and ends up by stating that the ambitions of India are the same as those of Ireland. But the first instalment should have included another sentence which is a continuation of the theme of the words "And our ambitions and those of Ireland are the same" to the effect that Ireland is more advanced than India in the walk of freedom and the sacrifice of Mc Swiney calls upon them to follow his example and sacrifice their all for the sake of the country,

Now the principles which have to be followed by the Court in estimating whether any matter spoken, written or published is such as to bring it within the purview of S. 124A have been laid down by a series of decisions of the Courts in India and perhaps the leading authority is the charge delivered to the jury by Strachey, J., in the case of *Queen-Empress* v. *Bal Gangadhar Tilak* (1). The principles are clearly set out in that charge.

Lord Fitzgerald too in the case of *Regina* v *Sullivan* (2) showed what should be the guiding principles in interpreting an article of the kind which we have to consider. We must not look to single sentences or isolated expressions but take the article as a whole and give a full, free and generous consideration and amply deal with it in a fair and liberal spirit, not picking out objectionable sentences or strong words used, nor should undue importance be given to inflated and turgid language. We must also look to the real intention and spirit of the articles. [*Queen-Empress* v. *Jogendra Chunder Bose*(3).]

[His Lordship here recounted the arguments of the counsel for the defence and continued :—]

The admissibility of the two other instalments of the article put in as evidence to show intent has been questioned by the learned Counsel, but, though it is admitted that those subsequent articles are much stronger in their language than the first instalment, it is not, I think, necessary to depend upon them as evidence of the intention of the article which is the subject of the charge.

What we have to decide is whether the article constitutes an attempt to bring the British Government established in India into hatred or contempt or attempt to excite disaffection towards that Government. The meaning of "disaffection" has been explained in the section as including disloyalty and all feelings of enmity, and we have to decide whether the general tendency of this article is such as to show an intention to excite the feelings mentioned in the section. The amount or intensity of the disaffection is absolutely immaterial,

(1) [1897] 22 Bom. 112.
(2) [1868] 11 Cox. Cr. Cas. 44.
(3) [1891] 19 Cal. 35.

for if a man excites or attempts to excite feelings of disaffection at all, even in the smallest degree, he is guilty under the section, as has been pointed out by Strachey, J., in the charge to the jury in the case of *Queen-Empress* v. *Bal Gangadhar Tilak* (1). We have to decide, too, whether the character of the article is such as to bring it within either of the second or third explanations to S. 124A; and we have to bear in mind the class of paper in which the article appears and the class of people among whom it will be circulated and we have to remember also that though the ultimate object of the writer may be unobjectionable, if, in explaining that object, he uses language which is likely to bring the Government into contempt or to excite disaffection, S. 124A will apply.

It is quite true as argued by Mr. Manuk that the conditions at present in India are quite different from those which existed in 1897 and that far greater freedom is given to the press now than was given in those days and things which may now be said and written with impunity would have been treated as seditious at the end of the last century. But we have to consider the state of the minds of the people at present and the present conditions and to decide whether this article is now likely to engender feelings of hatred, enmity or disloyalty in the minds of the readers. The article is written in high flown Hindi which would not be easily intelligible to the less literate classes. The circulation of the papar is not a big one and the readers of this paper would probably be men of some intelligence who would be able to understand any double meaning that any word used might contain. It may be that expressions like the "Punjab atrocities" might be used under certain conditions and in certain criticisms of the Government without existing enmity or disaffection.

Mr. Devaki Prasad Sinha has cited before us passages from a despatch of the Secretary of State from the report of Mr, Justice Rankin in the committee appointed to consider the disorders in India, also passages from Mr. Ramsay McDonal's "Awakening of India" and Digby's "Prosperous British India" as well as from Mr. Dadhabhoy Naoroji's "Poverty under the British Rule." He has shown in the passages he has cited words and expressions that have been used and allowed to pass which are similar to the expressions and words used in the present article. But the character of the publications in which those words or expressions are used and their nature and also the class and nationality of the persons by whom those publications are intended to be read have to be taken into consideration; a book or report published in England is intended to inform the public in England of this day about the state of affairs in India, and it can have no intention of causing disaffection in this country or of bringing the Government established in this country into contempt. Those publications would in any case come under one of the two explanations even if published in India.

To turn now to the article, the heading of the first portion of it relates to the success of the diplomacy of the English meaning thereby the British Government in India. The word which has been translated by "diplomacy" has the somewhat sinister meaning of "crooked policy." We are told that the basic principle of the policy of the British Government out here is to "divide and rule" and the Muhammedans have suffered by aiding in this policy. The Sanskrit Sloka is then cited and the context seems to hint that the policy of Government is little to be depended upon and very variable. The Sloka is mistranslated in order to suggest that Government wastes money and plunders its subjects. It has been urged that this translation is justified since, if a king accumulates wealth and jewels, it can only mean that he obtains them by plundering his subjects. But the translation is far-fetched and it seems that the object is to hint that the Government plunders its subjects. It is then hinted by stating, after giving a description of the condition of a conquered race, that India is in the position of a conquered race and that regulations are promulgated by Government to des-

troy trade, commerce, art, and industies, while religion and duty and the development of intellect are blasted by these regulations and by the efforts of the British Government to make their existence here permanent, while the language and literature of the nation is being destroyed. Dissensions in India are ascribed to the strategy and the crooked policy of the Government. The events in the Punjab are referred to as showing that cruelty and atrocities were practised at Jalianwala by the Government and then it is stated that the Government is acting in an arbitrary and irresponsible manner enforcing its rule by the brute force of militarism. It is urged that this brute force must be overcome and the rule of brute force should be brought to an end. The allusions to Russia and Germany are not altogether clear but they seem to suggest that just as the autocratic Empires of Russia and Germany have been brought to the ground, the same must happen in India to a Government which rules by the force of the military. It is true that the article ends up by saying that the ambitions of the Indian people are the same as those of Ireland and there is absolutely nothing to cavil at in an expression of the wish that India should obtain self-government in the same way as Ireland.

But we have to consider the article as a whole and look to see whether the general tenor of the article as shown by the expression used was intended to bring the Government established by law in British India into hatred or contempt or constitutes an attempt to excite disaffection against that Government.

In my mind there is no doubt that in the minds of the readers of the article the ascription to the Government of object, as a root principle, to divide the races of India so as to strengthen its rule and to destroy the language, culture, trade, commerce, arts and industries by strangling regulations, as well as the description of the Government as a Government which rules by brute force in an arbitrary manner over a people who have no voice in the administration, could not fail to cause a feeling of disaffection and contempt, if not hatred, in the minds of the Indian reader It may be that the description of what happened in the Punjab as an "atrocity" is a description which has been used by a certain portion of the public, but it is quite evident that in the article reference is made to those events with the intention of stirring up a feeling of disaffection and enmity among all those who read the paper and to provide an argument to support and strengthen other allegations made against the Government.

In my opinion the article had the intent of bringing ths British Government into hatred and contempt and of exciting feelings of disaffection against the Government. It cannot be said to be covered by the explanation to S. 124A and the learned Additional District Magistrate was right in the finding he came to on this point.

Having come to the above decision as to the character and intent of the article which forms the subject of the charge, it remains to be decided whether the Appellants, or any of them can be held to be guilty of attempting to carry that intention into effect and of committing an offence under S. 124A.

Nageswar Prasad and Ganesh Panre have both been charged as Editors of the paper, but their defences are conflicting. Nageswar, while admitting that he was Editor of the issue of the paper which was published on the 13th January 1924, asserts that after that date he ceased to be Editor and that Ganesh Panre, who had been a clerk in the office, became Editor in his place and was responsible for the selection of the matter which was published in the issue of the 20th January 1924. To support his plea he relies on the entries printed on the paper issued on that day; he shows that while on the front page of the paper of the 13th January 1924 there is an entry just under what professes to be a picture of Mr. Gandhi of the words "Sampadak—Nageswar Prasad Sharma" (Sampadak meaning "Editor"), on the front page of the issue of the 20th January 1924, in the same place before Nageswar's name is printed simply the Hindi letter "सं:"

whilst right at the bottom of the last page there is an entry "Sampadak" Ganesh Panre. He asserts that the सं is an abbreviation for the word "Samrakshyak," meaning "patron." and that on the 20th January 1924 he was not Editor but only "Patron," while Ganesh was Editor as shown at the bottom of the last page, so that Nageswar could not be held liable under S. 124A. It is his case that सं could not be understood to be an abbreviation of the Hindi word "Sampadak."

[After referring to the evidence and the allegations of the parties, His Lordship went on.]

Under S. 7 of the Press and Registration of Books Act. 1867 (XXV of 1867) as amended by the Press Law Repeal and Amendment Act, 1922 (XIV of 1922) the entry of the name of the Editor as such on a newspaper is sufficient evidence that on the day that newspaper was published the person bearing that name was Editor of the paper. To bring home the offence charged in this case to Nageswar the prosecution had to prove that the abbreviation stood for Sampadak ("Editor") or if they failed in this they had to prove that he was Editor on the 20th January 1924 by other evidence. Both means of proof were resorted to.

[His Lordship next considered the evidence.]

There is thus no satisfactory direct evidence that on the 20th January 1924, Nageswar was Editor, but there is circumstantial evidence, and it is, in my opinion. so strong as to leave no doubt that in fact Nageswar was the Editor on the date of publication.

[His Lordship considered the circumstantial evidence and continued.]

I do not believe that Ganesh Panre was Editor of the paper at any time, and I do believe that Nageswar Prasad used him as a cat's paw in order that an objectionable article might be published without danger to himself. Nageswar was the proprietor of the paper and as such had responsibilities as to the conduct of the paper and as to the matter to be published in it.

In this Court an objection has been made that Nageswar was prejudiced by the joint trial with Ganesh Panre; that objection was not raised in the lower Court and cannot be heard now.

I would hold that Nageswar was rightly held to be responsible for the publication of the article which is the subject of this case, and to have attempted thereby to bring hatred and contempt, and to excite disaffection towards the Government established by law in British India. I am of opinion, however, that the sentence passed against him is unduly severe, even considering the fact that he undertook in December last not to offend again. The article in the "*Tarun Bharat*" while offending against the law does not offend so greatly as to justify a sentence of two years' simple imprisonment. I would reduce the sentence of imprisonment to a sentence of six months' simple imprisonment, the sentence of fine should be confirmed.

In dealing with the appeal of Nageswar Prasad, I have already expressed an opinion as to the liability of Ganesh Panre and have found that in fact Nageswar Prasad made him his cat's paw. Under the provisions of S. 7 Act XXV of 1867 as Amended by Act XIV of 1922, the fact that the name of Ganesh Panre was printed in the issue of the 1st of January as Editor of the paper would be sufficient evidence to prove him to have been the Editor on that date. Under S. 8A of the Act so amended Ganesh Panre could have come before the District Magistrate and made a declaration that his name had been incorrectly published, but that declaration has to be made within two weeks of the date of his becoming aware that his name has been so published. Ganesh Panre made no declaration under S. 8A, his case being that he was not aware of the fact that he was shown as Editor until proceedings were taken against him. I think that this explanation is a reasonable one.

[After discussing the evidence on the point, His Lordship observed:—]

Taking all the facts and circumstances into consideration I am not satisfied that on the 28th of January 1924, Ganesh was in fact the Editor of the paper and responsible for the publication of the article. In any

case he must get the benefit of the doubt and I would therefore acquit him of the charge against him.

With regard to Hanuman Upadhya, his difficulty is that he made a declaration under Act XXV of 1867 sometime ago and under S. 7 of that Act such declaration is sufficient evidence that he was Printer and Publisher of the article in the *Tarun Bharat* on the 20th January 1924. He could only save himself from the effect of S. 8 and on the 20th January no such declaration under S. 8 had been made by him. Further more he had in December 1923 in his petition of apology admitted that he was Printer and Publisher of the paper. This being the evidence against him, the only way in which he could save himself was to show absence from the office in good faith at the time of the printing and publication and absence of knowledge that the seditious articles would be published during his absence. The burden of proving that he was not the Printer and Publisher was thrown upon him by S. 7.

[His Lordship then discussed the evidence on the point and continued :-]

The onus lay on Hanuman to prove that he was not the Printer and Publisher on the date of issue, and in my opinion the evidence he has produced fails to discharge that onus. He has failed to prove that he was not the Publisher and Printer of the "*Tarun Bharat*" newspaper on the 20th of January 1924 and thus cannot escape liability according to the provisions of S. 7 of Act XXV of 1867. His conviction must be upheld but the sentence of 18 months' is, in my opinion, far too heavy. In my opinion a sentence of three months' simple imprisonment is sufficient.

[The remaining portion of the judgment is not material for the purpose of this report.]

Macpherson, J.—I agree,

✱✱ 1925 PATNA 106

JWALA PRASAD AND KULWANT SAHAY, JJ.

Nagendra Nath Ghosh—Plaintiff—Appellant.

v.

Sambhu Nath Panday and others—Defendants—Respondents.

Appeals from Original Decrees Nos. 120 and 245 of 1921, Decided on 12th May 1924, from a decision of Sub. J. of Dhanbad, D- 28th February, 1921.

✱✱ (a) *Civil P. C., O. 21 R. 93—No. separate suit lies for recovery of purchase money on ground of judgment-debtor not having saleable interest in property-Civil P. C., O. 21, R. 91.*

An auction purchaser at an execution sale has no right to bring a regular suit for realisation of the purchase money paid by him on the ground that the judgment-debtor had no saleable interest in the property, Statute and case law fully discussed. [P. 110, C. 1, 2.]

(b) *Civil P. C., O. 21, R. 91.—Want of saleable interest.*

Where previous execution sale was subject to mortgage in favour of certain persons, sale of same property in execution of decree cannot be set aside. [P. 111, C. 1, 2.]

(c) *Execution—Purchaser at execution sale takes subject to all equities affecting Judgment debtor.*

The purchaser at an auction sale in execution of a decree of a Civil Court purchases the property subject to all the equities affecting the judgment debtor. [P. 113, C. 1.]

S. C. Mitra and B. N. Mitter—for Appellants.

S. M. Mullick & N. N. Sen—for Respondents.

Facts.

In Appeal No. 120 of 1921—Under lease of underground rights in which the land was to remain hypothecated to the lessors for arrears of the royalty *etc.*, granted by G. B. and P., each was entitled to realise a distinct share of the royalty separately and the arrears of the royalty were the first charge upon the leasehold. G and B brought two separate suits for mortgage decrees for arrears of the royalty. In B's suit G and P. were also joined as parties. Both suits were decreed. In execution of B's decree the entire leasehold was purchased by the defendant No. 10, M. After this, in execution of G's decree, the leasehold interest in the same property was again sold and

purchased by the plaintiff who was one of the sub-lessees of the underground rights.

In Appeal No. 245 of 1921—The suit in this appeal was filed by M, (the auction purchaser in the sale in execution of B's decree), for declaration that P could not get the property sold in execution of his (P's) decree for royalty against the lessee and sub-lessees. P's decree was based on a compromise creating a charge in his favour between him and the lessees and sub-lessees and was passed about five months before M's purchase.

Kulwant Sahay, J.—The question for decision in the present appeal is as to the right of an auction purchaser at an execution sale to bring a regular suit for realisation of the purchase money paid by him on the ground that the judgment debtor had no saleable interest in the property. The question has been decided against the plaintiff-appellant by the Court below and he comes up in appeal to this Court.

[His Lordship then stated facts.]

In order to decide the point raised in this appeal, it is necessary to examine the law as it now stands after the various changes thereof by the legislature from time to time in regard to the right of auction purchasers at execution sales in this behalf.

Regulation VII of 1825 which provided for the first time for the sale of houses, gardens, orchards and small portions of land held exempt from public assessment by the Civil Court instead of through the Collectors provided in S. 3 (3), for setting aside the sale on the ground of material irregularity in the sale. Clause 4 of S. 3 provided that the purchaser at such sale was entitled to receive back the purchase money on restoring any property delivered to him if sale was set aside as invalid under clause 3 or on any account whatsoever. Clause 7 provided that it should be clearly explained to the bidders that nothing was guaranteed to them in the land beyond the rights and interests therein of the individuals answerable for the amount of the decree. It will be noticed that there was no provision in this Regulation of the auction purchaser on the ground that the judgment-debtor had no saleable interest in the property sold, nor did the law provide for a refund of the purchase money to the auction purchaser on the ground of there being no saleable interest in the judgment-debtor. The auction purchaser was only entitled to a refund of the purchase money in case the sale was set aside on the ground of materal irregularity and the purchaser was compelled to restore the property delivered to him as a result of setting aside the sale or on any other ground whatever. There was nothing in the law to bar a regular suit by the purchaser.

Then came the Civil Procedure Code (Act VIII of 1859). S. 249 directed that the Sale Proclamation shall declare that the sale extends only to the right, title and interest of the defendants in the property specified therein. S. 256 provided for application for setting aside sales on the ground of material irregularity in publishing and conducting the sale, if the applicant proved that he had sustained substantial injury by reason of such irregularity. S 267 empowered the Court to set aside a sale on the ground of material irregularity and substantial injury. S. 258 provided that.

"Wherever a sale of immovable property is set aside the purchaser shall be entitled to receive back his purchase money with or without interest in such manner as it may appear proper in the Court to direct in each instance."

With reference to this S. 258, it was decided by the Courts that a purchaser at a sale in execution of a decree could not recover his purchase money if it was subsequently found that the judgment debtor whose property he had purchased had no saleable interest therein, and that S. 258 applied only to cases in which a sale had been set aside for irregularities in publishing and conducting the same: vide *Dorab Ally Khan* v. *Khajah Moheeooddeen* (1) *Framji Besanji Dustur* v *Hormasji Pestanji Framji* (2) *Hiralal* v. *Karim-un Nissa* (3) *Ram Narain Singh* v. *Mahtab Bibi* (4).

(1) [1875] 1 Cal. 55=24 W. R. 372.
(2) [1877] 2 Bom. 258,
(3) [1878—80] 2 All. 780.
(4) [1878—80] 2 All. 828.

The auction purchaser under the Act of 1859 purchased at his own risk. All that the Court purported to sell under the distinct provision of S. 249 of the Code was the right, title and interest of the Judgment debtor and if it was subsequently found that the judgment-debtor had no interest, the purchaser could not obtain a refund of the purchase-money; there being no guarantee of title the purchaser took at his peril and if he failed to obtain possession of the property or was dispossessed therefrom he had no remedy at law to get back his money.

Act X of 1877 by which the Code of Civil Procedure of 1859 was repealed contains provisions similar to those in Act XIV of 1882, and it will therefore be sufficient to examine the provisions relating to the point under consideration in the Act of 1882.

S. 235 of the Act of 1882 provided that the application for execution of a decree shall be in writing verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain certain particulars set out therein in a tabular form S. 237 provided that when an application is made for the attachment of immoveable property belonging to the judgment-debtor it shall contain at the foot a description of the property sufficient to identify it, and also a specification of the judgment-debtor's share or interest therein to the best of the belief of the applicant and so far as he has been able to ascertain the same. S. 287 provided that when any property was ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court and then it sets out the particulars which the proclamation shall contain. These particulars consist of the description of the property, the revnue assessed upon it, any incumbrance to which the property was subject, the amount for the recovery of which the sale was ordered, and clause (e).

"every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property."

S. 311 provided that the decree holder or any person whose immovabe property has been sold may apply to the Court to set aside the sale on the ground of material irregularity in publishing or conducting the sale; but that no sale was to be set aside on the ground of irregularity unless the applicant proved to the satisfaction of the Court that he had sustained substantial injury by reason of such irregularity. S. 312 provided that if no application, such as one contemplated by S. 311 was made, or if such application be made and the objection be disallowed the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser. If such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale; and then the last clause of S. 312 provided

"no suit to set aside on the ground of such irregularity an order passed under this Section shall be brought by the party against whom such order has been made.

S. 313 authorised the purchaser at the execution sale to apply to the Courts to set aside the sale on the ground that the person whose property purported to be sold had no saleable interest therein and the Court was upon such application to make such order as it thought fit. S. 315 provided as follows:

When sale of immovable property is set aside under S. 310 (a), 312 or 313,

or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it

The purchaser shall be entitled to receive back his purchase money (with or without interest as the Court may direct) from any person to whom the purchase money has been paid.

The repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money".

Now, these are the essential provisions relating to the point under consideration, in the Code of 1882. Provision was made for the puchaser to apply for setting aside the sale on the ground that the person whose property he had purchased had no saleable interest therein, and if the

Court found that the person whose property it had purported to sell had no saleable interest in the property sold and that the purchaser was for that reason deprived of that property, then a declaration was to be made that the purchaser was entitled to receive back his purchase-money from any person to whom it had been paid, and that the repayment of such purchase money could be enforced against such person under the rules provided by the Code for execution of a decree for money. Under this Code the Courts had held that a regular suit by the purchaser for a declaration that the judgment-debtor whose property he had purchased had no saleable interest therein and for refund of the purchase money was not barred by the provisions of S. 315 of the Code. The leading case on the point is the Full Bench decision of the Allahabad High Court in *Muna Singh* v. *Gajadhar Singh* (5). This case was followed in a number of cases in the other Courts-vide-*Kishun Lal* v. *Muhammad Safdar Ali Khan* (6) *Pachayappan* v. *Narayana* (7) *Kumar Saha* v. *Ram Gour Saha* (8) *Hari Dayal Singh Roy* v. *Sheikh Samsuddin* (9) *Nityanand Roy* v. *Juggat Chandra Guha* (10)

Then came the present Code of Civil Procedure (Act V of 1908).

Order 21 rule 66 of the present Code provides for the proclamation of the intended sale to be made by the Court ordering the sale. Sub-rule 2 of rule 66 contains a provision for notice to be given to the decree holder and the judgment-debtor before drawing up the last proclamation, and this is a new provision which is not to be found in the Act of 1882. The particulars required to be specified in the sale proclamation are the same as those under the Act of 1882. Sub-rule 2 provides that

"every application for an order for sale under this rule should be accompanied by a statement signed and verified containing the matters required by sub-rule 2 to be specified in the sale proclamation."

and this provision is also a new provision not to be found in the Code of 1882. This rule provided for a judicial enquiry in order to settle the particulars to be specified in the sale proclamation.

Order 21 rule 89 provides for setting aside sales on deposit of the decretal amount and compensation 5 per centum to be paid to the auction purchaser, if such deposit is made within 30 days of the sale. Rule 90 provides for application for setting aside sale on the ground of material irregularity or fraud in publishing or conducting the sale, provided the applicant has sustained substantial injury by reason of such irregularity or fraud. Rule 91 which corresponds with section 313 of the Code of 1882 runs as follows:

The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the grouud that the judmgent debtor had no saleable interest in the property sold"

Rule 92 runs:—

(1) "Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where in the case of an application under rule 89, the deposit required by that rule is made within 30 days from the date of sale, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby:

(3) no suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

It is noticeable that whereas Section 312 of the Code of 1882, referred only to application for setting aside a sale on the ground of irregularity and consequent injury as provided in Section 311 which corresponds with rule 90 of the Code 1908, rule 92 applies not only to applications referred to in rule 90 but also to those referred to in rules 89 and 91. and the effect of including applications under rule 91 is that the provision contained in sub-rule 3 and providing that "no suit to set aside an order made under this rule shall be brought by any person against whom such order is made" is now made

5) [1883] 5. All. 577—1883 A. W. N. 130 (F. B.)
(6) [1891] 13 All. 383—1891 A. W. N. 138
(7) [1888] 11 Mad 369.
(8) [1909] 37 Cal. 67—13 C. W. N. 1080—2 I. C. 559 = 10 C. L. J. 558.
(9) [1901] 5 C. W. N. 240.
(10) [1902] 7 C. W. N. 105.

applicable to applications by auction purchasers under rule 91 also.

Then rule 93 provides that

"where a sale of immove able property is set aside under rule 92 the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid".

It will be noticed that the provision in Section 315 of the Code of 1882, to the effect that.

"when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it"

is omitted, and the provision that.

"the repayment of the purchase money and of interest allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money".

has also been omitted, and in lieu of the words.

"shall be entitled to receive back".

in Section 315, rule 93 contains the words.

"shall be entitled to an order for repayment".

Therefore, under the present Code an auction purchaser may apply under rule 91 to set aside a sale on the ground that the person whose property was sold had no saleable interest therein; and if the sale is set aside upon such application, he may apply under rule 93 for an order for repayment of his purchase money. If his application is disallowed, the Court has under rule 92 to make an order confirming the sale, whereupon the sale becomes absolute; and when an order confirming the sale is made, then under sub-rule 3 of rule 92 no suit can be maintained to set aside that order. To my mind the present Code of Civil Procedure makes a material alteration in the provisions of the Code of 1882, and it is, under the present Code, no longer open to an auction purchaser to maintain a regular suit for a declaration that the judgment-debtor had no saleable interest in the property which amounts to a declaration that the order confirming the sale was bad and for setting aside the same and for a refund of the purchase money. Whereas under Section 315 of the Code of 1882 it was optional to enforce repayment of the purchase money upon setting aside of a sale by having recourse to the procedure provided for execution of a decree for money, and the auction purchaser was not limited to that remedy which was not an exclusive remedy but he could, if he so chose, bring a regular suit to enforce payment of the purchase meney,under the present Code no such option is left to the auction purahaser and his only remedy is by way of an application under Order 21 rule 91 of the Code.

This view has been held in a number of recent cases of the different High Courts-vide *Ramsarup* v. *Dalpat Rai*, (11); *Balwant Raghunath* v. *Bala* (12), *Tirumalaisami Naidu*, v. *Subramanian Chettiar* (13); *Jurau Mahamad* v. *Jathi Mahamad* (14); *Banka Behari Das* v. *Guru Das Dhar* (15). A contrary view has been taken by a Division Bench of the Lahore High Court in *Asadullah Khan* v. *Karam Chand* (16), but with very great respect to the learned Judges I am unable to agree with them. A comparison of the provisions in the Code of 1908 with those in the previous Codes leaves no doubt in my mind that under the present Code a regular suit is not maintainable. I am therefore of opinion that the decision of the learnad Subordinate Judge on the point that the suit was not maintainable is correct.

It has been argued by the learned Vakil for the appellant that the provision in the present Code contained in Order 21 rule 66 as regards the settlement of the sale proclamation shows that in execution sales held by Court under the present Code there is a warranty of title and that the auction purchaser, if he is subsequently deprived of the property, will be entitled to maintain a suit on the ground of this warranty. To my mind there is no distinction in the provisions of the present Code from those in the earlier Codes on this point. All that is sold and is pro-

(11) [1921] 43 All. 60=58 I. C. 105=18 A. L. J. 95
(12) 1922 Bom. 205=46 Bom. 833=24 Bom. L. R. 308.
(13) [1917] 40 Mad. 1009=45 I. C. 109.
(14) [1918] 22 C. W. N. 760=46 I. C. 783.
(15) 1924 Cal. 172=28 C. W. N. 20=40 C. L. J. 157.
(16) 1924 Lah. 115=4 Lah. 354=6 L. L. J. 67.

claimed for sale is the interest of the judgment-debtor in the property advertised for sale The only innovation in the present Code is that in order to settle the sale proclamation the Court has to make some sort of judicial enquiry; but it has been held that the result of such enquiry made for the purpose of settling the sale proclamations will not operate as a bar to any party in a subsequent proceeding relating to the setting aside of the sale

For instance, it has been held that the valuation of the property proclaimed to be sold as given in the sale proclamation which is arrived at after a judicial enquiry can be reopened in a proceeding for setting aside the sale, and it is open to the judgment-debtor to prove that the value of the property was more than what was stated in the sale proclamation. There is therefore no substance in the argument of the learned Vakil that Order XXI rule 66 has made any such change in the law as regards warranty and the position of an auction purchaser is to my mind no better in this respect under the present Code than what it was under the old Code.

Next it nas to be noticed that assuming that the present suit was maintainable nothing has been shown as to why the sale should be set aside, and how the plaintiff is entitled to recover the purchase-money. It will be remembered that the plaintiff is one of the sub-lessees of the underground rights. He is in possession as such sub-lessee, he has obtained a sale certificate in persuance of his purchase, and there is no allegation, much less proof, that his title or possession has been disturbed by the purchaser at the previous sale of the 15th of September 1919. Indeed the allegation of the contesting defendants is that the purchaser at previous sale, namely the defendant No. 10 is merely a benamidar for the present plaintiff, and the evidence adduced in the case lends support to such contention. Moreover, the decree in the execution of which the plaintiff made his purchase was a mortgage decree and the mortgaged property was ordered to be sold therein. The decree in execution of which the defendant No, 10 made his purchase was also a mortgage decree; but his purchase must be held to be subject to the mortgage in favour of the defendants 1 to 3, and even if the defendant No. 10 is a real purchaser and not a benamidar for the plaintiff he cannot disturb the position of the plaintiff and his purchase was subject to the mortgage decree of the defendants 1 to 3. Under these circumstances, even if the present suit was maintainable, the plaintiff has made out no case for a refund of the purchase-money.

The result is that the decree of the Subordinate Judge is confirmed and the appeal is dismissed with costs.

[His Lordship here recounted the facts relating to appeal No. 245 of 1921.]

The stipulations contained in the lease clearly contemplate a charge on the entire lease hold interest in respect of the royalty and commission due to each of the three branches of the lessors. This view was held by this Court when the suit of the defendants 6 to 8 and the defendants 9 to 11 of the present suit, namely the two other branches of the Pandeys who had got a 5 annas 3 pice and 6 annas share in the property came up in appeal to this Court. It is only in accordance with this view that the decree could be passed in those two suits directing the sale of the entire leasehold interest for the shares of the royalty and commission due to each branch of the amily of the lessor. After a careful consideration of the various terms of the lease, I am clearly of opinion that the charge created by clause 17 of the lease must be read along with the stipulations in clause 24 thereof and that the entire leasehold interest was made liable for the share due to each branch of the family.

Then having regard to the compromise entered into between the lessee and the first defendant, a clear charge was created over the entire leasehold interest for the dues of the first defendant which was one half of the share of one branch of the Pandey family and the decree passed in accordance with the compromise

must be treated as a valid decree creating such a charge. As to the question whether the plaintiff is bound by that compromise decree it will be remembered that the compromise decree was passed on the 23rd of April 1919 and the plaintiff's purchase took place on the 15th September 1919 about five months after the compromise decree. At the time the plaintiff made his purchase, the lessee whose interest he had purchased had agreed to a splitting up of the charge; and, to my mind, the plaintiff who had purchased the interest of that lessee is bound by that compromise decree. That the purchaser at an auction sale in execution of a decree of a Civil Court purchases the property subject to all the equities affecting the judgment-debtor: has been recognised in a numb r of cases, some of which have been referred to by the learned Subordinate Judge. It is only necessary to refer to the Privy Council decision in *Mohammad Mozaffar Hossain* v. *Kishori Mohan Rai* (17) wherein their Lordships referred to and followed the equitable principle of estoppel laid down in the case of *Ram Kumar Kundu* v. *Macqueen* (18) which principle has also been followed in the Full Bench decision of the Calcutta High Court in *Ishan Chandra Sarkar* v. *Beni Madhab Sarkar* (19). In this view of the case the decision of the learned Subordinate Judge to the effect that the plaintiff who is the representative of the original lessor is debarred from questioning the validity of the compromise decree obtained before his auction purchase is correct and must be affirmed.

No other point was raised in this Court and the appeal is accordingly dismissed with costs.

Jwala Prasad, J.—I agree.

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(17) [1895] 22 Cal. 909=22 I.A. 129=5 M.L.J. 101=6 Sar 583. (P.C.)
(18) [1874-75] 11 B.L.R, 46=2 I.A. Sup. 40=18 W.R.166
(19) [1897] 24 Cal. 62=1 C. W. N. 36 (F. B.)

1925 PATNA 112

ADAMI AND BUCKNILL, JJ.

Sadhak Gir alias *Pasupati Bharti*—Petitioner.

v.

King Emperer—Opposite Party.

Criminal Rev. No. 693 of 1923 Decided on 21st January 1924, from an order of the Dist. J., Champaran, D/- 7th December, 1923.

Extradition Act (XV of 1903) S. 7—Warrent signed by the Assistant British Envoy is not valid.

A warrant of extradition signed by the Assistant British Envoy of Nepal Court is not valid where the officer is not empowered as a Political Agent within S, 7.

S. P. Varma and Hareshwar Prasad Sinha—for Petitioner.

Govt. Advocate—for Opposite Party.

Judgment.—The ground taken in this application is that on Extradition Warrant signed by the Assistant British Envoy at a Court of Nepal is invalid seeing that such an officer is not a Political Agent within the meaning of S. 7 of the Extradition Act. The petitioner has been arrested under a warrant bearing the signature of the Assistant British Envoy and is being detained. Mr. Varma argues that he should be set at liberty since he cannot be extradited to Nepal under this invalid warrant. It has taken the Crown no little time to discover whether the Assistant British Envoy has been empowered as a Political Agent for the purposes of S. 7, and the learned Government Advocate informs us to-day that this officer has never been so empowered,

The warrant for the extradition of the petitioner is, therefore, invalid and he cannot be extradited thereunder. He has been under detention for a long time and must now be set at liberty.

Revision allowed.

1925 PATNA 113

DAWSON MILLER, C. J., AND
KULWANT SAHAY, J.

O. G. MacDonald and others—Defendants—Appellants.

▼

Teknarain Rai and others—Plaintiffs—Respondents.

S. A. No. 760 of 1921, Decided on 11th June 1923, from a decision of the District Judge, Darbhanga, D/- 22nd December 1920.

Bengal T. Act, S. 178—Section does not apply to a compromise concerning the very existence of occupancy right.

Where the question in dispute in a suit was clearly whether an occupancy right existed or whether it did not and there was undoubtedly a *bona fide* dispute between the parties as to the existence of such a right and if by a compromise the parties agreed that such a right did not exist and that agreement is enforced by a decree, then it is no longer open to either of the parties to question the findings or validity of that decree and to plead the non extinction of occupancy right by having recourse to S. 178. [P 34 C 2]

P. K. Sen and *A. N. Das*—for Appellants.

P. Dayal—for Respondents.

Dawson Miller, C. J.—This is an appeal on behalf of the defendants in the suit against a decision of the District Judge of Darbhanga, dated the 22nd December 1920.

The suit was instituted by the plaintiffs as proprietors of certain *mauzas* which had been held in lease for a term of years by the defendants who carried on the business of indigo manufacture upon the leased property to recover back 43 bighas odd of land which had been in possession of the defendants as ticcadars under their lease. In the appeal before us the dispute only concerns an area of something over 20 bighas of land.

The case put forward by the defendants is that, although they held the land now in dispute under the ticca lease which expired in the year 1918, they had in fact acquired an occupancy right in that land before the lease began in the year 1901. The plaintiffs, on the other hand, relied upon a decree passed in Suit No. 37 of 1900 in which the very question was in issue as to whether the defendants had any kashtkari right in the land now in dispute and that suit, they say, was determined after compromise and by the decree it was found, as admitted in the compromise, that the defendants had no claime to kashtkari rights in the land. The decree arrived at after compromise in that suit and the ticca lease granted in 1901 were practically parts of the same arrangements which was then come to. The lease is dated the 29th May 1901 and no doubt before that lease was granted the terms of the compromise of the suit then pending had been arranged between the parties in the suit, the decree in the suit being dated the 5th June 1901. We have not had the lease placed in evidence before us but it is not disputed that by the terms of the lease the defendants undertook at the end of their term that is to say, in the year 1918, to deliver up possession of all the lands leased. By the terms of the compromise decree they gave up their claim to any kashtkari right they might have had or which they might have been able to establish in the lands now in dispute and the question which we have to determine in this appeal is, whether that decree must be taken as binding upon the parties to-day or whether the compromise which was the basis of the decree is bad as being in contravention of the provisions of S 178 of the Bengal Tenancy Act. That section provides that: "Nothing in any contract between a landlord and a tenant made before or after the passing of this Act shall take away an occupancy right in existence at the date of the contract." It is contended that at the date of the compromise the defendants had in fact acquired an occupancy right in the land in suit and, therefore, even if they had agreed to give up that occupancy right and take a fresh lease which covered not only the land in suit but also the whole village in which the land was situated as well as other villages, nevertheless that being an agreement taking away an occupancy right in existence it was not valid by reason of S. 178 of the Bengal Tenancy Act and, therefore,

could not be given effect to now. In so far as the ticca lease itself is concerned, I quite agree that any contract contained therein to give up an existing right of occupancy would not be binding upon the holder of the occupancy right, but very different considerations arise when one is dealing with the effect of a compromise arrived at in a suit the subject-matter of which is the very right to an occupancy holding at all. The compromise, or rather the effective part of it, is in these words :—"In the above case it has been agreed and settled between your petitioners, the plaintiffs and the defendants, that a decree be passed in favour of your petitioners, the plaintiffs, in respect of the land in suit," Then follow some terms acknowledging the receipt of mesne profits and then come these important words : "That your petitioners, the defendants have given up their claim to the kashtkari right in the lands decreed." Then follow certain terms as to granting a lease for 19 years of certain mouzas including that in which the lands in dispute in that action were situated. It is contended on behalf of the defendants that the real meaning of that clause which I have just referred to in the compromise was that the defendants gave up a right which they already had in the lands in suit ; that is to say, that they gave up their kashtkari right and in return therefore they took a lease for 17 years of those lands and others on certain terms. If it can be made out that the compromise between the parties recognised the right of the defendants as kashtkaridars at that time and that the defendants undertook to give up that right in exchange for a lease of a different sort then, I think, the defendants in that case would be entitled to succeed because such an agreement would, to my mind, be in direct conflict with the provisions of S. 178 of the Bengal Tenancy Act, but I cannot read the compromise in that way. It must be remembered that one of the questions, if not the main question in the suit, which resulted in that compromise was, whether the plaintiffs in that suit were entitled to khas possession of the lands or whether the defendants had kashtkari rights in them, and that dispute was settled by the defendants giving up their claim to kashtkari rights ; that is to say the defendants acknowledged that they had no claim at all to the kashtkari right. In other words, they submitted to a decree on behalf of the plaintiffs for possession on the ground that their kashtkari rights had not been established. The decree itself was passed in the terms of the compromise and I think it must be accepted that the dispute between the parties in that suit was determined by declaring in effect that the plaintiffs were entitled to recover possession of the land and that the defendants had no kashtkari right in it. This, to my mind, leads to an entirely different result from that which would have followed had the defendants in that suit agreed not to give up their claim to the kashtkari right but had agreed to abandon or to give up a kashtkari right which was admittedly in existence at that time. It is said that, if it can be shown at the present day that they had in fact such a kashtkari right when the compromise was entered into, then the compromise is one which was in contravention of S. 178 because it in fact gave up a right to which the defendants were entitled. In my opinion, it is not open to the defendants now to question the validity of the decree which was arrived at that time. The question in dispute at that time was clearly whether such a right existed or whether it did not and there was undoubtedly a *bona fide* dispute between the parties as to the existence of such a right and if by compromise the parties agreed that such a right did not exist and that agreement is enforced by the decree then it is not open any longer to either of the parties to question the finding or validity of that decree.

In the view I take of this case, it is unnecessary to consider whether what was done upon the occasion of the compromise was a surrender within S. 86 of the Bengal Tenancy Act because whether it was a surrender or whether it was a settlement of a *bona fide* dispute as to the existence

of the right in question in either case it would be equally binding upon the defendants. In my opinion this appeal fails and should be dismissed with costs.

Kulwant Sahay, J.—I agree.

Appeal dismissed.

1925 PATNA 115

JWALA PRASAD, J,

Binode Behary Bannerjee — Petitioner.

v.

King-Emperor—Opposite Party.

Cr. Misc. Case Nos. 48 and 58 of 1923, Decided on 13th December 1923.

Criminal P. C., S. 528—Reasonable apprehension of absence of fair trial is a ground for transfer though general rule can't be laid down.

It is difficult to lay down any hard and fast rule under which transfer is made, for the circumstances of one case might differ from those of the other but the principles under the decisions of the various cases go to establish that if there are circumstances in a case which raise a reasonable apprehension in the mind of an accused person that he would not receive fair dealings at his trial the case should be transferred to a calmer atmosphere. [P. 36, C. 1]

K. B. Dutt, G. C. Pal and *B. C. De*—for Petitioner.

Sultan Ahmed—for Opposite Party.

Jwala Prasad, J,—These two applications are for the transfer of the cases from the District Palamau, to some other District.

The petitioner is accused in both these cases and has been charged by the complainants with having taken bribe in connection with his duties as a Civil Court *Amin* of the District of Palamu. The petitioner has referred in his application in Criminal Miscellaneous Case No. 48 as to how his work done as a commissioner in Partition Suit No. 51 of 1919 was appreciated by the Civil Court. He has also referred to Babu Ashutosh Ghose, a pleader of Daltonganj, being on enimical terms with him, and to certain proceedings between the Judicial Commissioner and the Deputy Commissioner about the procedure to be adopted in partition cases. With these we are not concerned in the present case.

The allegations upon which the petitioner seeks to support his application for transfer are contained in paragraghs 8 to 10. In paragraph 8, it is said that the learned Deputy Commissioner went to Patan Police Station on tour on or about the 16th August, 1923, and sent for Dwarka Singh and others from Patha about 5 miles from Patan; in paragraph 9, it is stated that the learned Deputy Commissioner after hearing them advised them to lodge complaints against the petitioner on charges of bribery; and in paragraph 10 it is mentioned that the learned Deputy Commissioner has also deputed Akhauri Dwarka Prasad Singh, a Sub-Deputy Collector, to make inquiries in all partition suits from 1916 onwards in which the petitioner acted as commissioner with a view to find out whether there are allegations and evidence of bribery against the petitioner. Paragraphs 11 and 12 relate to the part taken by the Deputy Commissioner in the conduct of the prosecution, namely, the deputation of a Special Officer to conduct the prosecution against the petitioner and payment of cost to the prosecution witnesses. These are matters within the ordinary duties of Deputy Commissioner as representing the Crown to conduct and look after the Crown prosecutions, and do not give rise to any ground for transfer.

Paragraph 13 of the petition states that

"Daltonganj is a small place and rumour has been circulated that the Deputy Commissioner is taking a keen interest in the prosecution and will help every one who comes forward to prosecute the petitioner on a charge of bribery."

This is not capable of any reply by the Deputy Commissioner, and in fact has not been replied to. It may be that a rumour of the kind has been circulated, but the Deputy Commissioner cannot be responsible for a rumour of this kind, if any.

As to paragraphs 8 and 9, the reply of the Deputy Commissioner contained in Criminal Miscellaneous Case No. 48 of 1923 is as follows:—

"It is a fact that the Deputy Commissioner sent for Dwarika Singh and others when on tour at Patan Police Station in order to inquire why they had not presented the com

plaint which they said that they would present, a long time previously."

As to paragraph 10, the Deputy Commissioner's reply is:

"The Deputy Commissioner has caused investigation to be made only in cases with regard to which he received specific complaints from aggrieved parties."

These again do come within the ordinary duties of the Deputy Commissioner when complaints of such a nature were received by him.

Reading the allegations contained in the petition and the replies of the Deputy Commissioner, it seems that complaints were previously made to the Deputy Commissioner against the petitioner and when he went on tour he called for the complainants and inquired why they had not presented regular complaints against the accused, although a long time had expired since they had told the Deputy Commissioner that they would present such complaints. The Deputy Commissioner also seems to have received information against the petitioner having taken bribe in connection with his official duties and he has, therefore, caused an investigation to be made with regard to those complaints.

The petitioner has been *Amin*, as stated by him for about 25 years and as such he must have worked in a number of of cases in that district. An inquiry of the nature ordered by the Deputy Commissioner would naturally lead to a number of complaints against the petitioner and would create a sort of atmosphere unfavourable to him in that locality. On the one hand, the Deputy Commissioner and the authorities are bound to take such steps as they consider proper in order to have those complaints properly investigated; on the other hand, the accused would labour under inconvenience that might arise in a matter of this kind and there would be a reasonable suspicion in the mind of the accused that the action taken by the authorities, though legitimate, would create prejudicial atmosphere against him so as to prejudice him in the defence of the case against him. In the interest of the prosecution also it is desirable that prosecution may not suffer from prejudices in favour of the accused, if any, that may be in that district on account of his long service of 25 years. Though the allegations made do not cast any imputations against the action taken by the officer concerned, but the circumstances disclose a state of affairs that should be removed in order to give a fair and impartial and unprejudiced trial of the cases against the petitioner.

It is difficult to lay down any hard and fast rule under which transfer should be made, for the circumstances of one case might differ from those of the other; but the principle underlying the decisions of the various cases go to establish that if there are circumstances in a case which raise a reasonable apprehension in the mind of an accused person that he would not receive fair dealings at his trial, the case should be transferred to a calmer atmosphere. The cases cited before me of *Ram Kishun Das* v. *Emperor* (1) *Din Dayal Singh* v. *The King-Emperor* (2) *Bansgopal Pande* v. *Emperor* (3) do not afford similarity of circumstances with those of the present case in all respects. In some of them the circumstances were very grave. In others they were mild, and in the case of *Bansgopal Pande* v. *Emperor* (3) the transfer was allowed upon the following finding:

"A great number of allegations have been made in the petition for transfer which has been put before me. Most of these allegations were contained in a petition which was previously presented to this Court and rejected by the 1st Additional Judicial Commissioner on the 11th of March, last. However, Mr. Ohme has adduced some new argument in support of his case today and I think, having regard to the fact that these proceedings were initiated under the orders of the District Magistrate and having also regard to the fact that one of the important witnesses for the prosecution is a Deputy Magistrate attached to the Rae Bareili District, it will be advisable to have the case removed to a clamer atmosphere."

I have already said that all the circumstances of those cases are not applicable to the present one. I have therefore, taken into consideration the circumstances of the present case which I have set forth above and I

(1) [1912] 35 All. 5=10 A. L. J. 357=17 I. C. 567=13 Cr. L. J. 823.
(2) [1924] 1 P.L.T. 522=58 I. C. 523=21 Cr L. J. 795.
(3) [1914] 1 O.L.J. 271=24 I. C. 951=15 Cr. L. J. 543

think that they justify the transfer of the present case to be tried in a calmer atmosphere. The learned Counsel on behalf of the petitioner has very rightly said that he does not impute anything against the authorities concerned in the inquiry and investigation of the offences against the petitioners and that they did what they are legitimately required to do in the performance of their official duties. I agree with the learned Counsel in this view. I also agree with him that nonetheless the circumstances disclosed in the present case have raised a reasonable apprehension in the mind of the accused that his trial at Palamau will be prejudiced.

Palamau is not far off from Gaya, and I would, therefore, transfer these cases to the District Magistrate of Gaya, who will try them himself or depute some other Magistrate competent to try them.

Case Transferred.

✱ 1925 PATNA 117

ADAMI AND BUCKNILL, JJ.

Chhedi Singh—Applicant.

v.

The King-Emperor—Opposite Party.

Criminal Rev. No. 194 of 1924, Decided on 30th April 1924 from an order of Dist Mag. of Shahabad, dated the 21st February, 1924.

✱ *Criminal P. C. S. 106-Penal Code S. 149. Order under S. 106 Cr. P. C. does not lie where accused is convicted under section of I. P. C. read with S 149.*

The amendment to S. 106 by the Act XVIII of 1923 has made an order under S. 106 impossible where the only section under which the accused are convicted is a section of the Penal Code which is read with S. 149. The amendment is not very happily worded for it speaks of an offence punishable under S. 149. No offence is punishable under S. 149 alone; there must be some substantive offence charged to be read with S. 149. [P. 117, C. 2]

Where the accused were convicted under S. 325 read with S. 149.

Held: that under S. 106, as it now stands, an order cannot be passed against them. [P 117, C. 2]

Gour Chandra Pal.—for Applicant.

Md. Yusuf;—for Opposite Party.

Adami, J.—The five petitioners have been sentenced under S. 325 read with S 149, Penal Code, to six weeks' rigorous imprisonment each and to a fine of Rs. 50; they have also been bound down under S. 106, Criminal Procedure Code, to keep the peace for a year.

The case proved against these petitioners and found by the lower Court is that they were cutting the crop of one Raghunandan Singh and when he went to protest they beat him and Deonandan and caused many injuries on the bodies of these two persons.

The petitioners have been found guilty on the facts by both the Courts below. The only questions that arise before us now are with regard to the order passed under S. 106, Criminal Procedure Code, and with regard to the punishment imposed on the petitioners.

With regard to the order under S. 106 it is quite clear that it cannot be upheld. The amendment to S 106 by the Act XVIII of 1923 has made an order under S 106 impossible where the only section under which the accused are convicted is a section of the Penal Code which is read with S. 149 The amendment is not very happily worded for it speaks of an offence punishable under S. 149. Now no offence is punishable under S. 149 alone: there must be some substantive offence charged to be read with S. 149

In the present case the petitioners were convicted under S. 325 read with S 149 and under S. 106, as it now stands, an order cannot be passed against them under that section.

With regard to the sentence, considering the number of injuries and their severity, caused by the unlawful assembly, on the persons of Raghunandan and Deonandan, the sentence of six weeks' rigorous imprisonment and a fine of Rs. 50 each is not too severe even though most of the petitioners are memebers of one family.

The result is that the order passed under the provisions of S. 106, Criminal Procedure Code, must be set aside but the conviction and sentences passed under S 325 read with S. 149. Penal Code, must be upheld.

Bucknill, J.—I agree.

Order modified

1925 PATNA 118

DAWSON MILLER C. J. AND MULLICK, J.

Tilakdhari Singh—Plaintiff—Appellant.

v.

Chaturgun Bind and others—Defendants—Respondents.

L. P. A. No. 18 of 1923, Decided on 4th December 1923, against a decision of Ross, J., D/- 9- -1923.

Bengal Tenancy Act, Ss. 5 Cl. (3) and S. 48—Mortgagor raiyat by executing kabuliyat in favour of mortgagee does not hold under a raiyat as mortgagee is not a raiyat.

Where the sum advanced was not paid by the Zarpeshgidar as rent payable in advance for a certain period at the end of which the land was to be delivered up to the lessor and profits were to be taken as interest and the Zarpeshgidar was to remain in possession on the same conditions until the amount was repaid and the property was hypothecated for repayment of the loan in the event of the Zarpeshgidar being dispossessed.

Held: that the raiyat who executed the lease did not by executing kabuliyat become tenant holding immediately or mediately under a raiyat within the 5 (3) and S. 48 did not apply. Whether Zarpeshgi and the kabuliyat constituted one transaction or two transactions is immaterial. [P 121 C 1]

A. B. Mukerjee for *B. N. Mitter*—for Appellant.

Jadubans Sahai—for Respondents.

Dawson Miller, C. J.—This is an appeal on behalf of the Plaintiff under the Letters Patent from a decision of Mr. Justice Ross, reversing the decision of the District Judge and restoring that of the Munsif.

The facts out of which the suit arises are as follows:—On the 16th January, 1917, Ram Piyar Bind, the father and predecessor-in-interest of the Defendants, executed a *zarpeshgi* deed for a term of nine years from 1324F., over 2 bighas 7 cottahs 12 dhurs of his occupancy holding in favour of the Plaintiff in consideration of an advance of Rs. 975. The Plaintiff in lieu of interest on the loan was to enter into possession and take the profits arising out of the cultivation of the land after paying the proprietor's rent amounting to Rs. 16 odd. In the event of the principal sum not being paid off at the end of the term the *zarpeshgidar* was to remain in possession upon the condition stipulated in the deed until repayment of the principal in Jeth of any succeeding year. The property was also hypothecated to secure repayment of the principal sum advanced if the *zarpeshgidar* should be dispossessed. Two days later Ram Piyar Bind executed a *kabuliyat* in favour of his mortgagee. This document recites the previous *zarpeshgi* transaction and states that the *zarpeshgidar* has been in possession of the property and as the mortgagor wished to keep the property under his own cultivation paying the *zarpeshgidar* Rs. 75-7-0 annually as rent the latter had acceded to his request and granted him a simple lease for nine years from 1324 to 1333F, at the rent named. The rent so arrived at may be assumed to include the Rs. 16 odd payable to the landlord and interest amounting roughly to 6 per cent. on the principal sum advanced. In the year 1919 the rent was in arrears and Piyar Bind having died the Plaintiff instituted the present suit against his sons, the Defendants.

The Defendants challenged the genuineness of the *kabuliyat* and pleaded payment of a smaller rent amounting to Rs. 24-7-0 which they contended was all that was payable according to the survey *khatian*. They further pleaded that their father was an old man with a disordered brain and was incapable of understanding the terms of the *kabuliyat*. The genuineness of the *zarpeshgi* executed two days earlier was not challenged in the written statement.

The Munsif rejected the plea of payment. He held that the only rent recoverable was that recorded in the survey *khatian*, namely, Rs. 24-7-0 and stated that he thought the Plaintiff had succeeded in getting the *kabuliyat* executed but he had great doubt as to the genuineness of the transaction. It appears that at the recent revisional survey the Assistant Settlement Officer had entered the rent in the record-of-rights as Rs. 24-7-0, being of opinion that the Plaintiff was the raiyat and Piyar Bind his under-raiyat and that under S. 48 of the Bengal Tenancy Act the Plaintiff could not recover from his under-raiyat more than 50 per cent. in

excess of the rent payable by him to his superior landlord.

The Plaintiff appealed to the District Judge who considered that the Assistant Settlement Officer and the Munsif had proceeded upon an incorrect application of S. 48 of the Bengal Tenancy Act and that Piyar Bind by executing the *zarpeshgi* did not lose his original status of a raiyat. He accordingly varied the decree of the trial Court and entered judgment for the Plaintiff for the amount claimed with costs in both Courts.

The Defendants preferred a second appeal to the High Court which came before Mr. Justice Ross. The learned Judge was of opinion that the *zarpeshgi* deed was both a lease and a mortgage and that the Plaintiff by this transaction held directly under the landlord and not by way of sub-lease under the raiyat and that Piyar Bind ceased to be a raiyat as long as the lease was outstanding against him. He further considered that the *kabuliyat* did not create a lease of the raiyati interest of the land in the original raiyat but that he was an under-raiyat of the Plaintiff and that S. 48 of the Bengal Tenancy Act was applicable in the circumstances of the case. He accordingly set aside the decree of the District Judge with costs and restored that of the Munsif.

From that decision the present appeal has been preferred under the Letters Patent by the Plaintiff.

In my opinion, the *zarpeshgi* was an instrument of mortgage and not a lease. The sum advanced was not paid by the *zarpeshgidar* as rent payable in advance for a certain period at the end of which the land was to be delivered up to the lessor. The profits after deducting the proportionate amount of rent payable to the landlord were to be taken as interest on the principal sum and even at the end of the term the *zarpeshgidar* was to remain in possession upon the same conditions until the principal sum should be repaid; and the property was hypothecated for repayment of the loan in the event of the *zarpeshgidar* being dispossessed. I think it is well established that a mortgagee, which I consider the *zarpeshgidar* was in this case, is not the tenant of his mortgagor. In fact in argument before us it was conceded that the mortgagee is not a raiyat. It was contended, however, that Piyar Bind and consequently the Defendants were under-raiyats within the meaning of the definition of that term in S. 5 (3) of the Bengal Tenancy Act which defines under-raiyats as "tenants holding whether immediately or mediately under raiyats." It was argued that Piyar Bind held if not immediately at least mediately under himself as a raiyat and was therefore an under-raiyat. I am unable to accede to the view that a person who is a raiyat can also be his own under-raiyat. I agree with the view of the District Judge that the mortgagor by the *zarpeshgi* transaction never ceased to be the raiyat holding under the landlord and he cannot, in such circumstances, be said to be an under-raiyat holding indirectly under himself.

A further point was raised that Piyar Bind was found to be incapable of understanding the effect of the *kabuliyat*. There is no definite finding by the Munsif upon this point and the matter does not appear to have been urged in appeal before the District Judge as a defence to the suit. Moreover the Defendants having remained in possession of the land under the *kabuliyat* cannot now be heard to say that it was not a genuine transaction. In my opinion, the appeal should be allowed, the decree of Ross, J., should be set aside and that of the District Judge restored. The Appellants are entitled to their costs of this appeal and of the appeal before Mr. Justice Ross.

Mullick, J.—On the 16th January 1917, Ram Piyar Bind, the predecessor of the Defendants, executed a *zarpeshgi* deed in respect of 2 bighas 7 cottahs 12 dhurs of *kasht* land in favour of the Plaintiff for a consideration of Rs. 975. On the 18th January of the same year, Ram Piyar executed a *kabuliyat* for the land in favour of the Plaintiff reserving a rent of Rs. 75/5 per annum for a term of 9 years from 1324 to 1333 F. S. In 1919 the Defendants defaulted in the payment of the reserved rent in respect of the year 1325 and of part of

the year 1326 and the Plaintiff brought the present suit for recovery thereof.

The Munsif decreed the suit at a rate of Rs. 24-7-0 per annum relying on a record-of-rights prepared under the Bengal Tenancy Act.

On appeal the District Judge of Chapra set aside the decree of the Munsif and held that the Defendants were not under-raiyats and that therefore S. 48 of the Bengal Tenancy Act was not applicable to the case and he decreed the suit at the full rate claimed.

There was a second appeal then to this Court and Mr. Justice Ross has reversed the decree of the District Judge and restored that of the Munsif.

The present appeal is preferred under the Letters Patent against the judgment of Mr. Justice Ross.

Now the first question is what was the effect of the *zarpeshgi* deed of the 16th January 1917. If it was a lease and not a mortgage, then the Plaintiff became an under raiyat of the first degree under Ram Piyar Bind who in turn by the *kabuliyat* of the 18th January became an under-raiyat of the second degree under the Plaintiff. In that case S. 48 of the Bengal Tenancy Act would operate to preclude the Plaintiff from recovering from his under-raiyat more than 50 per cent. in excess of the rent payable by him to his superior landlord, that is to say, more than a total rent of Rs. 24/7 as recorded by the Settlement Officer.

If, on the other hand, the *zarpeshgi* transaction was not a lease but a mortgage then the *kabuliyat* of the 18th January 1917 operated to create a raiyati tenancy and S. 48 would have no application.

The view taken by the learned Judge of this Court is that the transaction was both a lease and a mortgage. It seems to me that even in that case the transferee would be neither a raiyat nor an under-raiyat.

I am, however, of opinion that the document does not create any raiyati tenancy at all. The transfer in this case was for the purpose of securing the payment of money advanced and was not consideration for a price paid. The sum of Rs. 975 did not represent either wholly or in part an advance payment for the rent of the land. The deed recites that the transferee is to pay to the superior landlord the rental due from the raiyat which was a sum of Rs. 16-6-0 and that he was to pay himself the interest upon the mortgage money out of the proceeds of the land, and it is very similar to a *zarpeshgi* deed which was the subject of *Ram Khelawan Roy* v. *Sambhoo Roy* (1). In that case the whole of the rent for a period of five years was to be taken by the *zarpeshgidars* on account of the profits of their *zarpeshgi* excepting one rupee which was to be paid yearly by them to the proprietors (the grantors) and if the *zarpeshgi* money was not paid at the end of the five years the *zarpeshgidars* were to remain in possession until payment. The decision was that the deed did not create a raiyati tenancy.

On the other hand it was held in *Ramdhari* v. *M. H. Mackenzie* (2) that where the raiyat was already previously in possession as a raiyat he does not divest himself of his right to acquire a right of occupancy in the land by taking a *zarpeshgi* lease of the land.

Again in *Damodar Narain Chowdhry* v. *Dalgleish* (3) it was held that a *zarpeshgi* lease which merely provided for a part of the rent to be paid in advance, there being no stipulation for the payment of interest on the money so advanced, did not create the relationship of mortgagor and mortgagee.

In the present case the contrac was not merely for the cultivation of the land but also constituted a real and valid security to the transferee for the principal sum advanced by him and for the interest thereon and his possession was not merely that of a cultivator but of a creditor holding the land as security. In these circumstances the transferee was a mortgagee and not a raiyat within

(1) [1898] 2 C.W.N. 758.
(2) [1905] 10 C.W.N. 351.
(3) [1911] 38 Cal. 432=38 I.A. 65=15 C.W.N. 345=9 M.L.T. 364=9 I.C. 913=8 A.L.J. 441=13 C.L.J. 512=13 Bom.L.R. 396=(1911) 2 M.W.N. 182. (P.C.)

the meaning of S. 5, Cl. (3) of the Bengal Tenancy Act. It follows therefore that by executing the *kabuliyat* of the 18th January 1917 Ram Piyar Bind did not become a tenant holding immediately or mediately under a raiyat, and S. 48 of the Bengal Tenancy Act is not applicable.

For the purposes of this case it is immaterial whether the *zarpeshgi* and the *kabuliyat* constituted one transaction or two separate transactions and *Chimman Lal* v. *Bahadur Singh* (4) has no application to the present case.

Nor does the decision in *Uttam Chandra Daw* v. *Rajkrishna Dalal* (5) on which the learned Judge of this Court relies assist the Defendants. In this last mentioned case a proprietor executed a *zarpeshgi* mortgage in favour of the Defendants who on the same day resettled the land with the proprietor as tenants. The mortgagor having defaulted in payment of rent the mortgagee sued for it, obtained a decree and in execution purchased the equity of redemption and took possession of the property. The Plaintiffs alleged that they were purchasers of the equity of redemption from the mortgagors and filed a suit for redemption. The principal point decided in that case by a Full Bench was that the sale was not void but voidable and that although the mortgagee had purchased the equity of redemption in contravention of the terms of S. 99 of the Transfer of Property Act, the sale was not a nullity and must be duly avoided and that the Plaintiffs were not entitled to redeem so long as it subsisted. One of the points in the case was whether the sale was held in execution of a rent decree or whether it was merely a sale in execution of a decree for arrears of interest upon the mortgage money. Mr. Justice Chatterjea in the course of his judgment observed that by executing the *kabuliyat* in favour of the mortgagee the mortgagor had become the tenant of the mortgagee within the meaning of the Bengal Tenancy Act. If I may say so the facts found in that case entirely supported this view and the mertgagor became a raiyat by reason of the terms of S. 5 of the Bengal Tenancy Act, which read together with the definition of proprietor in the Act which includes a trustee. But a mortgagee from an occupancy raiyat is not in any sense a raiyat or under-raiyat and a sub-tenant under him cannot be an under-raiyat.

A point was taken in the trial Court that there had been no intelligent execution of the *kabuliyat* by Ram Piyar Bind. This defence does not appear to have been repeated before the District Judge and the point is no longer open.

The result is that the judgment of Mr. Justice Ross must be set aside and that of the District Judge restored. The Appellant will be entitled to his costs in this Court.

Appeal allowed.

(4) [1901] 23 All. 338=(1901) A.W.N. 95
(5) [1919] 47 Cal. 377=31 C.L.J. 98=55 I.C. 157=24 C.W.N. 229. (F.B.)

✱ 1925 PATNA 121

DAS, J.

Ramji Pandey—Petitioner.

v.

Alafkhan and others — Opposite Party.

Civil. Rev. No. 373 of 1923, Decided on 28th April 1924, from an order of Offg J. C. of Chota Nagpur, D/- 27th July 1923.

✱ *Civil P.C., O. 1 R. 10—Order under is not appealable but striking out defendant's name in partition suit, resulting in leaving defendant's right to share undecided, is appealable.*

An order under O 1 R. 10 is not appealable under the Civil Procedure Code. But a partition suit differs from other suits. In that every party whether arrayed on the side of the plaintiffs or on the side of the defendants is in the position of a plaintiff in so far as every party whether plaintiff or defendant is entitled to ask the Court allot a share of joint property to him. In such a case, where the name of one of the defendants is struck out at the instance of the plaintiff, the order is appealable if its effect is to leave undecided the defendant's claim to a share in the partition. [P 123 C 2, P 123 C 1]

Parmeshwar Dayal—for Petitioner.

R. C. Bhaduri and *Santa Prasad*—for Opposite Party.

Das, J.—This application is directed against the order of the learned Judicial Commissioner of Chota Nagpur dated the 27th July 1923, by which he set aside the order of the Munsif dated the 1st February 192 . The facts are as follows. The plaintiff who is the petitioner in this Court brought a suit for partition as against various persons. He also cited one Bichan Panday as defendant No. 12 in he action. Bichan Pandy is the nephew of defendants 10 and 11. The defendants 10 and 11 filed a written statement in which they stated that their nephew Bichan Panday had no title to the properties which were the subject matter of the partition. Bichan Pandey sold his alleged interest in the properties to one Ritubhanjan Singh and on the 27th January 1923 Ritubhanjan applied that he might be added as a party on the ground that he purchased Bichan's interest. The Munsif added him as a party defendant.

On the 31st January the plaintiff applied for an order that Bichan Panday and Ritubhanjan should be dismissed from the action and their names struck out It is this application which resulted in the order which is the subject matter of the present proceedings.

The learned Munsif did not decide the question whether Bichan Panday had any interest in the joint property. All that he says is that according to the plaintiff Bichan Panday had no interest whatever in the suit properties and that in those circumstances, he and the purchaser Ritubhanjan should not be made parties. In this view, and without deciding the question which was actually raised, he ordered that the names of Bichan Panday and Ritubhanjan should be struck out and he passed a preliminary decree for partition after striking out the names of Bichan Panday and Ritubhanjan.

The learned Judicial Commissioner on appeal has set aside the order of the learned Munsif.

I have been asked in this application to consider whether there was any jurisdiction in the Judicial Commissioner to deal with the matter at all.

It was contended on behalf of the plaintiff petitioner that the learned Munsif purported to act under Order 1 rule 10 of the Code and that an order under Order 1 rule 10 is not appealable under the Civil Procedure Code. That position may be conceded to the plaintiffs ; but this is an entirely different case. The suit was for partition ; Bichan Pandy had been added as a party to the suit on the footing that he had an interest in the joint property ; Ritubhanjan had actually purchased the interest of Bichan and was added as a party defendant on his own application. Now a partition suit differs from other suits. In that every party whether arrayed on the side of the plaintiffs or on the side of the defendants is in the position of a plaintiff in so far as every party whether plaintiff or defendant is entitled to ask the Court to allot a share of joint property to him. Now this was the position. Ritubhanjan was as a matter of fact in the record as a defendant on the 27th January 1923, and it was open to him to ask the Court to determine the question whether his vendor had any interest in the joint properties and if he had, whether he was not entitled to a share in the joint properties. It was open to Ritubhanjan to ask the Court to allot a definite share to him. Now this was the position, and the plaintiff came to Court and said "I do not want to proceed against Ritubhanjan and Bichan Panday." Now if this was not a partition, no exception could possibly be taken to the plaintiff withdrawing the suit as against the defendant. A defendant certainly could not complain if the plaintiff himself asked that the suit as against a particular defendant should stand dismissed. But as I have said a partition suit stands entirely on a different footing. Although arrayed on the side of the defendants Bichan Panday was in the position of a plaintiff in so far as he was entitled to ask the Court to allot a share of the properties to him and the learned Munsif by the course which he took declined to consider the case of Bichan Pandey. The result of his

order is that Bichan Pandey is unable to get any relief in the partition action.

That being so, the question is whether the order of the Munsif was appealable. In my opinion it was. Although the order was passed under Order 1 rule 10 of the Code, the effect of the order was that the Court declined to adjudicate on the question distinctly raised by Bichan Panday. It was held in the case of *Rama Rao* v. *Surya Rao Bahadur Garu* (1), that it is open to a plaintiff to appeal from the order of the Court striking out the name of the defendant on the ground that the plaint disclosed no cause of action against him. Similarly in this case the effect of the order of the Munsif is that the claim of Bichan and therefore of Ritubhanjan remains undecided. There was an appeal open to Ritubhanjan, not indeed from the order of the Munsif looked upon as an order passed under Order 1 rule 10, but from that order looked upon as a decree decling to adjudicate upon the claim of Bichan and therefore of Ritubhanjan. That being so, this application must fail and must be refused with costs: hearing fee two gold mohurs.

Application rejected.

(1) [1919] 42 Mad. 219=36 M.L.J. 169=49 I.C. 835=25 M.L.T. 184=9 L.W. 329.

✱ 1925 PATNA 123

JWALA PRASAD AND KULWANT SAHAY, JJ.

Lilo Sonar—Appellant.

v.

Jhagru Sahu—Respondent.

S. A. No 388 of 1923, Decided on 25th April 1924.

✱ (a) *Civil, P.C., O. 22, Rr. 4 and 11—One of the legal representatives already on record at the date of death—Application for substitution is not dispensed with.*

The fact that one of the legal representatives of the deceased, is already on the record does not relieve the appellant or the other heirs of the deceased from making an application for substitution as legal representatives of the deceased in terms of rule 4, of Order 22. The legal representative already on record is respondent in his own capacity. If the appellant wants him to be placed on the record as legal representative of the deceased, a proper application should be made. Therefore, the appeal will abate if the application for substitution is filed more than 90 days after the death of the deceased respondent. 10 Bom. 320, 13 I. C. 313, 13 I. C. 165. Dist. [P 124 C 1, 2]

(b) *Civil, P. C., O. 22, R. 9. (2)—Abatement due to not applying in time for substitution of legal representatives, was set aside when substitution was applied for within time from date of knowledge of the respondent's death.*

Where the respondent died in September in a certain year and the appellants came to know of his death in December, and after certain correspondence with the vakil who appeared for them in the case the application was made within time from the date of knowledge of the death of the respondent, for substitution of the legal representatives,

Held: that though the application was made more than 90 days from the death of the deceased, and the appeal therefore had abated, the abatement should be set aside. [P 124 C 2]

Sambhu Saran—for Appellant.

Guru Saran Prasad and *Anand Prasad*—for Respondent.

Judgment.—On the 1st of February, 1924, the petitioner applied for substitution in place of the deceased respondent No. 1, Jhagru Sahu. This application was made more than ninety days after the death of Jhagru Sahu. The proposed legal representatives of Jhagru Sahu have entered appearance and oppose the application for substitution. Their case is that the appeal has already abated, no application for substitution having been made within time. The learned Vakil on behalf of the appellant-petitioner submits that no substitution was necessary and the abatement did not take place, inasmuch as one of the legal representatives, Doman, was already on the record as respondent No. 2, and the family being a joint *Mitakshara* family he was competent to represent all the other heirs of Jhagru Sahu. It is said that so long as Doman is on the record the appeal could not abate, notwithstanding that all the heirs of Jhagru Sahu were not on the record. This contention is based upon the legal notion of a joint *Mitakshara* family, but "legal representative" as defined in clause (11) of S. 2 of the Civil Procedure Code includes the person on whom the estate devolves on the death of the

party suing or sued in a representative character. Therefore even if Jhagru Sahu and Doman were members of a joint *Mitakshara* family, their legal representatives will be the heirs on whom the estate would devolve upon their death by survivorship. In the present case upon the death of Jhagru Sahu, his legal representatives would be the surviving members of the family, the opposite party. O. 22 requires legal representatives of parties to be brought on the record in the case of the death of any one of them irrespective of whether the deceased was joint or separate from the other members of the family. Assuming for the sake of argument that the said heirs, who are now proposed to be substituted, are the legal representatives of Jhagru Sahu, they must be brought on the record in accordance with law and the procedure set forth in O. 22. The procedure in a case of this kind is prescribed by rule 4 of the said Order which requires that, upon the death of a defendant, and when the right to sue does not survive against the surviving defendant, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party. By rule 11 of the said Order the word "defendant" includes "respondent". Therefore, the respondent in the present case being dead, the substitution could only be made upon an application made in that behalf by the appellant or by the legal representatives of the deceased. The fact that Doman, one of the legal representatives of the deceased, is already on the record does not relieve the appellant or the other heirs of Jhagru Sahu from making an application for substitution as legal representatives of Jhagru Sahu in terms of rule 4 of Order 22. Doman was respondent in his own capacity. Now, if the appellant wants him to be placed on the record as legal representative of Jhagru Sahu, a proper application should be made. Therefore, the appeal did abate before the application for substitution was filed.

Reliance has been placed upon a number of cases [*Bhikaji Ramchandra* v. *Purushotam* (1), *Adusupalli Venkata Row* v. *Marikruthu Ammal* (2) and *Mt. Sughar Kunwar* v. *Babu Sitaat Ram* (3)] in support of the contention that the presence of Doman on the record as legal representative would prevent the appeal from abating. These cases do not go so far. They only lay down that where there are several representatives, if an application is made within time for bringing any one of them on the record, the appeal does not abate, and that the other legal representatives may be made parties to the case even after the expiry of the time fixed for substitution. It is notable that in all those cases an application was made as required by rule 4 of Order 22 as regards one of the legal representatives within time. The rule does not require that all the legal representatives should be on the record, and if one of them is properly brought on the record as legal representative there will be no abatement. The aforesaid cases are not on all fours with the present one.

The learned Vakil on behalf of the appellants then urges that upon the grounds stated in the petition the abatement should be set aside. On this score he seems to stand on a firmer footing. It appears that Jhagru Sahu died in September last, and the appellants came to know of his death in December, and that after certain correspondence with the learned Vakil who appears for them in the present case the application was made within time from the date of knowledge of the death of the deceased. The allegations made in the application are not at all controverted by any counter-affidavit, and regard being had to the fact that the appellant lives at a distance from the residence of the deceased Jhagru Sahu, it is possible that, as alleged by him, he did not come to know of the death of the deceased until December. We, therefore, accept the reasons given in the petition for not making the application for substitution in

(1) [1886] 10 Bom. 220.
(2) [1912] 11 M.L.T. 19=(1912) M.W.N. 9=13 I.C. 313=23 M.L.J. 169.
(3) [1917] 20 O.C. 67=39 I.C. 135=4 O.L.J. 92.

time, and accordingly we set aside the abatement and direct that the substitution as prayed for be made. The opposite party has entered appearance and in this case he is entitled to costs.

Substitution ordered.

✱ 1925 PATNA 125

DAS AND ROSS, JJ.

Akbar Ali Khan—Petitioner.

v.

Herbert Francis—Opposite Party.

Civil Rev. No. 18 of 1924, Decided on 29th April 1924, from an order of Sub. J. of Patna, D/-1st December 1923.

✱ *Civil P.C., O 26 R.5—Examination of plaintiff on commission—Jurisdiction exists but should not be granted save in extreme cases—Such caution is not needed in case of plaintiff's witnesses.*

An order for the examination of the plaintiff on commission is a very strong order to pass in any case though it is with jurisdiction. The case of the defendant stands on an entirely different footing. Where an application is made by a defendant who lawfully resides out of the jurisdiction of the Court according to the ordinary course of his life and business, the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a *forum* of his choice though he resides beyond the jurisdiction of such Court. [P 126 C 1]

Where in a money suit the lower Court had granted plaintiff's application to examine himself on commission and the suit had been filed at Patna and the Plaintiff resided in London,

Held: in revision that the application should not be granted. But the order was upheld so far as it concerned the plaintiff's witnesses being examined on commission. 1922 Cal. 42 Foll. 25 Ch. D. 21 E. manual v Soltykeff Ref. to. [P 127 C 2]

Sultan Ahmed, Janak Kishore and Saiyed Ali Khan—for Petitioner.

Baikuntha Nath Mitter — for Opposite party.

Das, J.—This application is directed against the order of the learned Subordinate Judge of Patna, dated the 1st of December 1923. An application was made before him for the examination of certain persons including the plaintiff in London. The learned Subordinate Judge has acceded to the application. The suit in which the application was made was instituted by one Herbert Francis residing at No. 21 Bedford Row. London, against Nawab Saiyid Muhammad Akbar Ali residing in Patna, and certain other persons. The allegations on which the suit was brought were these that on the 15th of September 1919 Nawab Wasig Hussain Mobarak Jung, the son of the first defendant then residing in London, executed a bond in favour of the plaintiff by which he agreed to pay to the plaintiff the sum of £1400 in five years and to pay interest at 15 per cent per annum annually. The plaint goes on to assert that the bond "was intended to constitute a mortgage and was sent to India to be registered where it was lost and was never registered" and the plaintiff says that he does not rely on the agreement between him and the deceased as a mortgage The plaintiff then states that there are three instalments of interest due to him amounting to £ 630. It is then asserted that on the 2nd of December 1919, the deceased executed a promissory note by which he agreed to pay to the plaintiff the sum of £ 35 six months after that date. The suit was instituted to recover £ 35 and interest thereon £ 6-8-6, and the sum of £ 630 due as interest upon the bond which according to the plaintiff is lost.

Now this is the suit and the plaintiff applied before the Subordinate Judge for an order permitting him to examine on commission himself, his two clerks, Doctor Abdul Mazid now in England, and the widow of the deceased Mrs. Jung. The learned Subordinate Judge thought that the application was a reasonable one and he saw no objection whatever in granting it. Mr. Sultan Ahmed on behalf of the defendant No. 1, the petitioner in this Court, objects to the order passed by the learned Subordinate Judge.

A distinction must, in my opinion, be drawn between the plaintiff himself and the witnesses whom he seeks to examine on his behalf. The provision of law under which the application was made is contained in Order 26, rule 5 of the Civil Procedure Code which provides as follows:

'Where any Court to which application is made for the issue of a commission for the

examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request."

There was undoubtedly a jurisdiction in the Court to allow the examination of the plaintiff on commission; but, the question, in my opinion is, whether the exercise of that jurisdiction in this case does not amount to a denial of justice to the defendant. In my opinion, an order for the examination of the plaintiff on commission is a very strong order to pass in any case. The case of the defendant stands on an entirely different footing., As was pointed out in the case of *Kumar Sarat Kumar Ray* v. *Ram Chandra Chatterjee* (1).

"Where an application is made by a defendant, who lawfully resides out of the jurisdiction of the Court, according to the ordinary course of his life and business, the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a *forum* of his choice though he resides beyond the jurisdiction of such Court."

It is not difficult to understand the principle upon which the distinction is drawn between the case of a plaintiff and the case of a defendant. The plaintiff is entitled to choose his own *forum* and having chosen his *forum* he is not entitled to say, "I reside outside the jurisdiction of the Court, therefore I ask to be allowed to examine myself on commission" The obvious reply is, "Why did you choose that particular *forum*? It was open to you to bring the suit in the Court where you reside". So far as the defendant is concerned, obviously the same argument does not apply in his case. In the case of *Nadin* v. *Bassett* (2) the plaintiff residing in New Zealand brought an action in in England for redemption alleging himself to be the heir-at law of a person who had died intestate entitled to a remainder in fee in the equity of redemption which had fallen into possession since his death. As was pointed out by Kay, J in the Court of first instance, and Cotten, L. J. in the Court of Appeal, in order to make out his personal identity it was necessary for him:

"To produce evidence showing himself to be the person who landed in New Zealand from such a ship and in such a year".

He applied for his own examination and the examination of certain number of witnesses in New Zealand. Kay, J. thought that to compel him to come to England and to give evidence in his favour would be to deny him justice for it was not possible for him to incur the expenses involved in a jurney to England from New Zealand; and he allowed the application. In appeal a different view was taken. The decision of Cotton, L. J. on this point is as follows:

"The great contest, however, is as to the examination of the plaintiff. The examination before a special examiner may be ordered if the Court considers it "necessary for the purposes of Justice." No case is made that it is practically impossible for the plaintiff to attend at the trial, and what we have to consider is whether under the circumstances of the particular case justice requires that he should be examined in this way. It appears to me that it is not consistent with the due administration of justice to allow the plaintiff to give evidence in his own behalf without attending to be orally cross-examined".

In the result the learned Judge qualified the order passed by the Court of first instance by inserting a proviso that the depositions of the Plaintiff are not to be read if the Defendant requires him to appear at the trial to be examined and cross-examined. We offered to pass an order in these terms in this case, but Mr. B. N. Mitter on behalf of the plaintiff opposite party, says that an order in this form will be perfectly useless so far as he is concerned That being so, the question is, whether we ought to maintain the order passed by the learned Judge in the Court below for the examination of the plaintiff on commission in England. It is contended before us by Mr. Mitter that the learned Subordinate Judge acted with Jurisdiction; and that we ought not to interfere in this case, since it is not shown that he had no jurisdiction to act in the way that he has done. This question was also investigated by Sir Ashutosh Mukherji in the case to which I have already referred. The learned Judge cited the following passage of Lord Esher M. R. in *Emanuel* v. *Soltykoff*:

(1922) Cal 42 = 35 C. L. J. 78
(2) 25 C.H.D. 21 = 53 L.J. C.H. 253 = 49 L.T. 454 = 32 W. R. 70.

"The Court had to exercise its discretion as to granting a commission, and this Court would be very unwilling to interfere with the exercise of that discretion by the Court below. Each case must depend upon its own circumstances and no rule as to the exercise of that discretion could be laid down. If this court saw that the discretion had been wrongly exercised, if it saw that the case in all its bearings was not laid before the Court below, if it saw that the court below misapprehended an important part of the case, this Court would intertere. The Court below seemed to have treated the matter as if it was merely a commission to examine witnesses".

This is exactly the point here. In my opinion, the learned Judge in the Court below dealt with the application as if it was merely an application for examination of witnesses on commission. He conceded, it is true, that ordinarily a party himself or his servants should not be allowed to be examined on commission; but he did not sufficiently realise that even in the case of parties to the suit the case of a plaintiff stands entirely on a different footing and that it is an extraordinary thing to pass an order for the examination of a plaintiff on commission. That being so, I arrive at the conclusion that the learned Judge in the Court below exercised his jurisdiction with material irregularity; and that this Court sitting in revision is entitled to interfere with that order in aid of justice. The order of the learned Subordinate Judge must accordingly be set aside so far as this point is concerned.

The other question is whether the rest of his order ought to stand. It is urged that two of the witnesses are the servants of the plaintiff, and that in any case there is no justification for the examination of all these witnesses in England specially as the whole case will then have to be tried in India on dead evidence. That may be so; but we cannot at this stage say that the plaintiff is not entitled to have the evidence of his own witnesses. It is not shown that the plaintiff can procure their attendance in India. They may refuse to come to India; to say at this stage, that the plaintiff is not entitled to have them examined on commission, is practically to deprive the plaintiff of justice. I am not willing to take this risk in this case. It was suggested that their evidence is really irrelevant. That may be so, but I am not prepared at this stage to say how their evidence will affect this case.

The result is that the order of the learned Subordinate Judge, in so far as he has directed the examination of the plaintiff on commission is set aside. The rest of the order will stand. The petitioner is entitled to the costs of this application. Hearing fee five gold mohurs.

Ross J.:—I agree.

Applicatin partly allowed.

✱ 1925 PATNA 127

DAS AND ROSS, JJ.

Amolak Chand—Appellant

v.

Mansukh Rai Mangan Lal — Respondent.

Appeal from Original Order No. 52 of 1924, Decided on 9th May 1924, from an order of D. J. of Bhagalpur, D/- 13th March 1924.

✱ *Provincial Insolvency Act (V of 1920) S. 2 (d)—Ancestral property which may be sold for paying antecedent debts is liable.*

Property over which a person has a disposing power which he may exercise for his own benefit includes ancestral property which may be sold for the satisfaction of antecedent debts.

One L acquired considerable properties, movable and immovable and died leaving a son J. who had four sons, two of whom were minors, and two of whom had two sons who were minors. J and his two major sons embarked on business which proved unsuccessful and heavy debts having been incurred they were adjudged insolvent. When the Receiver was selling the joint family property objection was raised by the minors that this is not property within the meaning of section 2 (d) of the Insolvency Act.

Held that the objection was not open.—7 Bom. 438—26 Mad. 214—44 All. 316 Foll 1924 Patna 259 Overruled. [P 128 C 2]

Susil Madhab Mullick and Satya Sundar Bose—for Appellant.

Noresh Chandra Sinha — for Respondents.

Ross, J.—This is an appeal against a decision of the District Judge of Bhagalpur, holding that certain properties vested in the Receiver in insolvency.

The facts of the case are that one Lachmi Chand, who acquired considerable properties, movable and immovable, died leaving a son Jiban Ram who had four sons, two of whom are minors and two of whom had two sons who are minors. The appellants are these four minors. Jiban Ram and his two major sons embarked on business which proved unsuccessful and heavy debts having been incurred they were adjudged insolvent at the instance of the creditors and a Receiver was appointed. As the Receiver is selling the joint family property this objection has been raised by the minors that this is not property within the meaning of section 2 (*d*) of the Insolvency Act.

This contention was overruled by the learned District Judge. It is contended in appeal that as the property is admittedly the ancestral property of a joint *Mitakshara* family it cannot be proceeded against at all or, if at all, only to the extent of the share of the major members of the family. Two decisions of this Court have been cited in support of this contention *Sahaj Narayan Sahi* v. *Wajid Hussain* (1) and *Sant Prasad Singh* v. *Sheodut Singh* (2). The principle was discussed in the latter decision. That decision, however, proceeded expressly on the authority of *Sahu Ram Chandra's* case (3). That case has been recently considered by the Judicial Committee and certain propositions laid down therein have been overruled. Therefore the decision in *Sant Prasad Singh* v. *Sheodut Singh* (2), cannot now be considered to be an authority on this subject. On the other hand there are the decisions in *Fakirchand Motichand* v. *Motichand Hurruckchand* (4), *Nunna Brahmayya Setti* v. *Chidaraboyina Venkitaswami* (5) and *Bawan Das* v. *O. M. Chiene* (6) to mention only three of the decisions which have been referred to by the respondents; and, in my opinion, it is too late now to contend that property over which a person has a disposing power which he may exercise for his own benefit does not include ancestral property which may be sold for the satisfaction of antecedent debts.

I would, therefore, dismiss this appeal with costs.

Das, J.—I agree.

Appeal dismissed.

(1) [1919] 49 I. C. 848.
(2) 1924 Pat. 259—2 Patna 724.
(3) [1917] 39 All. 437—44 I. A. 126—21 C. W. N. 698—1 P. L. W. 557—15 A. L. J. 437—19 Bom. L. R. 498=26 C. L. J. 1—33 M. L. J. 14=39 I. C. 280—(1917) M. W. N. 439—22 M. L. T. 22—6 L. W. 213 (P. C.)
(4) [1883) 7 Bom. 438.
(5) [1903] 26 Mad. 214.
(6) 1922 All. 79—44 All. 316—20 A. L. J. 155

✱ ✱ 1925 PATNA 128

MULLICK AND KULWANT SAHAY, JJ.

Mangal Pathak and others—Decree-holders—Appellants.

v.

Mesar Singh and others—Judgment-debtors—Respondents.

Appeal from original Decree No. 7 of 1922, Decided on 21st December 1922. against an order of the Subordinate Judge, third Court of Gaya D/- 9th July 1921.

✱ ✱. *Decree—Amendment of—Grant of stay of execution on parties, agreement is not amendment of decree.*

Grant by appellate Court of stay of execution in consequence of agreement between parties does not amount to amedment of decree in terms of the agreement so as to make the agreement enforceable in execution upon the appellate Court affirming the original decree. 5 W. R. Mis. App. 1, ; 7 Mad. 400 Dist.

[P. 129, C. 2.]

S. N. Ray for *J. P. Sinha*—for Appellants.

B. N. Mitter and *B. K. Sinha*—for Respondents.

Mullick, J.—The paper-book in this case does not contain the necessary papers and we have been considerably inconvenienced by the omission of the Appellants in this respect.

On reference to the original records we find that on the 27th February 1917 a decree was made in favour of the Appellants for Rs 2,715-6 damages and Rs. 1,647-12-4 on account of costs. Although it is now contended that the decree allowed interest both on principal and costs, it is quite clear on a reference to the decree that the direction of the Court was that interest was to be paid only

upon costs. Then the Defendants appealed against the decree. While the appeal was pending, the decree-holders proceeded to execute and the judgment-debtors filed an application before the appeal Court asking for stay of execution and agreed, it is alleged by the Appellants, to pay not only the amount of damages due up to that date but also interest and thereby to modify the original decree. The appeal Court allowed stay upon the judgment debtor's executing the necessary security bond and paying Rs. 1,699-2-3 in cash. The security bond in its earlier portion states that they were liable to pay interest both upon the principal sum and the costs. but in the concluding portion it is stated that the security is being given for Rs. 2851-11-3 on account of the mesne profits only.

However that may be, it is contended now before us that there was a clear admission in the security bond that the judgment-debtors were liable to pay interest upon the principal money. The appeal Court finally dismissed the appeal, and the question now is, whether in the execution, which is now proceeding, the decree-holders are entitled to interest not only upon the costs but also upon the principal. The Subordinate Judge has held that upon a construction of the decree, the claim of the decree-holders is not tenable and the present appeal is filed against his order.

It is quite clear that there was no specific agreement in the security bond to pay interest upon the principal, nor is there any recital of the rate of interest; so that on that ground alone this appeal must fail. But even if it were admitted that there was an agreement to pay interest at the rate of 6 per cent. the question is whether that agreement can be enforced in execution of the decree.

Reliance is placed upon *Sreeshteedhur Saha* v. *Woomeshnath Roy* (1) and *Lakshmana* v. *Sukiya Bai* (2). In both these cases an application was made by the judgment-debtor at the execution stage for the stay of the sale and in the presence of the Court the Judgment-debtor agreed to pay interest upon the decretal sum. It was held that the Court's order allowing the prayer was in effect an amendment of the decree by consent and was operative. But in the present case the difficulty is that the agreement, if any, to pay interest was made not in the execution Court but in the appeal Court and that, notwithstanding any arrangement that may have been arrived at between the parties with the consent of the Court the Court eventually by dismissing the appeal before it affirmed the original decree; and therefore the decree that now stands between the parties is not the decree amended by the alleged consent but the original decree in which no provision is made for the payment of interest upon the principal.

In these circumstances the Subordinate Judge was right and the appeal must be dismissed with costs.

Kulwant Sahay, J.—I agree.

Appeal dismissed.

(1) 5 W. R. Mis. 1.
(2) [1884] 7 Mad. 400.

1925 PATNA 129

DAS AND ROSS, JJ.

Secretary of State—Appellant.

v.

Manmatha Nath Dey and others—Respondents.

Civil Appeal Nos. 242 to 244 of 1921, Decided on 27th May 1924.

(a) *Land Acquisition Act, S. 23—Sale nearest in date is the best criterion of the market value—Distinction between frontage and back for a very small plot is meaningless.*

Sale nearest in date to the acquisition is the best criterion of the market value at the time of the acquisition.

Where the total area was only 1·123 acres.

Held : that for a small plot like this, the distinction between frontage and back did not appear to have much meaning andthat there was no good ground for fixing two rates for such a small plot. [P 130 C 2]

(b) *Land Acquisition Act S. 28—Interest on excess is payable from taking possession by collector to payment of excess.*

Land owner is entitled to interest at six per cent. per annum on the excess awarded over the amount awarded by the Collector from the date on which the Collector took possession of land to the date of payment of such excess into Court. [P 130 C 2]

Government Pleader—for Appellant.

N. C. Sinha, B. C. Mitter and *Achalendra Nath Das*—for Respondents.

Ross, J.—These are three appeals by the Secretary of State against a decision of the learned District Judge of Patna in three references under S. 18 of the Land Acquisition Act. The only question which has been discussed in these appeals is the rate of compensation for the lands. In the compensation actually awarded there are other elements, namely compensation for buildings, trees and wells, but with these we are not concerned.

The learned Government Pleader contended that the evidence was insufficient to support the award of the District Judge. On behalf of the respondents there are cross appeals and it is contended that the rate fixed by the District Judge is, on the evidence, too low. In my opinion there is no merit in the appeals themselves. The only documentary evidence that was produced on behalf of the Secretary of State was two sale deeds in favour of Chuni Mahto which gave a rate of Rs. 200 a *Cottah*. Now the evidence of Chuni Mahto, who was examined on behalf of the Secretary of State, shows that the land was given to him by way of gift in consideration of his long service of his master from whom he purchased. He admitted that several persons were purchasers who were willing to pay Rs. 1700, Rs. 1800 or Rs. 2000. Evidently therefore these sale deeds are no criterion of the true value of the lands. The respondents in their cross-appeals contended that more weight ought to have been given to Exhibits 4, 5, and 6. Now in all these cases the prices were high, Rs. 1400, Rs. 1500 and even more per *Cottah*, but in every case there were special reasons for the purchases and in my opinion these must all be considered as fancy prices. It is true that in the case of the highest price of all Ext. 6 the vendor himself purchased at a high figure, but the circumstances in which he purchased have not been made a subject of investigation. The real argument on behalf of the respondents is that of the two documents which the learned District Judge has taken into consideration, namely, Exts. 2 and 3, Ext. 3 gives the better criterion of the two. Ex. 2 is a sale deed of 1918 by which the very land covered by case No. 50, that is appeal No. 243 was conveyed. The rate was Rs. 441 a *Cottah*. The evidence shows that the land was sold cheap because it was inauspicious. The other document Ex. 3 gives the rate at Rs. 600 a *Cottah* and the learned District Judge has taken the mean roughly between these two and has arrived at the figure of Rs. 500. Now Ex. 3 is nearest in date to the acquisition itself and is therefore in my opinion the best criterion of the market value at the time of the acquisition. The land was acquired in March 1920 and this sale deed was executed on the 28th of January of that year. The land is directly opposite the land acquired in case No. 50 and I can see no reason why the rate shown in that deed, namely Rs. 600, should not be taken as the standard of these cases. It is the best evidence on the record.

In appeal No. 244 the respondent in his cross-appeal objects to the treatment of half of his land as frontage land and half as back land as being arbitrary. The total area is only 1·423 acres and for a small plot like this the distinction between frontage and back land does not appear to have much meaning. In my opinion there is no good ground for fixing two rates for this small plot and I would award compensation at the uniform rate of Rs. 600 a *Cottah*.

In case No. 50, appeal No. 243, the respondent claims interest under S. 28. He is clearly entitled to interest at six per cent. per annum on the excess now awarded over the amount awarded by the Collector from the date on which the Collector took possession of land to the date of payment of such excess into Court.

The result is that the appeals are dismissed with costs and the cross-appeals are decreed to this extent that the rate of compensation for the land in all the cases is fixed at Rs. 600 a *Cottah* and in appeal No. 244 this rate is made uniform for the whole land acquired and in appeal No. 243 interest is awarded at six per cent. per an numas stated above.

Das, J.—I agree.

Appeal dismissed.

1925 PATNA 131

JWALA PRASAD, J.

Deodhari Pandey—Petitioners.

v.

King Emperor—Opposite Party.

Criminal Rev. No. 222 of 1924, Decided on 1st July, 1924, against an order of the S. J., Saran, D/-25th February, 1924.

(a) *Criminal Trial—Benefit of doubt—Accused must get the benefit of refusal of police to refer to diary—Criminal P. C. S. 172.*

It may be within the right of the police officers not to refer to a diary, but the accused is entitled to the benefit of their refusal to refer to the diary and to disclose the source of their information. [P 132 C 1]

(b) *Criminal P. C. S. 117 Cl. 4—Association must be proved.*

Under cl. 4 of S. 117. two or more persons may be jointly tried where they have been associated together in the matter under inquiry, but there must be clear evidence to prove the association. [P 137 C 1]

(c) *Criminal P. C., S. 110—Evidence must not be vague and general.*

Evidence to prove the charge against the accused under S. 110, Cls. (a) (d) and (f) should not be vague, general and of hearsay character. [P 137 C 1]

Abdul Aziz and *S. Nooruddin*—for Petitioner.

S. Varma—for Opposite Party,

Judgment.—The Petitioner Deodhari Pandey has been convicted under S. 110 of the Code of Criminal Procedure and directed to execute a bond of Rs. 500 with two sureties of Rs. 250 each to be of good behaviour for one year, or in default to undergo rigorous imprisonment for one year.

On 4th September 1923 the Sub-Inspector of Basantpur submitted to the Magistrate two reports: one against the Petitioner Deodhari Pandey and the other against one Adit Singh, for taking action under S. 110, cls. (*a*), (*d*) and (*f*) of the Code of Criminal Procedure.

The Magistrate drew up two separate proceedings under the aforesaid section, one on the 15th September 1923 against Adit Singh (Case No. 130 of 1923) and the other on the 17th September against the Petitioner (Case No. 141 of 1923). Both the cases were however, amalgamated by order No. 9 of the Magistrate, dated the 28th September 1923, and thus the Petitioner and Adit Singh were jointly tried and convicted by a single judgment passed by the Magistrate on the 4th February 1924. The Petitioner Deodhari Pandey appealed to the Sessions Judge and his appeal was dismissed by the Sessions Judge of Saran on the 25th February 1924. The Petitioner has now come to us in revision.

Mr. Abdul Aziz on behalf of the Petitioner contends that the Petitioner has been materially prejudiced by his being jointly tried with Adit Singh, that the evidence adduced against the Petitioner is not sufficient in law for his conviction of the charge under S. 110 and that the Courts below omitted to consider the defence and plea of the Petitioner.

Now the charge against the Petitioner as laid in the proceeding is in terms of S. 110, cls. (*a*), (*d*) and (*f*) that he is by habit a thief and house-breaker and habitually commits mischief and is so dangerous and desperate that his being at large without security is hazardous to the community. The Petitioner denied being by habit a thief or burglar, and asserted that he bore good character and that he was falsely implicated in the case at the instigation of his enemies Asharfi Singh and Hafizuddin. Mr. Abdul Aziz contends that the accused's plea of enmity with the aforesaid persons has not only been proved by the defence but has also been admitted by the prosecution witnesses and found to be true by the Courts below but that the Courts below omitted to take into account this enmity as vitiating the evidence of the prosecution and as having been instigated and influenced by Asharfi Singh and Hafizuddin. The prosecution sought to establish the charge against the accused by oral and documentary evidence.

The documentary evidence consists of several first informations (Exhibits 1 to 17) collected by the Sub-Inspector of Basantpur for a period of a year and a half ranging from 1922. In none of the first informations the Petitioner Deodhari was suspected. Only in some of them Adit Singh, who was tried jointly with the Petitioner, was suspected, but we have nothing to do with Adit Singh, The Sub-Inspector (P. W. 21), however, says that Deodhari was suspected in

the cases of which the first informations are Exhibits 1, 2, 3 and 4. Of these Exhibits 3 and 4, were not drawn up by him but were drawn up by Inspector Ziauddin who has not been examined. In these first informations the Petitioner was not named as having been suspected, and the Sub-Inspector refused to refer to the diary and to disclose the source of his information. Consequently the information upon which his knowledge is based cannot be tested. Though in the first information (Exhibit 9), dated the 14th July 1923, lodged by Ganga Singh (P. W. 31) about his house-breaking, none was suspected, yet in the evidence in the present case Ganga Singh says that Deodhari had come to purchase a bullock a day before the burglary was committed and a *danta* was shown to him by a Constable. Karim Mohammad (P. W. 32) tries to support Ganga Singh. But in cross-examination both these witnesses say that they did not state to any officer about Deodhari having come to Ganga Singh's house for purchasing a bullock. Therefore the evidence as to the complicity of the Petitioner with the house-breaking in question is unreliable.

Exhibit 10, dated the 14th July 1923 is a first information of a theft lodged by Sahadeo Dubey (P. W. 51) through the son of the Chowkidar. Sahadeo says that the people identified a *danta* as belonging to Deodhari. In cross-examination he says that he does not remember the name of any persons who identified the *danta* as belonging to the Petitioner nor does he know the names of persons who called him thief. P. W. 2, Dafadar of Mustagabad, is a tenant of Asharfi and in the letter he sent to the Sub-Inspector he did not mention the fact of the *danta* having been left behind by Deodhari and of his having any suspicion against him. P. W. 54 called to corroborate P. W. 2 says that he saw the *danta* at the door of the complainant. Still, it is strange that the complainant did not mention it to the police or suspect Deodhari as having committed the theft. Therefore this story for connecting the accused Deodhari with the theft in question is suspicious.

Exhibit 15, dated the 4th November 1922, is an information lodged by Kulanjan Rai of a *sindh* having been cut in the house of Babban Tewari and the thieves having entered the room where his son was sleeping, but the son having got up raised a *halla*, the thieves ran away without stealing anything. The Chowkidar says in the first information that nobody was identified and that he suspected nobody. Babban Tewari (P. W. 27), however, in his evidence says that he recognised Deodhari amongst the thieves and he gave a description of it. He also says that he told of it to the police. This is inconsistent with the first information lodged by the Chowkidar and is not corroborated by any evidence on the record.

Exhibit 17, dated the 1st January 1922, is another information lodged by Bahadur Mian, Chowkidar (P. W. 20), of a *sindh* having been cut in the house of Hafizudin of Govindpur in which it is stated that the thieves were not recognized although they were chased by the villagers, and he did not suspect anybody. The Writer Head-Constables like the Sub-Inspector refused to refer to the diary and to disclose the information upon which the Petitioner Deodhari was suspected in any of the aforesaid cases. Ganga Singh, Writer Head-Constable, goes so far as to say, "I do not want to refer to my diary as the accused would be entitled to see it." It may be within the right of the police officers not to refer to a diary, but the accused is entitled to the benefit of their refusal to refer to the diary and to disclose the source of their information. Their evidence therefore does not prove anything against the Petitioner. It is obvious that the cases referred to in the first information filed in the case do not afford any tangible proof against the Petitioner. The one or two cases sought to connect the Petitioner with the occurrence rest upon the flimsy identification of a *danta* (F. I. Exhibits 9 and 10) having been left behind by the Petitioner in the course of commission of offences and the statement of Babban Tewari inconsistent with the first information lodged (Exhibit 15). To crown all, Hafizuddin (P. W. 29), who is stated

by the accused to be at the bottom of the case, has examined himself as a witness. He is the sworn enemy of the Petitioner. He had a market at Mustafabad, and a rival market was opened at Gopalpur by Mahendra Tewari and Bahadur Tewari, which led to a proceeding under S. 144 of the Code of Criminal Procedure, in which the Petitioner played an important part against Hafizuddin. Hafizuddin tries to connect Deodhari with the theft in his house of which information (Exhibit 30) was given by Chowkidar Bahadur Mian (P. W. 30). The Chowkidar met him before going to the thana. He did not disclose to the Chowkidar that he had suspected Deodhari, and the Chowkidar stated in his first information that the people chased the dacoits but nobody was identified. Had he suspected Deodhari, certainly the Sub-Inspector would have searched the house of Deodhari, but he admits that his (Deodhari's) house was not searched.

This is the summaryof the documentary evidence. The learned Sessions Judge after reviewing the first informations summed them up thus:—

"It would appear from what has been said above that only in a few cases the accused Deodhari was suspected during the course of investigation."

The few cases referred to by the learned Sessions Judge have already been noticed, namely, Exhibits 9 and 10, which rest upon the identification of a *danta* of Deodhari having been left behind in the course of commission of the offences. It has already been shown that the evidence is flimsy, particularly when the *danta* affair was not mentioned in the first information nor was any suspicion expressed against the accused in the first information.

Therefore it may now be safely stated that in spite of the investigation regarding the history of the accused Deodhari from the year 1922 no tangible evidence of any reasonable suspicion against Deodhari has been disclosed in any of the cases. The case therefore rests entirely upon the oral evidence in the case.

[Here the judgment narrates the evidence of some of the prosecution witnesses.]

The remaining witnesses that have not already been commented upon come from distant places and do not seem to say anything specific against the petitioner. In fact, they do not seem to have any personal knowledge of the character of the accused. Their evidence does not prove the case of the prosecution.

The oral evidence on behalf of the prosecution is not satisfactory and is obviously due to the combination of Hafizuddin and Asharfi, the enemies of the Petitioner,

Out of the 70 witnesses exmined on behalf of the defence, 30 are cultivators, namely, D. Ws. 14, 18, 21, 24, 25, 27, 28, 29, 30 tc 46, 49, 52, 55, 56, 58 and 59. Of these D. W. 18 is also a Pandit and 29 a Vaidya. D. Ws. Nos. 47 and 54 are traders, having properties yielding a very large income besides lands in their own cultivation. They are very respectable and have ample opportunities of knowing the character of the Petitioner.

[Here a summary of defence evidence is given.]

The above is the summary of the evidence on behalf of the prosecution and defence. Dealing with this evidence the Magistrate says as follows:-

"Accused Deodhari states that Asharfi Singh and Hafizuddin are at the bottom of the case. The former, he says, bears him ill-will as he helped Mathura Sahu with whom Asharfi was fighting a case regarding the possession of the village Chitauli and the latter for helping his opponents Mahendra Tewari and Bahadur Tewari with whom he had a dispute regarding a market in respect of which there had been a proceeding under S. 144, Cr. P. C.

"The plea of the accused is not at all tenable against the overwhelming evidence of specific instances which even ignoring the evidence of general repute is sufficient to prove the charge against them. The witnesses examined by the defence do not at all go to rebut the evidence adduced by the Crown to prove the specific instances in which the accused have been supected and there is no reason whatever to suppose that such evidence had been manufactured by the enemies of the accused. The defence

witnasses have come forward to give the accused good character but when cross-examined they say that they do not know what the accused do and where they go at night."

The above observation of the Magistrate is with respect to the case of Petitioner Deodhari Pandey as well as Adit Singh jointly tried with him. It is, therefore, vague and general and does not purport to deal with the special pleading of the Petitioner set forth in the words of the Magistrate quoted above. Adit Singh dropped out when Petitioner's case was dealt with by the Sessions Judge, who disposes of the evidence as follows:—

"It is submitted that the witnesses come from about 12 different villages but none from Sisai and some of them are connected with Asharfi Singh. It is in the evidence of Gaya Singh (D. W. 70) that Mathura and Asharfi are on bad terms in taking possession of a village and he gave Rs. 10 or Rs. 20 to accused Deodhari to help them in taking possession of the village on behalf of Mathura's widow. It is clear therefore that wherever force was necessary Deodhari who is a *pahalwan* was engaged. It is also said that Hafizuddin had litigation with Mahendra Tewari regarding a market and there was a S. 144, Cr. P. C., case and Deobhari was engaged by Mahendra. It is in the evidence of D. W. 62 that Hafiz asked Deodhari not to disturb the *mela* and this was the cause of the quarrel. P. W. 2, a President of the Union, says that there was a burglary 5 or 6 months ago and the accused was suspected and that he is the leader of a gang of bad characters. He is not concerned with Hafi Buddin who, it is said, is annoyed with the accused for taking the side of Mathura and Maherdra. P. W. 8 proves a theft at the house of Noor Mohammad and Hafizuddin in which the accused was suspected. P. W. 12 says that he heard the voice of the accused after theft in the house of Hafiz. D. W. 14 corroborates him. D. W. 15 says that people say that the accused is a thief. A year ago he saw him taking away a pair of shoes from a cobbler's shop. It is in the evidence of the witnesses from the neighbouring villages, that Deodhari is a thief. It is in the evidence of some of them that whenever Deodhari goes to the village there is a theft. Some of the prosecution witnesses are zemindars, Presidents of the Unions, cultivators and shop-keepers and there is no adequate ground for disbelieving their evidence.

"Regarding the absence of any witness from village Sisai, it is submitted by the learned Public Prosecutor that Sheodhari Singh (D. W. 65), *malik* of Sisai, is a Bhuinhar and a receiver of stolen properties and he is helping the accused, though this is denied by him, and it is for this reason that the defence witnesses, most of whom are petty Babhan zemindars—70 witnesses in all of Sisai and neighbouring villages Sisain, Chitauli Dudhra, Chainpur Gore Kothi, Kursaul, Lodipur, Karanpura Barahiatola: Bewal, Pipra, Ajayan, Pokhra Lehaji, Serai, Mahammadpui Madar Kalan, Begahin, Seraia, Sikandarpur Jagarnathpur, Palezpura, Bangra, Saidpur, Hulas Chapra, Parsnowli—have come to give evidence of good character of the accused. Only a few are cultivators and Brahmins and I do not consider their evidence reliable. It is for this reason that the prosecution has not been able to examine any witness from Sisai.

"In the circumstances and in view of the nature of evidence adduced on behalf of the prosecution I am satisfied that the charge against the accused has been established. The defence witnesses appear to have combined together to give a certificate of good character to the accused and are not reliable In my opinion the charge has been brought home to the accused and the learned Deputy Magistrate was right in ordering the Appellant to execute a bond."

The learned Sessions Judge does not clearly state that he accepts the contention of the Public Prosecutor that the *malik* of Sisai is a receiver of stolen properties. He refuses to accept the evidence of the defence witnesses upon the ground that only a few of them are cultivators and Babhans and that they have combined together to give a certificate of good character to the accused. It may

perhaps be said that he impliedly accepted the Public Prosecutor's explanation that the *malik* of Sisai is a receiver of stolen properties and consequently the witnesses of the Petitioner's village as well as of the neighbouring villages have come forward to give evidence in favour of Deodhari. No such suggestion seems to have been made before the Magistrate, nor does the Magistrate find the *malik* of Sisai was a receiver of stolen properties. He discarded the defence witnesses upon the ground that "they do not know what the accused do and where they go at night." The learned Sessions Judge does not refer to any evidence for his view that the *malik* of Sisai is a receiver of stolen properties, nor does he show that the said *malik* had any concern with the 24 villages besides Sisai from where the defence witnesses come. The police officers examined in this case as witnesses Nos. 21, 22 and 23 do not say that the *malik* of Sisai is a receiver of stolen properties. The Sub-Inspector (P. W. 21) mentions Gonraj Lohar and Gopi Lohar of Sisain, Mog Ahir of Chainpur, one or two Ahirs of Hariharpur and one Ahir of Afrad as the associates of Deodhari Pandey. He does not mention the name of Sheodhari Singh, *malik* of Sisai, as an associate or as a receiver of stolen properties. I have read the evidence and I do not find any witness stating that Sheodhari Singh was a receiver of stolen properties and in fact, as observed above, the Sessions Judge does not refer to any evidence on the point. In the second place, the witnesses are not from Sisai alone, but are also from 24 other neighbouring villages with which Sheodhari's connection has not been proved. Therefore the evidence of these defence witnesses has not been disposed of by the Magistrate or the Sessions Judge and no reason has been given, except the aforesaid one which appears to be purely imaginary and not based upon any evidence, for discarding the evidence of 70 witnesses on behalf of the accused coming from his own and the neighbouring villages. The learned Sessions Judge says that these witnesses are only "a few cultivators and Babhans" and assigns this as a reason for not accepting their evidence as against the witnesses of the prosecution whom he calls "Zemindars, Presidents of Unions, cultivators and shop-keepers." The Magistrate does not go so far and does not say that the defence witnesses are only a few cultivators and Babhans. In this also the learned Sessions Judge's view is against the record as the summary of the evidence already given in this judgment will show.

Most of the witnesses, if not all, are under the influence of Asharfi, Mathura and Hafizuddin. Therefore the evidence on behalf of the prosecution is not independent. The prosecution witnesses are mostly ordinary cultivators. They do not disclose their income or status and come from different villages having no concern with the accused or his village, whereas the witnesess for the defence have already been shown to be men of substance, their credit not having been shaken in the long cross-examination. The learned Sessions Judge in comparing the witnesses for the prosecution with those of the defence has made a remark in the inverse order. When he says that the witnesses on behalf of the accused are only a few cultivators and Babhans, he says what would apply, upon the record, to the witnesses for the prosecution, and when he says that the witnesses for the prosecution are zemindars and Presidents of Unions cultivators and shop-keepers, he says what would virtually apply to the witnesses for the accused. There are Presidents or ex-Presidents of Unions on behalf of both the parties. The learned Magistrate has not differentiated the witnesses of the prosecution and the defence on the above ground stated by the learned Sessions Judge. He has not acted upon the evidence of the defence on the ground that the prosecution has proved specific instances against the accused. Whereas the learned Magistrate is wrong in holding that specific instances against the accused Deodhari have been proved, the learned Sessions Judge is equally wrong in remarking that the witnesses for the accused are mere cultivators and Babhans, whereas those for the

prosecution are respectable witnesses. If the credibility of the witnesses depends upon their respectability and status in life, the summary already given in this judgment will show that the witnesses for the defence are entitled to greater weight than those on behalf of the prosecution. Those witnesses are from 25 villages, whereas the prosecution witnesses come from only 12 villages. The witnesses for the defence coma from the villages where the accused lives as well as from the neighbouring villages as admitted by the learned Sessions Judge, and those for the prosecution come from 12 distant villages. They had, as already shown, no opportunity of knowing the life and character of the accused, whereas the witnesses for the defence have had ample opportunity of knowing the accused. Although they may not be living with the accused in the night time, they live in close neighbourhood and vicinity of the accused to know of his movements and character. The learned Sessions Judge has omitted to consider the evidence on behalf of the defence and has thus fallen into an irregularity which vitiates his decision. He has also either misread or misapprehended or has not at all read the evidence of the witnesses on the record or else he would not have fallen into the error of saying that the witnesses for the defence were only cultivators and Babhans and those on behalf of the prosecution were zemindars and Presidents, etc. There are 38 substantial zemindar witnesses on behalf of the Petitioner as against 3 or 4 on behalf of the prosecution of minor importance who do not disclose their income and are under the influence of Asharfi and Hafizuddin, the enemies of the Petitioner. The proportion of zemindar witnesses on behalf of the defence is enormously greater than on behalf of the prosecution. I do not think the learned Sessions Judge applied his mind to the evidence on the record. He seems to have simply taken the points from the decision of the Magistrate and to have amplified them by his own imagination without having any recourse to the record. To the same indifference to evidence might be attributed his tacit acceptance of the argument of the Public Prosecutor that the witnesses of the accused's village and of the neighbouring villages must not be believed, inasmuch as the *malik* of the accused's village Sisai is a Bhuinhar and receiver of stolen properties. Except what may possibly have been contained in the police diaries and reports, which the police officers refused to disclose in their evidence there is nothing in the evidence either of the police or the witnesses to suggest that Sheodhari Singh, *malik* of Sisai, is a receiver of stolen properties. There is nothing to show that he is the *malik* of all the 25 villages or has any concern with them. There is absolutely no specific instance of any theft having been committed by the accused or of any theft or dacoity or mischief in which the accused was seriously suspected in the first informations or during the course of the investigation of the various cases referred to in the first information filed in this case. The evidence of general reputation is of a very vague character unsupported by any reason. It is based only upon suspicion. Besides, such evidence comes from the unreliable quarters, and the enmity of the accused Deodhari with Asharfi, Mathura and Hafizuddin has been fully established which affords ample reason for most of the witnesses who are under their influence, to have come forward to depose against the accused Deodhari.

Therefore the decision of the Courts below, particularly of the learned Sessions Judge, is vitiated by his omission to consider the evidence of the defence and he appears to have misread or misapprehended the evidence in the case. We are concerned with Deodhari alone and the evidence so far as Deodhari is concerned. We are not concerned with the other accused Adit who was tried jointly with Deodhari. The police and the prosecution witnesses no doubt say that they are associates, but the evidence has not established any association between Deodhari and Adit, residents of two different villages,

to commit theft, extortion or cheating. Under cl. (4) of S, 117, two or more persons may be jointly tried where they have been associated together in the matter under inquiry. I, however, fail to find any credible information or evidence regarding the association of the two persons Deodhari and Adit. The joint trial in this case probably proceeded upon the police report of the two accused being associates, yet the evidence led in Court failed to substantiate any association, and at the trial where 17 first informations were put in and number of witnesses examined no specific instance of both the accused being jointly concerned in any theft, robbery or extortion, mischief, etc., was established. It is therefore, contended on behalf of the Petitioner that the consideration of the evidence at one and the same time against both the accused by the Court below has prejudiced the Petitioner. I, however, do not rest my decision upon this technical ground alone, though I consider it to be a substantial one. I rest my decision upon the more substantial ground of there being no independent evidence to prove the charge against the accused under S. 110, cls. (*a*), (*d*) and (*f*) and because the evidence given is vague, general and of hearsay character, and not legally admissible for the purpose of proving a charge under S. 110, cls. (*a*), (*d*) and (*f*). The accused Deodhari is a cultivator of admittedly 8 or 9 bighas of land and is a wrestler and adds to his income by wrestling. He is regarded by the co-villagers as well as those of the neighbouring villages as a man of good character and his neighbours being men of substantial status in life do not suspect him to be a man of bad character and dangerous to the community. Nothing has been shown against these witnesses why their evidence should not be accepted. Upon their evidence it is impossible to hold that the accused is by habit a robber, house breaker or thief or he habitually commits mischief, extortion or cheating or is so desperate and dangerous that his being rendered at large without security would be hazardous to the community. The evidence shows that he is somewhat meddlesome and has identified himself with the local disputes and has thus become the enemy of Mathura, Asharfi and Hafizuddin. The learned Sessions Judge puts it thus: "It is, therefore, clear that wherever force was necessary Deodhari, who is a *pahalwan*, was engaged." The admitted enmity of these persons with the accused Deodhari has not been considered by the Courts below, which accounts for the prosecution witnesses having deposed against him.

For all these reasons, I would set aside the order of the Courts below and cancel the order requiring Deodhari to give security for being of good character under S. 118 of the Caiminal Procedure Code.

The evidence in this case is voluminous. The Courts below, particularly the learned Sessions Judge, dealt with it in a general and vague manner. Their judgments did not afford much assistance to this Court and I had to scrutinize the whole evidence. Though I tried to go through it cerefully, I am not sure if on account of the scribbling in the manuscript writing thereof I have not committed any slip or error, but the summary given by me is substantially correct.

Revision allowed.

✱ 1925 PATNA 137

ROSS AND SEN, JJ.

Gursahai Mahton—Petitioner.

v.

Muhammad Saiyad and others—Opposite-party.

Civil Rev. No. 267 of 1924, Decided on 31st July 1924, against an order of the D. J. of Patna, dated 8th May 1924.

✱ (*a*) *Evidence Act. S. 115–Taking part in partition proceedings by Revenue Court–Party can afterwards deny Revenue Court's Jurisdiction to proceed with partition.*

By taking part in the partition proceedings taken by collector one could not possibly confer Jurisdiction on the Revenue Court where there was none, so as to preclude oneself from suing for a declaration that the Revenue Court could not proceed with the partition. [P 138 C 2]

(*b*) *Specific Relief Act., S. 52—Injunction may be granted restraining partition by collector though applicant has taken part for several years, in collector's partition.*

Where a party who had taken part in partition proceedings by collector for several

years, afterwards filed a suit in a civil Court for a declaration that the Revenue Court had no jurisdiction to proceed with the partition and applied for injunction restraining the completion of the partition :

Held that injunction being a discretionary relief, it might properly be granted in this case. [P 138 C 1]

Kailash Pati—for Petitioner.

B. C. Sinha and Rajeshri Prasad—for Opposite Party.

Sen, J.—The petitioners and the opposite party are parties to a partition proceeding now pending before the Collector. It appears that the petitioner raised an objection under S. 7 of the Estates Partition Act, setting up a previous partition and possession by the parties in pursuance of such previous partition. This objection was disollowed by the Revenue Court and the application for partition was admitted; and the Collector went on with the partition proceedings. The opposite party also participated in the partition proceeding for about four or five years. Ultimately a suit was filed by the petitioner in the Civil Court in which he again pleaded the previous partition and asked for a declaration that the Revenue Court had no jurisdiction whatsoever to proceed with the partition. An application was then put in before the learned Subordinate Judge asking for an injunction staying the partition proceedings till the determination of the civil suit. The learned Subordinate Judge dismissed the application on the ground that the applicant had been for a long time taking part in the partition proceedings and could not be allowed at such a late stage to turn round and say that the Collector had initially no jurisdiction to go on with the partition. On appeal against this order refusing stay the learned District Judge has come to a different conclusion. He has granted the stay on grounds of equity and convenience, holding that it is desirable that the subject matter of the suit should be maintained in *statu quo* until the decision of the Civil suit. This is a matter entirely discretionary with the Court and it does not appear that the parties will be put to any inconvenience or be prejudiced on account of such a stay. It is clear that by taking part in the partition proceedings one could not possibly confer Jurisdiction on the Revenue Court. The matter is now open for decision by the Civil Court as to whether the Revenue Court had jurisdiction or not. In the meantime it seems to be in the interests of all parties concerned that the partition proceedings should be stayed.

I do not think that we can interfere with the discretion that has been exercised by the learned District Judge in this matter. The application is dismissed with costs; hearing fee one gold *mohar*.

Ross, J.—I agree.

Application dismissed.

✱ 1925 PATNA 138

DAWSON MILLER, C. J. AND FOSTER, J.

Bibi Washihan—Appellant.

v.

Mir Nawab Ali—Respondent.

Appeal from Original Order No. 248 of 1923, Decided on 13th June, 1924, from an order of the Dt. J., Shahabad, D/- 20th July, 1923.

(a) *Bengal, Assam and Agra Civil Courts Act (XII of 1887)—S. 20—The section deals with* forum *of appeal only,*

The Section does not give right of appeal from every order of a Dt. Judge to the High Court. It merely deals with the *forum* of appeal. [P 139 C 1]

✱ (b) *Religious Endowments Act, (1863) S. 18—Order refusing leave to institute a suit is not appealable.*

Order refusing leave to institute a suit under the Act is not appealable under S. 18. [P 139 C 2]

M. N. Pal with *N. N. Sen*—for Appellant.

G. N. Mukherji for *M. Yunus*—for Respondent.

Facts—An application was made to the District Judge Shahabad, under S. 18 of the Religious Endowments Act, XX of 1863, to remove the *mutwali* of a certain *Dargu*. Before granting the application the Dt. Judge made an enquiry and examined certain witnesses on behalf of the applicants. After hearing their evidence he came to the conclusion that no *prima facie* case had been made out so as to justify granting of leave for the institution of the suit. The learned Judge also pointed out that

the present *mutwali* so far from mismanaging the property had in fact, out of his own income redeemed the whole of the wakf property which had been mortgaged to other persons by his predecessors. Under these circumstances he refused the application and the appellant filed an appeal. A preliminary objection was raised by the respondent that no appeal lies from an order under S. 18 of the Religious Endowments Act.

Dawson Miller, C. J.—[His Lordship set out the facts of the case as given above and referring to the preliminary objection, proceeded:—]

This objection, I think, is sound. The Act itself which creates the cause of action does not provide for any appeal from the order of the District Judge. Nor is there anything in the Civil Procedure Code which would indicate that any appeal lay. The order of the District Judge is clearly not a decree and the cases in which an appeal lies from orders are laid down in Ss. 104 and 105 of the Civil Procedure Code; the cases are there named in which an appeal lies from certain orders and an appeal lies from no other orders. These two sections, coupled with Order XLI of the Code, show quite clearly to my mind that no appeal is permissible in such a case. The only contention put forward by the other side is that under S. 20 of the Bengal Civil Courts Act of 1887 it is provided that save as otherwise provided by any enactment for the time being in force an appeal from a decree or order of a District Judge or Additional District Judge shall lie to the High Court. The learned Vakil wants us to construe that section as if it granted a right of appeal from every order of the District Judge to the High Court. This is clearly not the interpretation of that section; the only thing the section is dealing with is the *forum* to which an appeal, if any, shall lie from decrees or orders of the District Judge.

In my opinion the preliminary objection is a sound one and this appeal is not permissible.

The appeal is dismissed with costs.

Foster, J.—I agree.

Appeal dismissed.

1925 PATNA 139

DAS AND ROSS, JJ.

Shaikh Abdul Hadi—Petitioner—Appellant.

v.

Mt. Kabultunnissa—Opposite Party—Respondent.

A. F. O. O. No. 226 of 1923, Decided on 17th June 1924, from an order of the Sub J. of Gaya, D/- 27th August 1923.

(a) *Civil P. C, S. 38 and 39—Except in case of decree for sale of mortgaged properties, no Court can execute decree entirely affecting property beyond its jurisdiction.*

Under Ss. 38 and 39 no Court can execute a decree in which the subject matter of the suit or of the application of the suit is property situated entirely outside the local limits of its jurisdiction, but an exception has been recognised in cases of decrees for sale of mortgaged properties. 39 Cal. 104, Foll. [P 139 C 2]

(b) *Civil P. C., S. 39—Court can execute decree against property entirely outside its jurisdiction if it is a mortgage decree for sale.*

Under S. 39 a Court can execute a decree for sale of the mortgaged property, though it is wholly out of its jurisdiction because a mortgage decree is practically a decree of specific performance of the contract between the mortgagor and the mortgagee. [P 139 C 2]

Abani Bhusan Mukharaji—for Appellant.

Kailaspati—for Respondent.

Das, J.—It has been contended before us that the Subordinate Judge of Gaya had no jurisdiction to sell the property which was in Patna. It must be remembered that the decree which was being executed in the Gaya Court was a mortgage decree and that the mortgage comprised properties situated both in Gaya and Patna. In these circumstances the question arises whether the Subordinate Judge of Gaya had jurisdiction to sell the property in Patna. No doubt the provisions of S. 38 of the Code read with those of S, 39 indicate the acceptance of the view by the legislature that no Court can execute a decree in which the subject-matter of the suit or of the application for execution is property situated entirely outside the local limits of its jurisdiction. But as was pointed out by Mookerjee, J. in *Begg Dunlop & Co.* v. *Jagannath Marwari* (1). "In cases of decrees for sale of mortgaged pro-

(1) [1911] 39 Cal. 104—14 C. L. J. 228—11 I C. 417—16 C. W. N. 402.

perties an exception has been recognized."—See *Maseyk* v. *Steel & Co.* (2), *Kartick Nath Pandey* v. *Tilukdhari Lall* (3), *Gopi Mohan Roy* v. *Doybaki Nundan Sen* (4), *Tincouri Debya* v. *Shib Chandra Pal Chowdhury* (5), *Latchman Pundey* v. *Maddan Mohun Shey* (6) and *Jahar* v. *Kamini Debi* (7). Sir W. Comer Petheram in the case in *Maseyk* v. *Steel & Co.*, (2) clearly indicated the principle upon which the Court acts in cases of this nature. He pointed out that a mortgage-decree "is practically a decree for specific performance of the contract between the mortgagor and mortgagee" and where that is so" the authority given by S. 19 of the Code of Civil Procedure must include the authority to make an order of this kind, that the property shall be sold, and to direct the mode in which the sale shall take place." In my opinion, the authorities are conclusive on this point. It makes no difference that the property at Gaya had been sold at a previous execution case. The original authority remains and the Gaya Court could execute that authority by directing the sale of the Patna property. It is also contended that the Gaya Court could not direct its peon to serve the sale processes in Patna. I can find no merit whatever in this argument.

The result is that the order passed by the learned Subordinate Judge must be affirmed and this appeal must be dismissed with costs.

Ross, J.—I agree.

Appeal dismissed.

(2) [1887] 14 Cal. 661.
(3) [1888] 15 Cal. 667.
(4) [1892] 19 Cal. 13.
(5) [1894] 21 Cal. 639.
(6) [1881] 6 Cal. 513—7 C. L. R. 521.
(7) [1901] 28 Cal. 238—5 C. W. N. 150.

✱ 1925 PATNA 140

DAS AND ROSS, JJ.

Hem Singh and others—Appellants.

v.

Bhagwat Singh and others—Respondents.

F. A. No. 216 of 1921, Decided on 7th May, 1924, from a decision of the Sub. J., Darbhanga, D/- 6th May, 1921.

✱ *Contract Act (IX of 1872) S. 18—Signing of document is not consenting—Document signed by blind man—Contents of document mis-represented—Plea of* non-est factum *can be raised*—Bona fide *purchaser for consideration is not affected.*

Mere signing of a document does not necessarily imply consent. Thus if a blind man, or a man who cannot read, has a written contract falsely read over to him, the reader mis-reading to such an extent that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, or if the contents of the document are otherwise mis-represented to the person signing, it then at any rate if there is no negligence the signature so obtained is of no force.

The rule does not apply to a man who can read but who forbears to read the document. But the question is important only when it is raised between two innocent parties, for unless the document is wholly void, as it would be if the plea of *non-est factum* succeeds, an innocent party giving consideration cannot be deprived of an interest which he has taken under the deed; but where the question arises between a party deceiving and a party deceived it is immaterial whether the deed is void or voidable; and, even if the party deceived fails in his plea of *non-est factum*, that is to say, that there was no consent on his part within the meaning of the term as defined in the Contract Act, it is still open to him to prove that there was a misrepresentation and to ask the Court to relieve him from the consequences of the transaction. [P 141 C 2, P 142 C 1]

Sultan Ahmed and *N. N. Sinha*—for Appellants.

C. C. Das, *Hasan Jan*, *Janak Kishore* and *Jalgobind Prasad Singh*—for Respondents.

Das, J.—In my opinion there is no ground for interfering with the judgment of the learned Subordinate Judge. The short question which we have to decide in this case is whether in the circumstances of the case the plaintiff is entitled to take up the position that his rights are unaffected by the deed of release executed by him on the 10th August 1918 and the consent decree of the 12th August 1919 to which he was a party. The plaintiff is a blind man, aged 70. He was undoubtedly entitled to a half share in the joint family properties and he instituted a suit sometime in 1917 to have his share partitioned by metes and bounds. His case in the plaint was that the family had separated many years ago but that the properties which were the subject-matter of the litigation had nsver

been partitioned by metes and bounds. Being a blind man and having no one to look after his interests he entrusted his case to one Harihar Prasad Singh who has been cited as defendant second party in this litigation and who is the father-in-law of one of his daughters. The plaintiff's case is that sometime in July 1918 Harihar Prasad suggested a compromise on the terms that he (the plaintiff) should execute a *thika-patta* in respect of the landed property in favour of the defendants. The plaintiff says that he readily consented to the suggestion made by Harihar Prasad Singh and executed a document on the 10th August 1918 which he believed to be a *thika-patta*, but which in fact was a deed of release. This was followed by the consent decree in the partition suit on the 12th August and according to the plaintiff he never agreed to the terms on which the case was settled although he was always ready and willing to settle, and thought that he did settle the case, on the terms that he had agreed to give a *thika-patta* of his properties to the defendants. He instituted the present suit on the 10th February 1919 in substance to have it declared that the deed of release and the consent decree are not binding upon him. The defendant's case is that the terms of settlement as contained in the consent decree were in fact consented to by the plaintiff and that those terms were arranged by certain panchas in Dhobgama to whom the matter was referred by the parties.

As I have said the plaintiff is a blind man aged 70 years having no one to look after him except a wife and a widowed daughter. The critical question in the case is did the plaintiff consent to relinquish his interest in the family property for a mere annuity. The term "consent" has been defined as follows in the Indian Contract Act—"Two or more persons are said to consent when they agree upon the same thing in the same sense." In England a plea of *non-est factum* is open to a party when there is a mis-representation as to the character of the document and the party deceived proves that his mind was directed to one thing and what he put his hand to was a document of an altogether different character. Whether the statement of the law in *Foster* v. *Mackinnon* (1), would be wholly supported to-day is a matter of some doubt. A distinction has been drawn in the more modern cases between misrepresentation as to the character of a document and misrepresentation as to the contents of a document and it seems to be the modern view that when there is a misrepresentation as to the contents of a document, but not as to the character of the document the plea of *non est factum* is not available to the party deceived unless—and this is very important,—he is blind or illiterate. The point is put in this form in Halsbury's Laws of England Vol. 7 page 355. "The mere signing of a contract does not necessarily imply consent. Thus, if a blind man, or a man who cannot read, or one who for some reason (not involving negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, or if the contents of the document are otherwise misrepresented to the person signing, then, at any rate if there is no negligence, the signature so obtained is of no force." In the passage quoted the rule appears to be confined first to a blind man, secondly, to a man who cannot read; and, thirdly, to a man who for some reason forbears to read. This was undoubtedly the view established in *Foster* v. *Mackinnon* (1), but so far as I understand the more modern decision is *Howatson* v. *Webb* (2), the rule does not apply to a man who can read but who forbears to read the document. But the question is important only when it is raised between two innocent parties, for unless the document is wholly void, as it would be if the plea of *non-est factum* succeeds, an innocent party

(1) 1869] 4 C.P. 704=38 L.J.C.P. 310=20 L.T. 887=17 W.R. 1105.
(2) [1908] 1 Ch. 1=97 L.T. 730=77 L.J.Ch. 32.

giving consideration cannot be deprived of an interest which he has taken under the deed; but where the question arises between a party deceiving and a party deceived it is immaterial whether the deed is void or voidable; and, even if the party deceived fails in his plea of *non-est factum*, that is to say, that there was no consent on his part within the meaning of the term as defined in the Indian Contract Act, it is still open to him to prove that there was a misrepresentation and to ask the Court to relieve him from the consequences of the transaction.

The question whether there was a consent on the part of the plaintiff to the terms of the deed of release and of the consent decree is a question of fact and the Subordinate Judge has accepted the evidence tendered on behalf of the plaintiff. The decision of the Trial Court on a question of fact is entitled to great weight and having anxiously considered all the evidence for myself I am unable to say that the conclusion at which the learned Subordinate Judge has arrived is not supported by the evidence in the record.

The case of the defendants is that the dispute between the parties was settled at the instance of panchas at Dhobgama. Rambalak Singh one of the defendants in his evidence gave the names of the panchas. He said that Rownak Singh, Adhiram Singh and Chaturi Singh were the panchas and he added that there were no other panchas. Now, none of these gentlemen has been examined on behalf of the defendants to support their case. It has, however, been suggested by Rambalak Singh that they have been won over by the plaintiff. The suggestion is in these words. "As far as I can remember all of them were summoned as witnesses. They declined to come here as witnesses on our side, when they heard of the talk of *bech*." We are informed that the term "*bech*" refers to the sale of an interest in his share by the plaintiff Bhagwat Singh to Biseswar Lal. The suggestion is that Biseswar Lal who has purchased an interest in the share of Bhagwat Singh in the family properties is such an influential man in the village that he persuaded the panchas not to give evidence on behalf of the defendant. But suggestion is not proof; and on the evidence it is impossible to come to the conclusion that these three gentlemen Rownak Singh, Adhiram Singh and Chaturi Singh have been won over by the plaintiff. The fact remains that none of the punchas named as such by Rambalak Singh, the defendant, has come to the witness-box on behalf of the defendant. But one Kuldip later on came to the witness-box and said that he was one of the punchas in the case. Kuldip undoubtedly is a resident of Dhobgama. Having regard to the evidence of Rambalak it is quite impossible to accept Kuldip as a truthful witness and we cannot regard Kuldip as one of the punchas to whom, according to the case of the defendant, the dispute between the parties was referred. That being so, it is certainly a matter of comment that not a single witness from Dhobgama has come to support the case of the defendants. On the other hand the plaintiff has examined numerous witnesses from Dhobgama who swear that the case was in fact settled between the parties. They give the terms of the settlement and according to them the case was settled on the terms that the plaintiff would give a *thika-patta* of his interest in the joint family properties to the defendants. As I have said the question is a question of fact, and the learned Subordinate Judge who undoubtedly was in a far better position than this Court to arrive at the truth, accepted the plaintiff's case on this point. The oral evidence in my opinion did not support the case of the defendants, whereas numerous witnesses were called by the plaintiff who satisfactorily established the plaintiff's case.

Mr. Sultan Ahmad appearing on behalf of the defendants asked us to consider the terms of the deed of release and invited us to hold that the terms were such as a man in the plaintiff's position would readily agree to. Under the deed of release the plaintiff took an annuity of Rs. 400 per year; an orchard of graft mangoes 1 *bigha* 10 *kathas* in area; an

orchard of seedling mango trees 10 *kathas* in area and 6 *kathas* of zerait land. The deed provided that the annuity of Rs. 400 would be reduced to Rs. 300 on the death of the annuitant's wife if she should predecease him; and on his death, if he should predecease her, an annuity of Rs. 250 would be made to the widow. The deed also provided that upon the death of husband and wife Rs. 200 would be paid to each of the three daughters. Lastly it was provided that all debts due on bonds should be paid by the defendants. The evidence establishes that there was a sum of Rs. 2,600 due on a bond at the date of the transaction in suit.

Now these are the terms of the deed of release and in order to consider whether the terms are such as the plaintiff would readily agree to, we have to see what was the value of the plaintiff's share in the joint family properties. For the purpose of Court-fee the plaintiff valued his share at Rs. 10 000 but the learned Subordinate Judge arrived at the conclusion on the admission of one of the defendants that the nett income available to the plaintiffs was Rs. 700 a year. He based his conclusion on the evidence of Rambalak Singh, one of the defendants, who said as follows:—"Our zerait land has increased since the survey, to the extent of about 40 *bighas*. We had 70 to 80 *bighas* of *Zerait* at the time of survey. We got orchards to the extent of 7 to 8 *bighas*. We have orchards of about 2 *bighas* at Dhobgama. Our cash income was about Rs. 800 at the time of survey. But it is about Rs. 500. We are to pay about Rs. 125 as revenue and Rs. 125 as cesses. The *zerait* lands are near about "Dhobgama." On this evidence the learned Subordinate Judge says as follows: "It is, therefore, clear that their total income from *zerait* and *nagdi* lands would be 16 times the amount of cesses *i.e.*, about Rs. 2,000. Half the amount belongs to the plaintiff. In his share, the income would be about Rs. 1,000 a year. Making all deductions, this net income would not fall much short of Rs. 600 a year, even according to the admission of Rambalak (defendant's witness No. 3). It is, therefore, highly unlikely that he would forego his half share in these properties yielding an annual income of about Rs 1,000 or a net income of about Rs. 700 (in his half share) for a life annuity of Rs. 400 a year, which has been made a charge on the half share of one of the tauzis only" Now undoubtedly the cess payable forms a *basis* for calculating the value of the property, and it cannot be doubted that the learned Subordinate Judge with his local knowledge was in a position to arrive at a correct conclusion on this question. Mr. Sultan Ahmad has contended before us that there was no issue, and that the parties did not really give any evidence on this point. In my opinion the question of the value of the plaintiff's share was not a matter which it was for the plaintiff to put in issue. The plaintiff was called upon to prove that his mind did not accompany his signature. As a reply to that case the defendants assert that the terms in the deed of release were such as a man in the position of the plaintiff would readily agree to. It was, therefore, necessary for the defendants to establish that the terms were proper terms upon which the plaintiff might agree to settle the dispute between him and the defendants. In my opinion it was for the defendants to prove the value of the plaintiff's share in the property. That being so, it is only necessary to refer to the deed of release to see that this old man of 70 gave up his interest in the joint family properties which would yield him an income of Rs. 700 per year for an annuity of Rs. 400. As I have said, he was an old man of 70 and it is impossible to say how long he would live to enjoy this annuity. Under the terms the daughters are not provided for; they are only entitled to receive Rs. 200 each, not forthwith, but upon the death of both the parents. In my opinion it is impossible to say that the terms offered by the defendants to the plaintiff were such as would be readily accepted by him.

Mr. Sultan Ahmad has strongly relied upon the evidence of Mathura Prasad, the Sub-Registrar, and Nath

Prasad and Kamaluddin, pleaders. It is suggested that if the plaintiff did not in fact put his signature to the deed of release with knowledge of its terms he would not have been taken first to the Sub-Registrar and then to the pleaders in the case. The Sub-Registrar in his evidence says as follows: "My practice was to enquire about the nature of the document from the executants. When the nature and the description of the documents stated by them were found to be correct then I used to register them." In cross-examination he admitted that he did not read the document nor did he get the entire document read over to him. Now, the Sub-Registrar was only speaking as to the practice of his office. He did not pretend to say what happened on the particular occasion on which the plaintiff went to his office to have the deed of release registered. But I am not very much troubled by the evidence of the Sub-Registrar. The plaintiff's own case is that he thought that he had executed a deed conveying the properties to the defendants for a term. The defendants' case is that he conveyed the properties to them for ever. That was the difference between the parties and I do not see that there was much risk of the difference being brought to his notice at the Registry Office. So far as the evidence of Nath Prasad is concerned he undoubtedly said that the plaintiff went to him. The plaintiff denies that he ever went to Nath Prasad. It is not necessary for me to express any opinion on the question whether Nath Prasad's evidence should be accepted on this point. It is sufficient to point out that Nath Prasad admits that he did not explain to the plaintiff the terms of the sulehnama. He merely asked the plaintiff whether he had entered into a compromise and on the plaintiff's giving an answer in the affirmative he took the thumb impression of the plaintiff on the sulehnama. This is not a very satisfactory state of affairs. Obviously Nath Prasad was engaged in the case for the purpose of putting his signature on the sulehnama. He appears to have done nothing else for the plaintiff. It is a remarkable feature in this case that the plaintiff's pleaders at no time had any opportunity of expressing their opinion on the terms of settlement. His pleaders were Babu Krishna Ballav Prasad, Babu Lachman Prasad and Babu Dharanidhar. Nath Prasad, the pleaeer, says that he asked Babu Krishna Ballav why he did not sign the compromise petition and that he said that there was a difference between him and Bhagwat about fees and that was the reason why he refused to sign. It is perfectly clear from the evidence that neither Babu Krishna Ballav, nor Babu Dharanidhar nor Babu Lachman Prasad who were the plaintiff's pleaders, had at any time an opportunity to express an opinion on the terms of settlement. The document was drafted by the defendant's pleader Kamaluddin. Nath Prasad was engaged only for the purpose of putting his signature to the compromise petition. Apart from that the plaintiff's pleaders had nothing whatever to do with the deed of release. It is impossible to overlook these circumstances when it is remembered that an old blind man of 70 was giving up all his interest in the joint family properties for an annuity of Rs. 400. So far as the evidence of Kamaluddin is concerned it is sufficient to say that he does not say that the plaintiff saw him at any time. There was undoubtedly some evidence that the document was read over and explained to the plaintiff, but although Kamaluddin and Nath Prasad, both pleaders, had something to do with the settlement it was not thought necessary that either of them should explain the document of settlement to the plaintiff. In these circumstances it is impossible to say thot the document was actually read out to the plaintiff. In my opinion the view taken by the learned Subordinate Judge is right and ought to be affirmed.

I would dismiss the appeal with costs.

Ross, J.—I agree.

Appeal dismissed.

1925 Patna 145 (1).

ADAMI AND BUCKNILL, JJ.

Gobind Sahu—Petitioner.

v.

Zafar Karim—Respondent.

Civil Rev. No. 444 of 1923, decided on 28th February 1924, from the order of the Munsif of Patna, dated 28th August 1923.

Civil Pro. Code, O. 22, R. 3—Names substituted in appeal from interlocutory order stand for all stages of suit.

The introduction of the plaintiff or a defendant, even if it be made in appeal from a mere interlocutory order, is an introduction for all stages of the suit, for as a general rule, the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages. [P 145, C. 2.]

Guru Saran Prasad—for the Petitioner.

Syed Jaffar Imam—for the Respondent.

Adami, J.—The facts of this case are simple. One Bibi Kulsum instituted a suit for a declaration that the decree obtained against her husband's father, Habibuddin, upon a mortgage was fraudulent; at the same time, she applied for an injunction against the proceedings taken in execution of the decree. The injunction was issued and thereupon the defendant in the suit appealed to the District Judge against this interlocutory order. Whilst the appeal was pending before the District Judge, Bibi Kulsum died, on the 29th of October 1921, and the defendant-appellant then applied to the District Judge on the 7th of January 1922 for substitution of the husband and three children of Bibi Kulsum as respondents to the appeal. The defendant-appellant succeeded in his appeal and the District Judge's order was upheld by this Court. An application was thereafter made to the Munsif asking for substitution in respect of one of the children of Bibi Kulsum, but no application was then made before the Munsif for substitution in the place of the deceased Bibi Kulsum, though on the 22nd November 1921, the plaintiff's pleader informed the Munsif that Bibi Kulsum had died. On the 18th August 1923, the Munsif directed that a subsequent application for substitution in the place of Bibi Kulsum and also an application for substitution in the place of *Mussammat* Sazda should be heard together on the 28th August. On the 28th August the Munsif considered the objection that the application for substitution of the heirs of Bibi Kulsum was made out of time and that the suit, therefore, had abated, and he held that as the substitution had been made in the appellate Court the present petition for amendment was merely a formal one and was not out of time.

This application is now made against the order of the Munsif, and it is argued, that no steps having been taken within time to substitute the legal representatives of Bibi Kulsum in the Munsif's Court, the suit was barred. The point taken in this case has been that the appeal was not an appeal arising out of the suit but out of the injunction in connection with that suit, and therefore the action taken before the District Judge would not satisfy the requirement to make such substitution within time before the Munsif. The case, however, is governed by the decision of the Privy Council in *Brij Indar Singh* v. *Kanshi Ram* (1). There it was held that the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages even if it be made on appeal from a mere interlocutory order. The decision of their Lordships of the Privy Council meets the contention of the petitioner and it is clear therefore that the application must be rejected with costs: hearing fee two gold *mohurs*.

Bucknill, J.—I agree.

Application dismissed.

(1) (1917) 45 Cal. 94=44 I. A. 218=38 M. L. J. 486=22 M. L. T. 362=6 L. W. 592=126 P. W. R. 1917=15 A. L. J. 777=19 Bom. L. R. 866=3 Pat. L. W. 313=26 C. L. J. 572=104 P. R. 1917=42 I. C. 43=(1917) M. W. N. 811=22 C. W. N. 169=127 P. L. R. 1917 (P.C.).

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* 1925 Patna 145 (2).

DAWSON MILLER, C. J. AND FOSTER, J.

Ramjanam Singh and another—Defendants-Appellants.

v.

Khub Lal Singh and others—Plaintiffs-Respondents.

Mis. F. A. No. 238 of 1924 decided on 19th June 1924, from the order of the Dist. Judge, Dharbhanga, dated 22nd June 1923.

* *Civil Pro. Code, S. 11 and O. 2, R. 2—Future mesne profits not claimed in suit for possession—Subsequent suit for such mesne-profits is not barred.*

Where, in a suit for possession, future mesne profits have not been claimed, a subsequent suit for the same is not barred as both in S. 11 as well as O. 2 R 2, the issues and claims referred to are those arising out of the cause of action and not

those arising out of some possible future cause of action. [P. 147, C. 2.]

S. N. Roy—for the Appellants.

J. P. Singh—for the Respondent,

Dawson Miller, C. J.—The suit out of which this appeal arises was instituted on the 31st May 1922 by the plaintiffs claiming from the defendants mesne-profits in respect of an occupancy holding from the 1st June 1919 to the 21st January 1922 as well as ths price of certain trees cut down by the defendants. A preliminary point was taken at the trial that the suit was barred by *res judicata*, the question of the plaintiffs' right to *mesne-profits* from these defendants in respect of this property having been determined in a previous suit.

The Munsif before whom the case came for trial took the view that the suit was barred.

On appeal the learned District Judge of Darbhanga reversed the decision of the Munsif and directed the case to proceed and an investigation to be held as to the amount of *mesne-profits* due.

It appears that the plaintiffs were the landlords of the holding in question, which had been purchased by the defendants some time in the year 1915. Subsequently the landlords sued for possession from the defendants on the ground that they were mere trespassers, the holding in question being non-transferable without their consent. In that suit in addition to possession of the property they claimed also *mesne-profits*. The claim with respect to *mesne-profits* was put thus. In paragraph 8 of the plaint in that suit, after stating the value of the property in dispute and the amount of the Court-fee payable thereon, they further state that the sum of Rs. 5-4 0 was the Court-fee on account of Rs. 69 *mesne-profits* on a rough calculation and in their prayer they claim in addition to possession of the property that the Court may be pleased to pass a decree for *mesne-profits* in favour of the plaintiff and the defendants' 4th party, the defendants' 4th party being some of their co-sharers who had not joined as plaintiffs, and that after passing the decree the amount of *mesne-profits* may be ascertained and then they undertake to pay the deficit amount of Court-fee upon the *mesne-profits* as calculated, if there should be a deficiency.

In that suit, the Court awarded the plaintiffs possession of the property, but the judgment and the decree were absolutely silent as to *mesne-profits*. No mention is made apparently in the judgment as to *mesne-profits* and no determination is come to expressly upon the question of whether the *mesne profits* were recoverable or not. There was an application in review from that decree filed by the plaintiffs asking the learned Judge who decided the suit to amend the judgment by introducing into it a clause about the *mesne-profits* but he refused to do so and it seems to me obvious that he had no power, on an application in review, to deal with a fresh matter, which had never been put before him at the trial and for which so far as I can see, there was no reason justifying the omission.

The matter went on appeal to the High Court and the High Court remanded the case for re-hearing, not on the question of *mesne-profits*, but for other reasons. When the case went back again on remand, again some mention was made about the *mesne-profits* but the learned Judge who re-heard the case on remand simply stated that he refused, upon this point, to interfere with the decision of his predecessor and there the matter stood.

In the present suit the claim of the plaintiffs is for *mesne-profits* from the 1st June 1919 up to the 21st January 1922, that is for the *mesne-profits* for three years prior to the suit except that there is no claim apparently for the period between the 21st January and the 31st May 1922 when the plaint was filed. The period for which *mesne-profits* are claimed in the present suit, it will be observed is a period subsequent to the institution of the previous suit. The first question which arises for determination is whether these *mesne-profits* which were the profits accruing after the institution of the previous suit were in fact claimed in the previous suit because if they were not then it seems to me quite clear that there could be no question of *res judicata* arising here because the previous suit can only be conclusive of questions arising between the parties which were raised in that suit or which ought to have been raised or arose out of the same cause of action. I have already referred to the plaint in the previous suit and the conclusion I have come to on reading that plaint is that there was no claim whatever for future *mesne-profits*. If that is so, then it seems to me that that determines the question and that the learned

District Judge in appeal was right in overruling the decision of the trial Court and sending the case back for re-hearing.

The argument which has been put before us on behalf of the appellants is based upon the construction of Section 11, O. II, r. 2 and O. XX of the Civil Procedure Code. Shortly the argument is this: that the plaintiffs were entitled in the previous suit to claim *mesne-profits* not only for the period ending with the institution of the suit but for the subsequent period up to the delivery of possession or up to three years from the date of the decree, whichever might be shorter and either that they did claim such profits, a point which I have already stated I find against them, or that if they did not that they were entitled to and if they failed to claim such relief as they were entitled to and the judgment was silent upon the question it must be taken that the point was decided against them and they cannot raise it in a subsequent suit. Section 11 provides that "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties." It is clear that in so far as future *mesne-profits* were concerned, that was not a matter directly and substantially in issue or indeed in issue at all in the previous suit but Explanation V of that Section is relied upon and it says. "Any relief claimed in the plaint which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused." Again that part of the section is of no avail in the present case unless the claim to future *mesne-profits* was a part of the relief claimed in the plaint. But, it is said, that with that section one must read O. II, r. 2 which provides:—

"(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

Again, in this Order, the relief referred to is the relief arising out of the cause of action and this Order does not appear to me to assist the appellants in this case because it is clear that at the date of the suit no cause of action had accrued for the subsequent *mesne-profits*. But it is contended that the case is covered by O. XX, r. 12 which provides that,

"(1) Where a suit is for the recovery of possession of immoveable property and for rent or *mesne-profits*, the Court may pass a decree—

(*a*) for the possession of the property;

(*b*) for the rent or *mesne-profits* which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or *mesne-profits*;

(*c*) directing an inquiry as to rent or *mesne-profits* from the institution of the suit until

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or,

(iii) the expiration of three years from the date of the decree,

whichever event first occurs."

It is contended that this was a relief which was open to the plaintiffs in the previous suit and that the Court was bound by its decree to deal with all the reliefs which the plaintiffs were entitled to sue for and if it did not deal with those matters then, under the former provisions of the Code to which I have referred, it must be taken that the Court had decided against the plaintiffs. I cannot accede to this view. It seems to me quite clear that both in Section 11 and in O. II, r. 2 the issues and claims there referred to are those which arise out of the cause of action and not those which arise out of some possible future cause of action, although for the sake of convenience it is provided by O. XX, r. 12 that future *mesne-profits*, although no cause of action may have arisen for such, at the date when the suit was instituted, may be dealt with by the Court. It is noticeable that under O. 20, r. 12 there is no obligation whatever upon the Court to determine any question as to the future *mesne-profits*. It may, if it likes, direct an enquiry as to the rent or *mesne-profits* from the institution of the suit until the date of delivery of possession or until one of the other periods mentioned in the rule. But if the Court does not choose to

do so, and there may be good reasons for its refusing to exercise its jurisdiction, then it seems to me that it cannot be said that any question has been decided with regard to the *mesne-profits*, especially where they have not been claimed in the suit, as here. We have been referred to certain cases in the Madras and Allahabad High Courts, *Doraiswami Aiyar* v. *Subramania Aiyar* (1), and *Mohammad Ishaq Khan* v. *Rustum Ali Khan* (2) in which it was held that even where future *mesne-profits* had been claimed in a previous suit, if the Court had not dealt with the matter at the hearing, this did not amount to *res judicata* and did not bar a subsequent suit for those future *mesne-profits* when the cause of action had in fact accrued. The Bombay High Court on the other hand in the case of *Atmaram Bhaskar* v. *Parashram Ballal* (3) took a contrary view. It is unnecessary for us to decide which of these conflicting views is, in our opinion, right, because in both cases the future *mesne-profits* had been claimed in the previous suit whereas in the present suit the future *mesne-profits*, which are the subject matter now in controversy, were not claimed at all in any previous suit. In my opinion the learned District Judge was right and the trial Court was wrong and this appeal must be dismissed with costs.

Foster, J.—I agree.

Appeal rejected.

(1) (1917) 41 Mad. 188=33 M. L. J. 690=6 L. W. 784=22 M. L. T. 484=42 I. C. 923=(1917) M W. N. 847 (F. B.)

(2) (1918) 40 All. 292=44 I. C. 88=16 A. L. J. 182.

(3) (1920) 44 Bom. 954=58 I. C. 419=22 Bom. L. R. 982.

1925 Patna 148.

JWALA PRASAD AND FOSTER, JJ.

Raghunath Sahai and others—Appellants

v.

Daroga Sahu and others—Respondents.

Mis. Civil A. No. 146 of 1922 decided on 2nd January 1924 from the order of the Sub-Judge, Gaya, dated 26th June 1922.

(a) *Civil Pro. Code, O.* 21, *R.* 90—*Onus of proof.*

Onus of proving defect in execution sale is on party assailing it.

(b) *Civil Pro. Code O.* 21 *R.* 90—*Court disregarding equities in determining order in which properties should be sold, the sale can be set aside for irregularity.*

The decree-holder has primarily the right to choose the order in which the properties should be sold and the Court ultimately has the right to determine the order of the properties to be sold according to the equities affecting the parties. [P. 150, C. 2]

Where the Court disregards the equities, the sale is liable to be set aside for irregularity. [P. 151, C. 1.]

Hasan Imam and *Kailaspathi*—for the Appellants.

Sultan Ahmad, Ragho Prasad and *Nawal Kishore Prasad II*—for the Respondents.

Jwala Prasad, J.—This is an appeal against the decision of the Subordinate Judge of Gaya, dated the 26th June 1922, refusing an application of the appellants to set aside an auction-sale under O. 21, r. 90. The decree, in execution of which the sale took place, was a mortgage-decree. The preliminary decree was passed on 7th July 1912 and was confirmed on appeal on 4th May 1915. It was made final on 16th April 1917, and was amended on 13th May 1921. A petition for execution was filed on the 25th May 1921. The amount sought to be levied was over fifteen thousand rupees. The following properties were asked to be sold :—

(1) Three annas *pacca* share, equal to 8 annas *katcha* share, by partition out of 16 annas proprietary interest in *mouza* Tengara valued at Rs. 3,000.

(2) One anna out of two annas in the 11 annas *takhta* out of 16 annas proprietary interest in *mouza* Sokanar, etc., valued at Rs. 200.

(3) Three annas out of 16 annas proprietary interest in *mouza* Pritampur valued at Rs. 500.

(4) Two annas out of 8 annas from 16 annas permanent *mukarari* interest in *mouza* Bhaus and Kharagpur valued at Rs. 3,000.

(5) Two annas out of 4 annas from 16 annas proprietary interest in *mouza* Rajhara Asli and Dakli together with Chak Chakukats, Nami and Benami Tappa Kot, valued at Rs. 4,000, and

(6) Two annas out of 8 annas from 16 annas share in *mouza* Sikmi together with Chakukats Nami and Benami, valued at Rs. 500.

On 4th November 1921 notice under O. 21, r. 66 was ordered to be issued for fixing valuation. The valuation of the decree-holder was accepted by the Court by order, dated the 17th December 1921, the objection of the judgment-debtors having been dismissed for default. The sale proclamation was ordered to be issued.

On the 6th March 1922, Saligram, one of the judgment-debtors, filed an objection under Section 47 of the Civil Procedure Code stating that the amount covered by

the decree was not due, it having been paid off by the judgment-debtors Raghunath Sahai and others executing a sale-deed, dated the 29th July 1917, whereby the decree-holders purchased the following properties of the judgment-debtors :—

(1) 1 anna 6 pies of *mouza* Rajhara ;
(2) 2 annas of *mouza* Sikmi ;
(3) 2 annas of *mouza* Nagar ;
(4) 2 annas of *mouza* Bisram ;
(5) 1 anna of *mouza* Bhaur ; and
(6) 1 anna of *mouza* Kharagpur.

This petition was numbered Judicial Miscellaneous Case No. 19 of 1922. On the 17th March 1922, Dasrath Lal, judgment-debtor, also filed an objection under Section 47 of the Civil Procedure Code stating that he had purchased the entire 8-annas share of *mouza* Bhaur on the 4th November 1921 for Rs. 8,900 at an auction-sale held in execution of a mortgage-decree No. 147 of 1921 passed by the Subordinate Judge, 1st Court, Gaya, in which Saligram and others were decree-holders, and Raghunath Sahai and others were judgment-debtors (mortgagors in the present case) and, therefore, he prayed that *mouza* Bhaur be exempted from the sale. He also supported the petition of Saligram referred to above as to the decree having been satisfied by the registered sale-deed, dated the 29th July 1917. He further stated that both the villages Bhaur and Kharagpur were not covered by the decree. Both the aforesaid Miscellaneous Judicial Cases were disposed of on the 24th March 1922 by Order No. 35. The Court held that the satisfaction of the decree by means of the registered sale-deed of 1917 cannot be recognised and that both Bhaur and Kharagpur were clearly covered by the decree. On that very day Dasrath Lal, judgment-debtor, then put in a petition praying that 2-annas *Mukarari* share of Bhaur be sold last of all, inasmuch as he had purchased 8-annas *mukarari* share of that village in execution of the decree based upon a mortgage. Similarly, Saligram put in a petition praying that the properties Nos. 1 to 3 be sold last. The guardian *ad litem* of minor judgment-debtor applied that the properties be sold in the order as given in the sale proclamation. The Court passed the following order :—

"Let properties Nos. 1 to 3 be sold last and village Bhaur be sold after other properties, and the petition of the guardian of the minors be rejected and let the bid sheet be sent to the Nazir for sale, and put up on 27th March 1922 for orders."

The properties were then sold in the order indicated above. Property No. 1 was sold for Rs. 9,000 and purchased by Murlidhar ; property No. 2, two annas of Kharagpur, was sold for Rs. 3,600 in the name of Dasarath Lal ; property No. 5, *mouza* Rajahara, was sold for Rs. 4,250 and property No. 6, *mouza* Sikmi, for Rs. 750. The decree was thus satisfied, and hence village Bhaur, property No. 4, and Pritampur, property No. 3, were not sold.

On 22nd April 1922, two applications were filed by the judgment-debtors ; Jagatdeo Prasad and others filed one objection and Raghunath Sahai, Ram Prasad Lal and Rameshwar Prasad filed another objection, for setting aside the sale under O. 21, r. 90. These applications were numbered Miscellaneous Judicial Cases Nos. 37 and 38, respectively. They were heard together and disposed of by the order of the Court, dated the 26th June 1922.

The Subordinate Judge dismissed the applications holding that there was no material irregularity in publishing or conducting the sale and that the appellant failed to show that the properties were sold for an inadequate price or that the applicants suffered any loss or injury from the sale. The decision of the Subordinate Judge is assailed in appeal. Nothing has been urged before us to show that the finding of the Court below that the appellants failed to prove that the prices fetched were inadequate is wrong. The onus to prove this was upon the appellants. The learned Subordinate Judge says that the village papers showing realizations from the villages sold were not produced and that this would tell against the case of the appellants. They also failed to show that the Road Cess Return (Exhibit 1) was acted upon.

As to the service of the processes, the Court below has accepted the evidence offered on behalf of the respondents that the processes were duly served. There was no evidence offered by the appellants of non-service of the processes. No irregularity has also been shown in the service of the processes or in publishing the said proclamations. The main contentions have been those set forth in grounds Nos. 5 and 9 in the Memorandum of Appeal to this Court. It is said that the Court below should not have changed the order of the properties to be sold " without there being any prayer on behalf of the decree-holders," nor should lot No. 4 have been split up into two lots,

The last objection was disposed of by the Subordinate Judge on the 24th of March 1922 in order No. 35, wherein he held that Bhaur and Kharagpur were two villages and were distinctly recited in the decree in question. There was no appeal from that order and it became final. Moreover, the order of the Subordinate Judge is supported by the decree. This contention, therefore, fails.

As to the other contention that the Subordinate Judge should not have changed the order of the properties mentioned in the sale proclamation, the learned Subordinate Judge says :

> " The sale of the properties in another order than that given by the decree-holder appears to have been properly done, as it is admitted that these properties had previously been sold "

It is conceded that there was no special direction given in the decree as to the order in which the mortgaged properties were to be sold. There was no such direction in the mortgage-bond. The properties were mentioned in the decree in the order in which they happened to be mentioned in the mortgage-bond. In the absence of any such special direction the decree-holder had a right to sell the properties in the order he thought best, in order to satisfy his decree. This is settled by authorities and is conceded in ground No. 5 of the Memorandum of Appeal wherein it is said that the Subordinate Judge should not have changed the order of the properties to be sold " without there being any prayer on behalf of the decree-holder." Mr. Hassan Imam refers to the petition for execution and the sale proclamations for his contention that the decree-holder prayed for the sale of the properties in the order mentioned therein and, consequently, the properties should have been sold in that order. To this Mr. Sultan Ahmed answers by referring to the proceedings which culminated in Order 36 of the 24th March 1922. He says that the prayer of Saligram and Dasrath Lal for the sale of properties Nos. 1, 2, 3, and village Bhaur after the sale of the other properties was not objected to by the decree-holder, rather the decree-holder accepted the directions made by the Court, and in fact he sold the properties in the order prescribed by the Court. Therefore, the decree-holder exercised his right to sell the properties in the order in which he liked and the appellants, therefore, cannot urge that the properties were sold in that order contrary to the wishes of the decree-holder.

Mr. Hassan Imam then contends that, in determining the order in which the properties should be sold, the Court should have looked into the equities in favour of all the persons concerned in the case. Now, reference has been made to a decision of this Court reported in *Jatadhari Singh* v. *Baldeo Lall* (1). That case seems to lay down that (1) the decree-holder has primarily the right to choose the order in which the properties should be sold, and (2) the Court ultimately has the right to determine the order of the properties to be sold according to the equities affecting the parties. Saligram was purchaser of properties Nos. 1 to 3 and Dasrath Lal was purchaser of Bhaur, one of the properties in lot No. 4, in execution of the decrees based on mortgages subsequent to that on the basis of which the present mortgage-decree was passed. They were parties to the present decree, being subsequent mortgagees interested in the equity of redemption. The properties 1 to 3 and Bhaur purchased by them were liable to contribute rateably to the satisfaction of the present decree. The judgment-debtors have a right to call upon them to contribute their quota of the decree-debt in proportion to the value of those properties. It is conceded that the judgment-debtors have this right, but that they should enforce it by a separate suit. The judgment-debtors would have been saved the trouble of a separate action for contribution against Saligram and Dasrath Lal if the Court had not directed the properties purchased by them to be sold last. The decree-holders in their application for execution and in the sale proclamations desired the properties to be sold in a particular order. When the properties were about to be sold Saligram and Dasrath Lal prayed for changing the order in which the properties were advertised for sale, urging that the properties in which they were interested should be sold last. The guardian *ad litem* of the minor judgment-debtor objected to it ; the other judgment-debtors did not. The Court should have at this stage considered the equities in favour of the judgment-debtors who are now by reason of the order of the Court being driven to expensive litigation for contribution from the properties held

(1) (1919) 4 Pat. L. J, 207=51 I. C. 444.

by Saligram and Dasrath Lal. The decree-holder has not appeared before us ; so (he being primarily in control of the execution sale) his intentions can be gauged only by his execution petition. In changing the order at a late stage the Court should have regard to the equities in favour of each particular party involved, especially when there were a number of judgment-debtors some mortgagors, some transferees from the mortgagors, all holding properties equally liable as security for the mortgage-debt. It is said that the judgment-debtors other than the minor judgment-debtor did not object to the order of the 24th March 1922. There is nothing to indicate in the order sheet that this order was passed in their presence. There is no signature of theirs or their pleader's in the order sheet.

We, therefore, are of opinion that the order of the Subordinate Judge of the 24th March 1922 was irregular and inequitable, and the sale conducted under that order was, therefore, irregular. This irregularity in the conduct of the sale resulted in substantial injury to the judgment-debtors.

The question now is what order would be equitable in the present case. We find that the properties Nos. 2 and 3 and Bhaur have not been sold, whereas they should have been sold before *mouza* Kharagpur and properties Nos. 5 and 6 were sold. The sales of Kharagpur and of properties No. 5 and 6 have, therefore, been irregular and have caused material injury to the judgment debtors. These sales are, therefore, set aside. Properties Nos. 2 to 6 will now be advertised for sale after fresh sale proclamation and they will be sold in that order. The sale of property No. 1 need not be set aside. The proceeds of the sale of that property will be applied towards the claim under the decree.

The result is that the appeal is partially decreed. As the sales of all the villages, except that of No. 1, have been set aside, the appellants have largely succeeded and are entitled to the costs of this Court as well as of the lower Court.

Foster, J.—I agree.

Appeal decreed partially.

1925 Patna 151.

FOSTER J,

Ram Pragash Lal—Defendant-Appellant.

v.

Mt. Bhikna Kuer and others—Respondents.

Appeal from Appellate Decree No. 992 of 1921, decided on 7th June, 1923, against a decision of Sub. Judge of Muzafferpur, dated the 21st March 1921.

(a) *T. P. Act*, S. 123—*Attestation.*

Want of attestation invalidates deed of gift.

(b) *T. P. Act*, S. 54—*Transfer stated to be* "banazar parwarish"—*No consideration proved—It is gift and not Sale—T. P. Act* S. 122.

A document which purports to convey the property to another who is to be Malik and it is stated that the grant is made *banazar parwarish* it is a deed of gift only, where transfer is voluntary. *Banazar Parwarish* only shows motive of transferor but not that consideration passed. [P. 152, C 1.]

S. K. Mitra—for the Appellant.

Jadubans Sahay for *L. N. Singh*—for the Respondents.

Judgment.—The question that was most important in the decision of the appeal out of which this second appeal arises was whether the plaintiff *Musammat* Bhikna Kuer had a cause of action. The previous plaintiff was *Mnsammat* Sundar Kuer and on her death *pendente lite* the present plaintiff was substituted on the ground that she was the transferee of the heir of *Musammat* Sundar Kuer. The defendant immediately raised the issue whether *Musammat* Bhikna Kuer had a right to sue in that capacity. It is obvious that the defendant was competent to raise this issue, The plaintiff is suing for a declaration that is hostile to the defendant's interest and the defendant can point to the terms of Section 42 of the Specific Relief Act and ask that they shall be respected. The plaintiff in such a case as this must be one entitled to some legal character or to some right as to the property, and the defendant says "You must first show that you have interest in this property before you can move the Court for a decree that will possibly affect my interest" for the defendant claims to have purchased in auction sale the very land in respect of which the declarations are being sought in the present suit, and the declarations contained in the reliefs are directly repugnant to the defendant's alleged title. The plaintiff's right to sue having been challenged she relies upon a

document executed by the admitted owner of the property of Harbans Sahay. That document purports to convey the property to *Musammat* Bhikna Kuer who is to be *Malik* and it is stated that the grant is made *banazar parwarish*. In the first Court this was held to be a deed of gift which required attestation under section 123 of the Transfer of Property Act, and as the evidence shows that there was no attestation effected, the deed was null and void. The learned Subordinate Judge in appeal held that this was not a deed of gift but a deed of conveyance. It is difficult to understand what kind of conveyance is meant by the learned Subordinate Judge. It cannot be a sale, for a sale is transfer of ownership in exchange for a price paid or promised ; nor does it fit in with the definition of a settlement to be found in the Indian Stamp Act. It is an absolute transfer and it appears to me to be purely voluntary. The fact that it was made *banazar parwarish* only indicates to me what was the motive of the grantor and in my opinion this is a good example of the difference between consideration and motive. Here there is no promise and no act on the part of the donee in return for the grant. I hold that the transfer Exhibit 2 is a transfer that falls under the definition of gift and that as it was not attested in accordance with the provisions of section 123 of the Transfer of Property Act it is null and void. It follows that the plaintiff *Musammat* Bhikna Kuer has not shown any title that would justify her coming into Court under section 42 of the Specific Relief Act. The appeal must therefore succeed, and in view of the fact that the defendant is successful on this one point it is unnecessary to go into other questions raised in the suit. Costs to the defendant.

Foster, J.—I agree.

Appeal allowed.

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* 1925 Patna 152.

KULWANT SAHAY, J.

Shafayet Khan and others—Petitioner

v.

The King-Emperor—Opposite Party.

Criminal Rev. No. 705 of 1923, decided on 21st January, 1924, from the decision of the Sessions Judge Gaya, dated 26th November 1923.

*(a) *Criminal Trial—Trial of cross cases.*

The simultaneous but separate trials of two cross cases of rioting is not bad unless the accused are prejudiced. [P. 153, C. 1.]

(b) *Penal Code, S. 147—Charge for offence with one common object will vitiate conviction for offence with another common object.*

Where the common object charged was to assault one K, certain accused, who joined the unlawful assembly, after K retired, in beating some other persons, cannot be convicted of the offence charged. [P. 153, C. 1.]

Yunus—for the Petitioners.

Judgment.—There are five petitioners in this case. They have all been convicted by the Sub-Divisional Magistrate of Aurangabad of an offence under section 147, Indian Penal Code, and sentenced to six months' rigorous imprisonment. The conviction and sentence have been upheld by the learned Sessions Judge of Gaya on appeal.

The first point taken by the learned, Counsel for the petitioners is that the conviction of two of the petitioners Eradat Khan and Rashid Khan is bad in law. The prosecution case is that on the 23rd April, 1923, the petitioners and others formed themselves into an unlawful assembly and assaulted Khairati Khan at a place near a mosque in village Sihuli Dargah. After Khairati was assaulted he cried out for help and Nabi Baksh, Rustam and Pheku came to his assistance and it is alleged that these three persons were also assaulted by the members of the unlawful assembly. Khairati lodged a first information before the Police on the 23rd April 1923. In this information he did not name Eradat and Rashid as being members of the unlawful assembly or as having assaulted him. Nabi Baksh lodged another first information the next day at 5 P.M. He named both Eradat and Rashid as being persons forming members of the unlawful assembly. It appears that on the 30th May, 1923, Khairati filed a written complaint in Court and in this complaint he named seven persons as members of the unlawful assembly. Amongst these persons Eradat and Rashid were not named. Khairati was examined as a witness on behalf of the prosecution, he being prosecution witness No. 6. In his deposition in Court as witness he names the other accused persons but does not name Eradat or Rashid. It has further been contended by the learned Counsel for the petitioners that so far as those two petitioners are concerned they did not form members of an unlawful assembly with

the common object of assaulting Khairati which was the charge framed against them. The learned Sub-Divisional Magistrate in his judgment finds that Rashid joined the assault after Khairati had left the place. As regards Eradat he refers to the fact that he was not named in Khairati's first information and the finding appears to be that Eradat Khan and Rashid Khan joined the unlawful assembly after Khairati had been assaulted and he (Khairati) had left the place and when Nabi Bakhsh and others were being assaulted. Now, the charge as framed in the Court below was that all the petitioners formed members of an unlawful assembly the common object whereof was to assault Khairati. Having regard to the evidence in the case and the finding arrived at by the learned Magistrate, it is clear that the charge cannot be sustained so far as Eradat and Rashid are concerned. They could not be members of an unlawful assembly the common object whereof was to assault Khairati when they did not turn up until after Khairati had been assaulted and had left the place, and joined the assembly only when Nabi Bakhsh and others were assaulted. It is clear, therefore, that the conviction so far as Eradat and Rashid are concerned must be set aside. As regards the other petitioners there is a clear finding that they along with several other members, exceeding five in number, did form an unlawful assembly with the common object whereof was to assault Khairati Khan and so far as they are concerned I see no reason to disturb the conviction or the sentence.

It appears that a counter-case was instituted by Ershad Khan, one of the party of the petitioners, against the complainant and other persons which resulted in an acquittal. Both cases were tried simultaneously and the learned Sub-Divisional Magistrate says that the two cases were so connected together that it was not possible to discuss the one and leave out the other. It has, therefore, been argued by the learned Counsel for the petitioners that the trial has been bad in law on account of the two cases being tried simultaneously and the facts proved in one case being used as evidence in the other case. As was laid down in the case of *Sahadev Ahir* v. *Emperor* (1), the trial of two cross-cases of rioting and grievous hurt almost simultaneously but separately did not vitiate the trial unless petitioners can show some prejudice. In this particular case having regard to the findings of the learned Sessions Judge, I am unable to say that there has been any prejudice to the petitioners on account of such trial. As has been pointed out by the learned Sessions Judge the only result of the two cases being tried simultaneously has been that the learned Magistrate has examined the defence in more detail than he would have done otherwise. But this by itself does not show any prejudice to the petitioners.

It has next been contended that the petitioners Nos. 1, 2 and 3 ought not to have been tried jointly with the petitioners Nos. 4 and 5, as petitioners Nos. 4 and 5 were not in any way concerned with the offence with which the petitioners Nos. 1, 2 and 3 have been charged. As I have already stated the charge against all the five petitioners was the same, being members of an unlawful assembly with the common object of assaulting Khairati Khan. The petitioners Nos. 4 and 5 are now being acquitted because of the finding that they did not join the assembly until after the assault had already been committed upon Khairati and Khairati had left the place. There is no separate offence with which the first three petitioners have been charged as can be distinguished from the charge against petitioners Nos. 4 and 5, and, therefore, there has been no error in the trial of all the five petitioners in a joint trial. I would, therefore, set aside the conviction and sentence so far as Eradat and Rashid are concerned and affirm the conviction and sentence so far as Shafayat, Ghani and Amjad are concerned.

Appeal dismissed partly.

(1) (1903-04) 8 C. W. N. 344.

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* **1925 Patna, 153.**

DAS, J.

Sheikh Hamidur Rahman—Petitioner

v.

Shahanand Das and others—Opposite Party.

Civil Rev. No. 435 of 1923, decided on 28th April 1924, from an order of the Sub-Judge, Purnea, dated 1st August 1923.

Civ. Pro. Code, S. 148—Time fixed for payment of costs on payment of which appeal was accepted cannot be extended—Civ Pro. Code, S. 151.

Where the appellant failed to pay the costs on payment of which only appeal was to be accepted,

the Court has no power to extend the time limited in the order for payment of the money either under S. 148 or 115. [P 151, C. 1.]

* (b) *Civ. Pro. Code, S.* 148—*Scope.*

Section 148 only applies to cases of Acts done by a party under the provisions of the Code itself. [P. 154, C. 2.]

Civ. Pro. Code, S. 511—*Scope*

The High Court should not exercise its power of revision except in aid of justice. [P. 154, C 2.]

P. C. Rai—for Petitioner.

S. Hussain, for *G. C. Pal*—for Opposite Party.

Judgment.—This application is directed against the order of the learned Subordinate Judge of Purnea, dated the 1st September 1923. The petitioner in this Court was the auction-purchaser of certain properties which were sold in execution of a Civil Court decree. The opposite party, who is the judgment-debtor, applied for setting aside the sale under the provisions of O. 21, r. 90 of the Code. That application failed in the Court of first instance. On appeal the learned Subordinate Judge passed the following order: "The result is that this appeal is allowed and the case remanded to the Court below for a fresh trial in accordance with law and in the light of these directions indicated above. On this express condition that the appellants do pay to the contesting opposite party respondents a sum of Rs. 50 as costs within a week, in default therein, this appeal shall stand dismissed without further reference to this Court."

The order was duly signed by the learned Subordinate Judge and there is no question that it was a good and operative order. It is conceded that the sum of Rs. 50 was not paid by the opposite party within the time allowed by the Court; but the opposite party made an application to the learned Subordinate Judge, after the expiry of the period of limitation by the Court, for leave to put in the money on the ground that he was not aware that the money should be filed within 7 days from the date of the order of the Appellate Court. The learned Subordinate Judge accepted the excuse put forward on behalf of the opposite party and exercised the power under Section 148 of the Civil Procedure Code and extended the period for paying the money into Court. He thought that in the circumstances of the case he should exercise his inherent jurisdiction in the matter.

Now, I should like to point out that the learned Subordinate Judge had no power whatever to exercise under section 148 of the Code. Section 148 provides as follows: "Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period even though the period originally fixed or granted may have expired." Now the doing of the act in this case, namely, paying the sum of Rs. 50 to the petitioner was not the doing of an act prescribed or allowed by the Code. In these circumstances Section 148 has no application whatever. It is obvious that Section 148 applies only to the case of an act by the party under the Civil Procedure Code itself, nor in my opinion, was there any inherent jurisdiction in the Subordinate Judge to vary the order passed by him on the 23rd July 1923.

But the question is whether I should interfere with the order passed by the learned Subordinate Judge. It is well settled that jurisdiction under Section 115 should not be exercised by this Court except in aid of justice. The respondents were no doubt late in bringing the money into Court; but they were late only by a single day, and the circumstances show that they have a substantial grievance in the way the case was tried in the Court of first instance. In these circumstances I do not think that I should interfere in this case, although I am clearly of opinion that the order passed by the learned Subordinate Judge was wrong.

I would, therefore, dismiss this application but in the circumstances of the case, without costs.

Application rejected.

1925 Patna, 154.

KULWANT SAHAY, J.

W. J. Watson—Petitioner

v.

P. H. Metcalfe—Opposite Party.

Criminal Rev. No. 680 of 1923, decided on 1st February 1924, from the decision of the Dist. Magistrate, Gaya, dated the 8th August 1923.

Criminal Pro. Code, Section 253 (2)—*Where conviction is impossible the Magistrate can discharge the accused even before the date of hearing.*

Under section 253 (2) a Magistrate can discharge an accused even before the date fixed for hearing if the Magistrate is satisfied from the

record that the accused cannot possibly be convicted of the offence. [P. 155, C. 1.]

B. N. Mitter—for the Petitioner.

S. P. Varma—for the Opposite Party.

Judgment.—This is an application in revision on behalf of the complainant against the order of the District Magistrate of Gaya, discharging the accused under Section 253, clause (2) of the Code of Criminal Procedure.

The complaint which was lodged before the Magistrate at Buxar was to the effect that the petitioner had sold his shares in a a certain Mill at Gaya to the accused for a sum of Rs. 4,000. On the 20th November 1922 the accused gave two cheques to the petitioner, one for Rs. 1,000 payable on the 21st November 1922 and another for Rs. 3,000 payable on the 2nd January 1923 drawn on the Chartered Bank of India, Australia and China. The case of the petitioner is that the first cheque was cashed on the 6th January 1923, but the second cheque for Rs. 3,000 could not be cashed as the accused had no money in his account in the bank. The second cheque was dishonoured on the 24th January 1923. The petitioner then served the accused with a notice to pay him the money, but before the present complaint was lodged, the accused wrote to the petitioner saying that he had changed his bank and asking him to return the cheque for Rs. 3,000 and to take a fresh cheque upon his new bank. The petitioner, however, instead of taking this new cheque lodged his complaint under Section 417 of the Indian Penal Code. The case was subsequently transferred from the Court of the Magistrate of Buxar to that of the District Magistrate of Gaya. On the 27th July 1923 the petitioner filed an application for action under Section 6 of Act XVIII of 1891, namely, for askingthe Chatered Bank to supply a copy of the statement of account of the accused. The Court thereupon made an order on the 27th July 1923, and on the 8th August 1923 the statement of account was received by the District Magistrate from the Chartered Bank. On receipt of this statement of account the learned District Magistrate on the 8th August found that the accused had sufficient money to pay the second cheque from the 2nd January up to the end of the month and that no offence of cheating could possibly be made out against the accused. He accordingly on that date discharged the accused under Section 253, clause (2) of the Code of Criminal Procedure.

Against this order the petitioner comes in revision to this Court, and his main contention is that the date fixed for the case was the 10th August 1923 and the learned Magistrate had no jurisdiction to take up and dispose of the case on the 8th August 1923. No doubt the date fixed in the case was the 10th August 1923 but under clause (2) of Section 253 of the Criminal Procedure Code, the Magistrate had ample jurisdiction to make an order of discharge if upon the materials then before him he was satisfied that no case of cheating could possibly be sustained against the accused. Nothing has been shown before me by the learned Vakil for the petitioner as to why this order is without jurisdiction. Clause (2) of Section 253 gives the Magistrate ample jurisdiction to make the order for discharge at any stage of the case previous to the stage referred to in clause (1) of Section 253. On the merits also I find that the dispute between the parties appears to be of a civil nature, and it is not desirable to order the proceedings to continue in the present case.

This application must, therefore, be dismissed.

Revision rejected.

1925 Patna, 155.

JWALA PRASAD AND KULWANT SAHAY, JJ.

Sachchidanand Sinha—Petitioner

v.

The Commissioner of Income-Tax, Bihar and Orissa—Opposite Party.

Mis. Judicial Case No. 37 of 1924, decided on 18th March 1923.

Income-Tax (1922)—S. 66—Whether review can be granted; whether, reasonable opportunity was given under S. 39 and whether personal income can be jointly assessed with family income are questions of law necessitating a reference to the High Court.

The assessee owned two houses, one at Allahabad and the other at Solon, which were both joint family properties. He was taxed on the income from the houses along with his personal income. The assessee's application, for review of the order or for reference to the High Court, was refused by the Commissioner of Income-Tax on the ground that he had no power to review his own order and that no question of law necessitating a reference to the High Court arose in the case. The assessee moved the High Court to call upon

the Commissioner to state a case on the following points :—

1. Whether reasonable opportunity of being heard was given to the assessee.

2. Whether in view of S. 14, income derived as a member of a joint Hindu family can be assessed jointly with the assessee's personal income.

3. Whether the Commissioner can review his order under S. 33 on sufficient grounds :

Held : that the High Court would be justified in calling upon the Commissioner of Income-Tax to state a case on all the points. [P. 157, C. 1.]

Jayaswal—for the Petitioner.

Order.—This is an application under Section 66 of the Income-Tax Act, 1922, praying that the Commissioner of Income-Tax be called upon to state a case and refer it to the High Court for determination.

It appears that the applicant, the Hon'ble Mr. S. Sinha, was assessed with income-tax for the year 1923-24 and the usual assessment form was issued on the 25th of May 1923. That assessment was principally upon the salary of the applicant as Member of the Executive Council, Bihar and Orissa, and was made by the Income-Tax Officer through whose authority and under whose signature the assessment form was issued.

On the 12th October 1923, the Commissioner of Income-Tax wrote to Mr. Sinha as follows :—

"I have the honour to say that your return of income for the year 1922-23 does not show any income from house property which I understand you possess. If my information is correct, I would request you to furnish particulars of its *bona fide* annual value, by October 26th."

Mr. Sinha thought that the house referred to by the Commissioner was his newly built house at Patna, and in his letter of the 14th October 1923 he explained the omission of house property from the return submitted by him as being due to the fact that he had removed to his new house only on the 1st of April 1923, previous to which he was occupying a rented house.

The Commissioner in his letter of the 23rd October 1923 pointed out that the properties referred to in his previous letter were Mr. Sinha's two houses, one at Allahabad and another in or near Simla. To this, Mr. Sinha replied on the 6th of November 1923, that he possessed a house at Allahabad (No. 7, Elgin Road) in which his mother and other members of his family had been residing since 1898 ; that his son has another house at Solon which he has inherited from his maternal grandfather. Mr. Sinha in this letter further offered to supply any additional information that the Commissioner might require.

On the 13th December 1923, the Commissioner of Income-Tax wrote to Mr. Sinha stating that the annual letting value of his house at 7, Elgin Road, Allahabad, was ascertained to be Rs. 2,400, and asked him to show cause under Section 33 of the Indian Income-Tax Act, 1922, by the 21st December, why the said sum of Rs. 2,400 should not be added to Mr. Sinha's income for the purpose of assessment to income-tax and super-tax. In reply to this, on the 20th December 1923, Mr. Sinha while "on tour" as noted in his letter, wrote to the Commissioner stating that he was under the impression that all the payments in connection with his house at Allahabad were made at Allahabad but if the assessment of his Allahabad house was to be made at Patna he would have no objection to his being assessed on the value of that house. He further stated that he would be returning to Patna on the 2nd January, 1924 when he would write to the Commissioner of Income-Tax definitely on the subject and that in the meantime he had written to his nephew at Allahabad making enquiries about the matter.

Accordingly, on his return to Patna, Mr. Sinha wrote to the Commissioner on the 19th January 1924, as follows :—

"In continuation of my letter sent to you from 9/3, Hungerford Street, Calcutta, dated the 20th December, 1923, I now write to say as the result of enquiries made by me that no assessment has been recently made of my Allahabad house for the purpose of income-tax. While this is so, you will permit me to add that looking into the law and taking into consideration the facts and circumstances of the case, which are not yet fully known to you, I am not quite sure that my Allahabad house is liable to assessment. In the circumstances, it seems to me that it would be in the interest of justice if you kindly give me an opportunity of stating my views before you pass final orders on the subject."

To this the Commissioner of Income-Tax replied, as per his letter of the 23rd January 1924, stating that he had already passed final orders in his case on 22nd December, 1923 and that he had no power to review the order already passed by him. The Commissioner added :—

"I would, however, point out that when I gave you the opportunity (as required by law) of making any representation, you stated that you had no objection to raise except possibly that assessment had already been made in Allahabad."

Thereupon, on the 20th February, 1924 Mr. Sinha applied to the Commissioner of In come-Tax for review of his order or reference to the High Court. The application of Mr. Sinha was refused by the Commissioner per his order, dated the 22nd February 1924. The Commissioner held that he had no power to review his own order and that no question of law arose necessitating any reference to the High Court. Hence this application before us for asking the Commissioner of Income-Tax to state the case and to refer it to the High Court for determination. The reference is sought on the following points :—

(*a*) Whether the Commissioner of Income-Tax having once passed an order under Section 33 has power to review his own order on sufficient grounds being shown ?

(*b*) Whether the requirements of the proviso to section 33 (2) of the Income-Tax Act, in regard to giving the petitioner reasonable opportunity of being heard, have been complied with in this case?

(*c*) Whether, in view of the provision of Section 14 of the Income-Tax Act, income derived as a member of a Hindu undivided family can be assessed jointly with the petitioner's personal income?

The first point is directed against the view of the Commissioner of Income-Tax as to his power of reviewing his own order passed under Section 33 of the Act. The Commissioner in his order refers probably to an instruction issued by the Inland Board of Revenue, contained in paragraph 76 of the Income-Tax Manual at page 111 (*a*). The instruction runs as follows :—

" The power conferred by this section as a Commissioner can only be exercised once in any particular case. A Commi sioner who has once passed an order in connection with any case under Section 33 cannot review that order even if he subsequently finds that he has made a mistake in passing such order."

The order in the present case was passed by the Commissioner upon his own initiative, and there is no appeal from his order. It is contended by Mr. Jayaswal that unless the aggrieved party is allowed to have the order reviewed by the Commissioner there is no remedy left to him and consequently the circular should not be allowed to override the principle that every Court or officer has power to review its or his own order on being convinced of its or his mistake. Mr. Jayaswal wants the authority of the circular to be tested. This is consequently a question of law which must be determined by the Court.

The next question is based upon the proviso to Section 33, Clause (2) of the Act. It is said that no reasonable opportunity was given to the applicant of being heard before the final order was passed by the Commissioner on the 22nd December, 1923. On the 13th December, 1923, the Commissioner wrote to Mr. Sinha intimating him the estimated letting value of his house at Allahabad and asking him to show cause under Section 33 why that value should not be added to his income in order to assess additional tax and super-tax. This letter was written from Ranchi and was received by Mr. Sinha while on tour. The date fixed for the disposal of the case was the 21st of December, 1923. The letter did not state the place where the cause was to be shewn. On the 20th December, 1923, Mr. Sinha wrote to the Commissioner of Income-Tax stating that he was "on tour" and that on his return he would write in detail and virtually asked him to postpone the disposal of the matter until his return. The matter was disposed of on the 22nd December, 1923 after the receipt of this letter of the 20th December. Mr. Jayaswal contends that no opportunity was given to Mr. Sinha of being heard before the matter was disposed of.

The circumstances set-forth above raise a question of law which justifies a reference by the Commissioner to the High Court for determination of point (*b*) mentioned above.

The last point is obviously a question of law upon which a reference is necessary.

As to the High Court's power to call for a reference in this case, Mr. Jayaswal has referred to the principles underlying the decision of their Lordships of the Judicial Committee in *Alcock Ashdown & Company, Limited* v. *The Chief Revenue Authority of Bombay*(1). He says that in accordance with the order passed on the 22nd December, 1923 by the Commissioner *suo motu* under Section 33, the Income-Tax Officer revised on the 9th January 1924 the original assessment made by him and imposed an additional assessment of tax upon the value of the house referred to above. Against this additional assessment there could be no appeal either under Section 31 or 32 of the Act, particularly when the assessment was

(1) 1923 P. C. 133=47 Bom. 742=50 I. A. 227 =25 Bom. L. R. 920=21 A.L.J. 689=(1923) M. W. N. 557=45 M. L. J. 592=23 M. L. T. 267=18 M. L.W. 918=4 L. R. P. C. 188=39 C.L.J. 302. (P.C.)

made in pursuance of the order of the Commissioner under Section 33. Under Clause (1) of Section 66 the Commissioner could, on his motion, refer the questions of law that arose in the case for the opinion of the High Court. The Commissioner when moved by the assessee to make a reference refused to do so. We think that the High Court can in the circumstances call for a reference.

Accordingly, we call upon the Commissioner of Income-Tax to state a case on all the three points (*a*), (*b*) and (*c*) mentioned above, setting forth the facts relating to the matters in question, and refer the same for the opinion of the High Court.

1925 Patna, 158.

KULWANT SAHAY, J.

Bhagawat Jha and others—Petitioners

v.

Emperor—Opposite Party.

Criminal Rev. No. 641 of 1923, decided on 7th December, 1923, to revise a decision of the S. J., Muzaffarpur, dated the 11th October 1923.

(a) *Penal Code, S. 147—Looting of crops alleged —Bona fide dispute as to land negatives offence.*

Where the common object of the unlawful assembly is alleged to be looting of crops, the fact that the title to the land is uncertain and that a *bona fide* dispute exists about it, obviates offence under S. 147. [P. 159, C. 1.]

(b) *Criminal Trial—Note of identification is evidence only if proved by the Magistrate holding the identification.*

Where a note of test-identification is not proved by the Magistrate who held the identification and full particulars of the identification are not given by him the note is no evidence of the identification. [P. 159, C. 2]

Ali Imam and S. P. Varma—for the Petitioners.

The Government Pleader—for the Crown.

Judgment.—This is an application in revision on behalf of 13 persons who have been convicted under Section 147 of the Indian Penal Code and some of whom have also been convicted under Sections 323 and 325 of the Penal Code and sentenced to various terms of imprisonment. The petitioner No. 1 has been convicted under Sections 147, 323 and 325, Indian Penal Code, and sentenced to four months' rigorous imprisonment and a fine of Rs. 100. Petitioners Nos. 2, 3, 6, 8, 9, 10 and 13 have been convicted under Sections 147 and 323 and sentenced to two months' rigorous imprisonment and a fine of Rs. 50. Petitioners Nos. 4, 5, 7, 11 and 12 have been convicted under Section 147 only and sentenced to two months' rigorous imprisonment. The conviction and sentence have been affirmed on appeal by the learned Sessions Judge. The dispute was as regards certain plots of land which are *diara* lands under recent accretions on account of the change in the course of the river. It appears that plots Nos. 1410, 1411, 1412 and 1413 of the Settlement Map of 1898, which is Exhibit 8 in the case, form the *zirait* land of the proprietors Jamuna Rai and Parichan Rai. The petitioners or at least some of them are tenants of the village and they have got their holdings to the south of these plots and there is no dispute as regards plots Nos. 1410, 1411, 1412 and 1413 belonging to the complainant's master. The dispute is as regards certain lands which have formed on account of the change in the course of the river and which are recent accretions and are claimed by complainant's master as belonging to him, whereas the accused persons claim these lands as belonging to them. The learned Sessions Judge in dealing with the question as to whether the lands belong tothe complainant's master or to the accused, says that it is impossible to say which of the parties is entitled to which portion of the accreted land. It appears that there was a dispute in the year 1905 as regards the title to some of these plots and it was held that the owner of plots 1410 and 1411 did not acquire any right to the accreted land which was then in dispute. Now, having regard to the finding that it is impossible to say whether the accused or the complainant's master had any title to the land in dispute, it is not possible to say as to whom the crops alleged to have been looted really belonged. Now, the common object of the unlawful assembly as stated in the charge sheet was to loot wheat and barley crops of complainant's master. When the learned Sessions Judge is unable to say as to whether the land belonged to the complainant's master or not, it is impossible for him to say that the crops which are alleged to have been looted belonged to the complainant's master. The charge, as it stands, charges the accused of an offence under Section 147 on the ground that they formed into an unlawful assembly with the common object of looting certain crops

belonging to the complainant's master. Upon the findings of the learned Sessions Judge it is impossible to say whether the crops did really belong to the complainant's master. If that is so, the common object fails and the conviction under Section 147 cannot stand. There appears to be a *bona fide* dispute as regards the title in these *diara* lands ; and as regards the lands recently formed by re-formation on account of the shifting of the course of the river, it is very difficult for a Criminal Court to say as to whether the title to the land belongs to one party or to the other, and in the absence of a title it is not possible for the Criminal Court to say that the crops belonged either to complainant's master or to the accused. In these circumstances there can be no looting because there can be no dishonest motive in taking away crops to which a party asserts a *bona fide* claim of title. The conviction under Section 147 of the Indian Penal Code must, therefore, fail.

As regards the conviction under Sections 323 and 325 there is no finding in the judgment of the learned Sessions Judge as to which of the accused committed what act in order to bring him within the definition of offences under Sections 323 and 325. Under the circumstances it would have been necessary to remand the case to the Court below for a finding as to which of the accused can be convicted under ections 323 and 325; but having regard to the nature of the injuries and to the nature of the dispute, the injuries being very slight except in the case of one person who has a fracture of the ulna, and to the fact that the petitioners have already undergone 27 days imprisonment, I do not think it desirable to order a fresh trial.

Another point has been taken by the learned Counsel on behalf of the petitioners on the question of identification of the petitioners. It appears that there was, what is called a test-identification, that is, during the Police investigation a Sub-Deputy Magistrate was called and in his presence some of the witnesses were asked to identify some of the persons who were suspected of having taken part in the offence. The Sub-Deputy Magistrate made a report which is in a tabular form with certain headings. The first column gives the date of conducting the identification. The second column gives the place where the identification was held. The third column gives the names of the identifying witnesses with note as to which of the suspects were identified by each witness. The fourth column contains the names of the suspects. The fifth contains mention of the place where the suspects were detained or kept before they were brought out for identification. The sixth column gives a description of the manner in which the identification was effected. The seventh column contains the names of witnesses in whose presence the identification was made with their signatures ; and the last column contains remarks and signature of the investigating officers. I am not aware as to whether this form of making a report as regards the test identification is prescribed anywhere in the law. Nothing has been shown to me, and from the document on the record which purports to be a note of the test identification, it is impossible for me to say what is exactly the nature of the report ; that is, the persons who are said to have identified certain other persons who were suspected, identified them as regards what? The document gives no description as to the offence or to the occurence in which the persons suspected are said to have taken part. Now in the absence of the Sub-Deputy Magistrate who prepared the report, it is impossible to see the exact meaning of this report. This Sub-Deputy Magistrate who prepared the test identification note has not been called as witness in this case and it is argued by the learned Counsel for the petitioners that this test-identification report was not admissible in evidence without examining the Sub-Deputy Magistrate. I agree with this contention and on a mere perusal of this note I am constrained to say that it is no evidence of identification of the accused persons in the present case. This identification note was chiefly relied on by the Deputy Magistrate as well as by the learned Sessions Judge in the present case. There is no doubt mention of other evidence before the Trying Magistrate as regards the identification of the accused. But it is impossible to say as to how far the mind of the learned Judge was influenced by this note of test-identification. However, having regard to the fact that convictions under Sections 147, 323 and 325 have been set aside it is not necessary to dwell at any length on this point. The result is that the convictions and sentences are set aside and the fines, if paid, will be refunded.

Convictions quashed.

* **1925 Patna, 160.**

DAS and ROSS, JJ.

Sidheswari Prasad Narayan Sinha—Appellant

v.

Mt. *Dulhin Radha Dulari Kuar*—Respondent.

Appeal from Original Order No. 199 of 1923, decided on 30th June 1924, from the order of the Sub-Judge, Chapra, dated 16th April 1923.

*(a) *Practice (Civil)—Execution Court—Duty of.*

It is the duty of the Court executing a decree to see that parties to the proceedings are properly before it. [P 160, C. 2.]

*(b) *Civ. Pro. Code, O.* 1, *R.* 3—*Execution proceedings—Judgment debtors' property under Court of Wards—Manager Court of Wards not made party—Judgment-debtor is not properly represented..*

If the property of the judgment-debtor is under the Court of Wards the ward (judgment-debtor) is not properly before the Court if the Manager of the Court of Wards is not made a party to the proceedings. [P. 160, C. 2.]

Sambhu Saran—for the Appellant.

Sultan Ahmad—for the Respondent.

Ross, J.—This is an appeal against an order of the Subordinate Judge of Chapra deciding that an execution was barred by limitation against judgment-debtor No. 1, the respondent.

It appears that a preliminary decree in a mortgage suit was passed on the 23rd March 1910, and that the present application for execution was made on the 12th of May 1922. The respondent in her objections took two grounds; first, that the execution petition was not maintainable because she had not been properly made a party to the execution case; and, secondly, that the decree was barred by limitation. It is conceded that no final decree was passed in the suit. Therefore if any decree is being executed, it must be the preliminary decree. Now a preliminary decree in a mortgage suit is not capable of execution. Whether that which is incapable of execution becomes capable of execution by reason of the objection not having been taken at an earlier stage is a matter as to which I express no opinion. But at the best, it must be the date of the preliminary decree from which time is to be calculated; and, in that case, the present petition for execution is clearly barred.

It is argued that this is a decree for the payment of money at a certain date and that under Section 48 (1) (*b*) twelve years ought to be calculated from that date. The answer to this is, first that the decree is not a decree for the payment of money, but a mortgage decree which is vitally distinct from a money decree; and, secondly, that it is not a decree for the payment of money at a certain date. The period of grace fixed by the mortgage decree is not a certain date fixed for the payment of money.

Then it is argued that the appellant could have shown that the present application for execution was in continuation of the last execution, if the question had been raised. The question was raised in the respondent's objection; and, in any case, it was for the appellant, who was clearly out of time, to show that his application for execution was maintainable. With regard to the objection that the preliminary decree is not capable of execution, this objection failed in the case of the other judgment-debtors and succeeded in the case of the present respondent; because it was held, that she being a ward under the Court of Wards, was not properly represented in the execution proceedings and was therefore entitled to raise the point now. The learned Vakil for the appellant argued that this part of the decision was wrong, because the question was raised in the trial itself and it was held not to have been shown that the property which was the subject of the mortgage had been taken charge of by the Court of Wards. The question at issue in the original trial was as to the maintainability of the suit. The order of the Board of Revenue declaring the respondent to be incompetent to manage her own property directed that the said property be taken charge of and managed by the Court of Wards. *Prima facie*, therefore, the property in suit was under the Court of Wards and the respondent is certainly disqualified to manage it. It was the duty of the executing Court to see that the parties to the execution were properly before the Court; and it is in no sense going behind the decree to hold that this disqualified proprietor was not properly before the Court when the manager of the Court of Wards had not been made party to the execution.

I hold, therefore, that the execution was not maintainable against the respondent both on the ground that he was not properly represented and on the ground that

the application itself was barred by time. The appeal must be dismissed with costs.

Das, J.—I agree.

Appeal dismissed.

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* 1925 Patna, 161.

DAS AND ROSS, JJ.

Harnarayan Pande—Plaintiff-Appellant

v.

Suresh Pande and others—Defendants-Respondents.

Appeal from Original Decree No. 103 of 1921, decided on 28th January 1924, from a decision of Sub-Judge, Saran, dated 28th April, 1920.

**Hindu Law—Joint family—Partition—Dealings between parties is a strong evidence in favour of the partition—Onus to prove separation is on the party asserting it where nucleus of joint family property is admitted.*

The circumstance that there have been dealings between the parties themselves is a strong evidence that there has been partition. The question of jointness of the members of the Hindu Family is ultimately a question of fact to be determined on evidence before the Court. But where nucleus of joint family property is admitted the initial onus of proving that separation did take place in fact is on the party asserting that there was separation. The Court may take into consideration cessor of commensality as one of the matters in finding out whether there has been separation or not. But it is not conclusive. [P. 161, C. 2.]

Sushil Madhab Mullick and *Sambhu Saran*—for Appellant.

Naresh Chandra Sinha and *Harihar Prasad Singh*—for Respondents.

Das, J.—This appeal arises out of a suit instituted by the appellant for partition of joint family properties. The defence, which has succeeded in the Court below, is that there was a previous partition and that the plaintiff is not entitled to a fresh partition of the properties. No documentary evidence was adduced in the case; but the learned Subordinate Judge has relied upon the testimony of one or two of the witnesses produced on behalf of the defendants and has found in favour of the case set up by the defendants. The learned Subordinate Judge attached considerable value to the fact that, admittedly, there has been a cessor of commensality. The view of the learned Subordinate Judge may be stated in his own words. He says as follows:

"It is not the case of the plaintiff that the parties have been joint in every respect. He admits separation in mess, whereas the defendants plead complete separation, so it is for the plaintiff more or less to show that the parties have been joint."

With this conclusion I am unable to agree. The cessor of commensality is no doubt one of the matters to be taken into consideration by the Court when the question in debate before the Court is whether the parties are joint or separate, but it by no means concludes the question. As this case must go back to the learned Subordinate Judge, it is desirable to state that the question whether parties are joint or separate is ultimately a question of fact to be determined on the evidence produced before the Court. In this case it is admitted that there is a nucleus of joint family properties. That being so, the initial onus is upon the party who asserts that there was a separation and it is for the party asserting the separation to prove that the separation did in fact take place. As it is pointed out in Mayne's Hindu Law, numerous circumtances may be

"set out as being more or less conclusive of a partition having taken place, such as separate food, dwelling, or worship; separate enjoyment of the property; separate income and expenditure; business transactions with each other and the like"

"But" as Mr. Mayne points out, "all these circumstances are merely evidence, and not conclusive evidence, of the fact of partition." To quote again the words of Mr. Mayne:

"Partition is a new *status*, and when it is brought about by consensus of the members of a co-parcenary they must intend that their condition as co-parceners shall cease. It is not sufficient that they should alter the mode of holding their property. They must alter, and intend to alter, their title to it. They must cease to be joint owners and become separate owners. And as, on the one hand, the mere cessor of commensality and joint worship, the existence of separate transactions, the division of income, or the holding of land in separate portions, or a mere definition of shares in revenue and village papers do not establish partition, unless such steps were taken with a view to partition; so, on the other hand, if a division in status has in fact been effected between the members of the family, it is not necessary that they should proceed to a physical separation of the particular pieces of their property."

(Mayne on Hindu Law and Usage, Ninth Edition, page 717). But it has been pointed out in more than one case that where there are dealings between the parties themselves, that circumstance may be taken as very strong evidence in favour of the view that there has been a partition.

In this case, the dispute between the parties arose during the Survey proceedings

and a petition of compromise was filed before the Settlement Officer which settled all the disputes of the parties so far as the immoveable properties were concerned. That petition runs as follows: "Your petitioners submit that there was a dispute between us"—all the names are mentioned—"which has been compromised in the presence of the *punches*.....that both parties should receive half and half of all the ancestral properties, *zemindari*, *kashtgari*, etc., over which we, the parties, have possession and occupation and with respect to which the names of us, the parties, have already been entered; and that the names of Mahadeva Pande, son of Nandkeshwar Pande, Tapesar Pande, son of Abhiram Pande and Suresh Pande, son of Ram Yad Pande, be recorded with respect to three-fourths, in equal shares, and the name of Har Narayan Pande, son of Gopi Pande, be recorded with respect to one-fourth of the *zemindari* bearing *tauji* No. 4964, in which five-annas four-pies share has been recently purchased. The signature of the *punches* are affixed below. Therefore, these few words have been written in the form of *Sulahnama*, so that the same may be of use when necessary." Now, the properties to which this petition refers, are properties entered in Schedule I and properties Nos. 1 and 2 in Schedule II of the petition of compromise. It seems to me that, so far as these properties are concerned, there has been a complete settlement between the parties; and the learned Subordinate Judge should have given effect to this petition of compromise. Mr. Naresh Chandra Sinha states that the Record-of-Rights was, as a matter of fact, prepared on the basis of this petition of compromise. If that be so, and we have no reason to doubt that that is so, the plaintiff is still entitled to a partition by metes and bounds of those properties; and we are assured that there are some properties which have been recorded in the joint names of the plaintiff and the defendants. So far as *tauji* No. 4964 is concerned, the interest of the parties is clearly specified in the petition of compromise and the plaintiff is clearly entitled to a partition by metes and bounds of this property. So far as property No. 3 in Schedule No. II is concerned, it is pointed out that a stranger is interested in this property and it cannot, therefore, be partitioned by metes and bounds. With regard to the properties in Schedule No. I, the partition will be on the basis of the Record-of-Rights which we accept as correctly defining the rights of the parties.

I now come to the *zarpeshgi* bonds which are set forth in Schedule II of the plaint. The right of the plaintiff to have a partition of these bonds must depend upon the question whether the parties are joint or separate. I have already said that the learned Subordinate Judge was not correct in placing the whole onus upon the plaintiff. We think that this question must be again determined by the learned Subordinate Judge. If he comes to the conclusion that the parties are joint, he must direct an enquiry in order to ascertain what the joint family properties consist of, and he must give a share in these joint family properties to the plaintiff. This enquiry must be in respect of the *zarpeshgi* bonds set out in Schedule I and the properties set out in Schedules III and IV of the plaint.

I would accordingly allow this appeal, set aside the decision of the learned Subordinate Judge and remand the case to him for disposal according to the directions given in this judgment. Costs will abide the result and will be disposed of by the learned Subordinate Judge.

Ross, J.—I agree.

Appeal accepted.

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* 1925 Patna, 162.

JWALA PRASAD, A. C. J. AND KULWANT SAHAY, J.

Hari Saran Singh and others—Plaintiffs-Appellants

v.

Syed Md. Eradat Hussain—Defendant-Respondent.

Civil Appeal No. 244 of 1923, decided on 1st August, 1924, from the order of the Addl. District Judge of Patna, dated 26th September 1923.

* (a) *Civ. Pro. Code, O. 22, R. 9—Ignorance of a pardhanashin lady's death in a different district is excusable where appellant is not guilty of laches—Appellant need not always be enquiring to see if respondent is dead.*

It is not the duty of the appellant to be on the look out and to be always inquiring as to whether the respondent in the appeal is dead or not, and if the appellant has done all that is necessary to bring the appeal to hearing, he cannot be punished for his ignorance of the death where there are no laches on his part so that it cannot be said that by the use of reasonable diligence, he could have come to know of the death, earlier. This

is especially so where the deceased respondent was a *pardhanashin* lady residing in the interior of a different district. [P. 164, C. 2.]

*(b) *Civil Pro. Code, O.* 43, R. 1 (*k*)—*Order refusing to set aside an abatement of an appeal is appealable.*

An appeal lies from an order refusing to set aside the abatement of an appeal, since O. 22, R. 11 makes the order apply to appeals. [P. 164, C. 1.]

Janak Kishore, Bindhyachal Prasad and *Rajeshwari Prasad*—for Appellants.

Khurshaid Hussain and *B. C. Mittra*—for Respondents.

Kulwant Sahai, J.—This is an appeal against an order of the Additional District Judge of Patna dismissing the appellant's appeal pending before him on the ground that no application for substitution had been made within time as regards respondent No. 2 who had died during the pendency of the appeal. He further ordered that as the appeal could not proceed in the absence of the heirs of the deceased respondent the appeal be dismissed as against the other respondents also.

A preliminary objection has been taken by the learned Vakil for the respondent that no appeal lies against this order to this Court. His contention is that the application filed by the appellant before the lower Appellate Court was an application for substitution under Order 22, Rule 4 of the Civil Procedure Code and the prayer in that application was for substitution of the legal representatives of the deceased respondents. This application had been refused by the District Judge and there is no provision in the Civil Procedure Code giving a right of appeal to the appellant against an order refusing an application for substitution.

The ground taken may be correct in so far as the form of the application is concerned but we have to look to the substance of the application and not merely to the form of it. What happened was that the respondent No. 2 *Musammat* Bibi Amma died on the 22nd March 1923. On the 20th July 1923 the Vakil for the deceased respondent informed the Court that his client was dead. This was after the service of the notice of the appeal upon the respondent and after she had entered appearance in the appeal. Thereupon the learned Judge made an order to the effect that the appellants be informed and they do take the necessary steps at once. On the 10th September 1923, the appellants filed an application before the District Judge in which they stated in paragraph 2, that although an order had been made to the effect that they, appellants, be informed about the death of the respondent no such information had been given to them and in paragraph 3 they stated that they had come to know of the death of the deceased respondent for the first time on the 10th September 1923 and by this application they applied that respondent No. 1 who was a relative of the deceased respondent may be directed to disclose the name of the heir of respondent No 2. As I have said, this application was filed on the 10th September 1923. On the 18th September 1923, the appellants filed an application for substitution stating that *Mt.* Bibi Amma, the deceased respondent, had died leaving certain heirs whose names were set out, that the appellant had come to know of the death of the respondent on the 10th September 1923 on seeing the order of the Court dated the 20th July 1923, and that the deceased respondent was a *pardanashin* Muhammadan lady and had died at Yusufpur, in the District of Muzaffarpur and that the appellants were residents of Jalalpur, *Pargana* Phulwari, District Patna and therefore the appellants could not ascertain the actual date of the death of the said respondent No. 2. This application was headed as one under Order 22, Rule 4 and the prayer was that the legal representatives named in the petition may be made respondents in place of respondent No 2. Now it has been argued that this was an application for substitution under Order 22, Rule 4 and not an application for setting aside the abatement of the appeal under Order 22, Rule 9 of the Code of Civil Procedure. Order 43, Rule 1 (*k*) of the Code of Civil Procedure provides for an appeal against an order under Order 22, Rule 9 refusing to set aside the abatement or dismissal of a suit and it has been argued by the learned Vakil for the respondent that the present order which was passed on the application for substitution was not an order refusing to set aside the abatement or dismissal of the appeal. Having regard to the circumstances of the case I am of opinion that the application filed on the 18th September 1923 must be treated as an application for setting aside the abatement and dismissal of the suit. When a

respondent dies and no application for substitution is made within the period prescribed by law, the appeal abates automatically under the provisions of Order 22, Rule 4 and the application which is filed after the abatement of the appeal must be an application for setting aside the abatement and then for substitution. No doubt there is no prayer in the application filed on the 19th September 1923 asking the Court to set aside the abatement, but having regard to the nature of the application it must be treated as if the appellants wanted substitution to be made which substitution could only be made after the setting aside of the abatement and therefore, in substance, this application was an application for setting aside the abatement and then for substitution. This was the view taken under similar circumstances in the cases of *Lachmi Narain* v. *Mohammad Yusuf* (1) and *Babu Badlu* v. *Mt. Naraini* (2). The preliminary objection therefore fails and it must be held that the appeal is an appeal as contemplated by Order 43, Rule 1 (*k*) of the Civil Procedure Code.

It has next been argued that Order 43, Rule 1 (*k*) refers to an order refusing to set aside the abatement or dismissal of the suit, and not of an appeal, in the present case the order relates to an appeal and therefore Order 43, Rule 1 (*k*) has no application to the present case ; but Order 22, Rule 11 provides that in the application of this Order (that is Order 22) to appeals, so far as may be, the word " suit " should include appeal and I am clearly of opinion that Order 43, rule 1 (*k*) would apply to the abatement or dismissal of an appeal also.

It has next been argued that if this application be treated as an application for setting aside the abatement and the order of the District Judge be treated as an order refusing to set aside the abatement, then the matter should be sent back to the learned Judge for consideration of the application as an application for setting aside the abatement and that an opportunity be given to the respondent to adduce evidence to show that the appellant was aware of the death before the date alleged by him. Now we have got before us the petition for substitution and for setting aside the abatement filed by the appellant supported by an affidavit. We have also got before us the petition of objection filed by the respondent in the Court below supported by an affidavit. In the application filed by the appellant an explanation was given why the application could not be filed within the period limited by law. In the petition of objection filed by the respondent there is no allegation made to show that the appellant was aware or could have been aware of the death of the respondent at any time before the date as stated by the appellant. The respondents had full opportunity to take any objection they liked to the grounds of the application filed on the 18th September 1923. They contended themselves with the objection contained in their petition of the 24th September 1923 and they did not choose to take any other objections and I see no reason to allow them a further opportunity for adducing evidence. As regards the merits of the case I am clearly of opinion that this is a fit case in which the abatement should be set aside. The deceased respondent was a *pardanashin* lady residing in the interior of a different district and there is no reason to suppose that the appellant was aware of her death at any time prior to the 10th September 1923. As I have already said, notice of the appeal had already been served on the deceased respondent and she had entered appearance, as is evident from the order dated the 30th January 1923. After that it was not the duty of the appellant to be on the look out and to be always enquiring as to whether the respondent in the appeal were alive or dead and if the appellant had done all that was necessary to bring the appeal to hearing, it was not incumbent upon him to go on enquiring every now and then as to whether the respondents were alive or dead. When the appellant came to know of the death he was very prompt and within 8 days of his knowledge he filed an application for setting aside the abatement. There is nothing to show that there were any laches on the part of the appellant or that by the use of reasonable diligence he could have come to know earlier of the death of the respondent No. 2. In the circumstances I am of opinion that the abatement should be set aside and the appeal restored and the case remitted to the learned District Judge so that he might make the substitution of the heirs of the deceased respondent and proceed to dispose of the appeal in accordance

(1) (1920) 42 All. 540=59 I. C. 903=18 A. L. J. 638.

(2) (1924) Lah. 424.

with law. The costs of this appeal will abide the result of the appeal in the lower Court.

Jwala Prasad, A. C. J.—I agree.

Appeal restored.

1925 Patna, 165.

MACPHERSON, J.

Ganga Singh—Complainant-Petitioner

v.

Rambhajan Singh and others—Accused-Opposite Party.

Criminal Rev. No. 332 of 1924, decided on 10th July 1924, from the decision of the Sessions Judge, Gaya, dated 31st March 1924.

Crim. Pro. Code, S. 439—Acquittal, can be revised, but only in exceptional cases—Grave error of procedure justifies revision but improper admission of evidence not essential to the result, does not.

The power of interference in revision with the judgment of acquittal is sparingly exercised and ordinarily, only in cases where it is urgently demanded in the interests of justice. But it is impossible nor would it be expedient to enunciate any general principle. The High Court will interfere where circumstances require it. [P. 165, C. 2.]

The final report in the diary of an investigating officer not called as a witness for the prosecution might be used to suggest means of further elucidating a point which needs clearing up, but only for elucidating by legal evidence. But using the final report for the purpose of evidence is a legal error. Such error cannot however, justify interference by the High Court, for setting aside an acquittal. An error of procedure of a grave character would justify interference by the High Court but not a mere error of improper admission of evidence which was not essential to a result which might have been come to independently of it. (44 Cal. 876, foll.) [P. 167, C. 1.]

G. C. Pal and *S. S. Bose*—for Petitioner.

Hasan Imam and *T. N. Sahai*—for Opposite Party.

Judgment.—This is an application in revision by the private prosecutor to set aside the acquittal of the opposite party by the Sessions Judge of Gaya on appeal.

There is no question that the High Court has power under Section 439 of the Code of Criminal Procedure to set aside an acquittal by a Subordinate Court. In not a few instances this Court has exercised the power and the case of *Jitan Dusadh* v. *Damoo Sahoo* (1) is an example. But an examination of those instances appears to indicate that in practice the exercise of the power has been largely restricted to cases which have not been tried out. For instance, the case cited dealt with an acquittal under section 247 of the Code of Criminal Procedure. The practice of the Court accords with the rule laid down by Jenkins, C. J., in *Faujdar Thakur* v. *Kasi Choudhuri* (2). That rule has been quoted with approval by a Bench of this Court of which I was a member in *Gulli Bhagat* v. *Narain Singh* (3), (Criminal Revision No. 229 of 1923) and *Dal Singh* v. *Emperor* (4) Thus the power of interference in revision with a judgment of acquittal is sparingly exercised and ordinarily, only in cases where it is urgently demanded in the interests of public justice.

But it is not possible nor would it be expedient to lay down general principle. The Court will interfere where the circumstances require it. And in the present case there is a differentiating consideration which was apparently not present in previous cases and which may have induced the Division Bench to issue a rule. The acquittal of the accused in the Sessions Court consequentially nullified an order of the Magistrate under Section 545 granting financial compensation to the private prosecutor.

The facts necessary for an appreciation of the case for the petitioner are briefly as follows:—There is a *pind* which is plot No. 24 of Patkhauha running north and south between the *Diwarhan ahar* (plots Nos. 10 to 21 of Patkhauha) on the west and plot No. 23 of Patkhauha and plot No. 483 of Majoauh on the east. Plot No. 483 is north of plot No. 23. East of plot No. 483 is plot No. 484 and east of plot No. 484 is plot No. 486 of the same village. The natural flow of the water is south to north. The prosecution case was that a *gera* or embankment extended from the *pind* eastward in the northern part of plots Nos. 483, 484 and 486, the object of which was to hold up the water so that the *dhan* fields to the north might be irrigated therefrom, and that the accused cut 25 cubits of that

(1) (1917) 20 C. W. N. 862=1 Pat. L. J. 264=37 I. C. 519=18 Cr. L. J. 151=2 Pat. L. W. 409.

(2) (1915) 42 Cal. 612=19 C. W. N. 184=17 I. C. 1=16 Cr. L. J. 53=16 Cr. L. J. 124.

(3) (1924) Pat. 253=4 Pat. 703=5 Pat. L. T. 44=25 Cr. L. J. 946=2 Pat. L. R. Cr. 165.

(4) (1917) 44 Cal. 876=44 I. A. 137=15 A. L. J. 475=1 Pat. L. W. 66=19 Bom. L. R. 510=21 C. W. N. 816=26 C. L. J. 13=6 L. W. 71=42 M. L. T. 31=(1917) M. W. N. 522=18 Cr. L. J. 471=33 M. L. J. 555=39 I. C. 311=11 Bur. L. T. 54=13 N. L. R. 100 (P. C.).

gera in plot No. 483 near the *pind*, so that the water behind the *gera* flowed away and was lost and thus the supply of water for agricultural purposes was diminished. The accused denied the existence of any such *gera* and asserted on the authority of the *fard-ab-pashi* that the surplus water of the *ahar* flowed by a *kanwah* (overflow) situated in plot No. 21 at the northern end of the *pind*, eastward into plot No. 483 of Majhauli and then back southward into plot No. 23 of Patkhaulia and then eastward. The complainant's case was that that *kanwah* no longer existed, the outlet being by a *pakka bhao* (opening) in the southern end of the *pind* from the *ahar* into plot No. 23. The accused contended that the *bhao* does not affect the *kanwah*, the former being intended to drain the *ahar* and the latter to discharge the surplus water when the *ahar* is full.

The Police reported the case to be false and the complainant impugned the report of the Investigating Sub-Inspector. The Trying Magistrate made a local inspection and found a *gera* existing in plots Nos. 484 and 486, and it is now clear that the *gera* in these plots as well as a broad *bandh* north of plot No. 23 do exist, the former apparently being made after the preparation in 1914 of the Survey Map. In his judgment, the Magistrate held that the *gera* had existed for some years, that half of the *gera* across plot No. 483 had been cut by the accused, and that the opening which exists therein was not due to *kanwah* water passing through. He convicted the opposite party, some under Section 430 and some under Section 430 read with Section 114, Indian Penal Code, and sentenced them to fines, half of which he directed to be given to the complainant as compensation under Section 545 of the Code of Criminal Procedure.

In appeal the learned Sessions Judge found that the case for the prosecution was not true, and that the appellants did not commit the offence for which they have been convicted. He accordingly allowed the appeal and directed the fines to be refunded.

It is now contended that his judgment is vitiated by an illegality patent on the face of the judgment in that he made use contrary to law, of the final report of the Investigating Sub-Inspector of Police who was not examined as a witness. In support of the contention, reference is made to the remarks of their Lordships of the Judicial Committee in *Dal Singh* v. *Emperor* (4). In reply, Mr. Hasan Imam for the opposite party submits that the Judge had materials before him on the record and came to conclusions thereon on which he was bound to acquit and only tested them by a reference to the Police papers.

The learned Sessions Judge first considered whether the *gera* exists and found that it did not extend cross the narrow strip of land in plot No. 483 up to the *pind*. He pointed out that the Magistrate in his inspection note had merely spoken of the *g ra* at this point as non-existent and continued.

"Obviously the most important witness on this point was the Sub-Inspector, who enquired into the case, and must have seen the place very soon after the occurrence. For some unexplained reason he has not been examined. If a substantial embankment, described by the prosecution witness as thigh-high and three to three and a half cubits broad, had just been removed by the appellants for a distance of twenty to twenty-five cubits, as alleged, the Sub-Inspector must have seen marks of demolition, and, as he has not been examined, I feel bound to point out that, in his final report he makes the following remarks: "the alleged *gera* 25 cubits in length which was said to have been cut, did not appear to have been freshly cut, rather it looks like a water course, through which the surplus water of the villages Tekra, Madarpur and Patkhaulia *ahar* No. 22 flows." It appears therefore that had the Sub-Inspector been examined, he would not have supported the prosecution on this important point."

It would seem, therefore, that a view adverse to the prosecution case that a *gera* existed in plot No. 483, suggested itself to the Appellate Court because the Investigating Sub-Inspector had not been examined and that the Court tested that view by reference to an opinion which the Sub-Inspector had recorded on the point at issue.

The learned Judge then considered whether the *kanwah* still existed and after pointing out that on this point also the evidence of the Sub-Inspector would have been important, he found on the evidence on the record that it did exist in plot No. 21. He proceeded:

"I find therefore that the prosecution has failed to show that any *gera* existed in plot

No. 483 or that the *kanwah* had ceased to exist or that the *ahar* no longer drains through plot No. 483 as recorded in Survey; rather it appears to me that the appellants are right on all these points."

He next pointed out that the *band* north of plot No. 23 did not affect the case as the water now flows direct east from that point, and found as follows:

"It is clear therefore that although a *gera* exists in plots Nos. 484 and 486 and no doubt holds up a certain amount of water for the irrigation of paddy it is confined to those plots, and did not extend into plot No. 483."

It is obvious that on such findings an acquittal must follow. But in the final paragraph of his judgment the learned Judge went on to give further reasons for holding that the prosecution case, as presented to the Court, was not true. Most of them are based on the record but he also again referred to the final report in connection with certain alleged statements of prosecution witnesses to the Investigating Officer as to which they had been cross-examined, and remarked: "Here again the Sub-Inspector was a necessary witness in the case."

In referring to the final report of the Investigating Officer for the purposes mentioned the learned Sessions Judge erred in law. The final report and diary of the Investigating Officer might be used to suggest means of further elucidating points which needed clearing up but only of elucidating them by legal evidence. Thus the Sessions Judge on a perusal of the final report might well have examined the Sub-Inspector as a witness or directed him to be examined by the Trying Magistrate, and in that manner his testimony as to what he saw on the spot and what was said to him by witnesses, would have, subject to all just exceptions become legal evidence.

But the mere fact that there has been an error of procedure is not by itself good ground for setting aside an acquittal. An error of procedure of a grave character would afford ground for interference but not a mere error of improper admission of evidence, which was not essential to a result which might have been come to wholly independently of it. Such is the law as laid down by their Lordships of the Judicial Committee in *Dal Singh* v. *Emperor* (4) in respect of a conviction and the latter part of it is certainly not less applicable to an acquittal. In the present case it has been found that the testimony of the first independent person who visited the place of occurrence has been withheld by the prosecution so that an inference as to the non-existence of a *gera* in plot No. 483 may be drawn; that the prosecution story as to *kanwah* is false, and that of the accused true; that the entry in the Record of Rights as to the course of irrigation through plot No. 483 which is in favour of defence, has not been rebutted; that there was delay in lodging the first information; and that there is no reference therein to the mob of 100 men mentioned in the evidence in Court, which fact leads to an inference that it is a subsequent development in the prosecution case. These findings, none of which are vitiated by an error of law, are when taken in combination at least as consistent with the truth of the defence as with the truth of the prosecution story, and clearly the acquittal might have been, and from the tenor of the judgment apparently would have been reached on these considerations independently of the inadmissible evidence. An examination of the record also satisfies me that a different result is not probable, if a rehearing of the appeal is directed.

In these circumstances, the order of acquittal ought not to be set aside in revision. The rule is accordingly discharged.

Rule discharged.

1925 Patna, 167.

ROSS, J.

Debi Dayal and others—Petitioner

v.

King-Emperor—Opposite Party.

Criminal Rev. No. 185 of 1924, decided on 28th April 1924, from an order of the Dist. Mag., Shahabad, dated 12th March 1924.

Penal Code, S. 448—Bona fide *claim of right negatives offence*—*Penal Code*, S. 441.

An intent to commit an offence or to intimidate, insult or annoy any person in possession of the property is an essential ingredient of the offence of criminal trespass. Accordingly entering a house under a claim of right is no offence provided the claim is a *bona-fide* one. [P. 168, C. 1.]

Gour Chandra Pal and *Nawal Kishore Prasad*—for Petitioners.

K. P. Jayaswal—for Opposite Party

Judgment.—One Sardar Ahir died leaving his mother *Musammat* Beradri and his widow *Musammat* Ramratia. *Musammat* Beradri was living in his house. There was a case in the Land Registration Department where *Musammat* Ramratia had applied for registration of her name in respect of the house. During the pendency of that case, Ramratia was brought by the four petitioners and put into the house of her late husband. The petitioners have been convicted under Sections 448 and 352 of the Indian Penal Code. The Trying Magistrate fined them Rs. 15 each under each section and the learned District Magistrate on appeal reduced the fine to Rs. 15 each in all. The charge under Section 448 was that the accused unlawfully entered into the house of the complainant, no intent is specified in the charge. The Courts below have found that the mother *Musammat* Beradri was in exclusive possession and that *Musammat* Ramratia was forcibly implanted into the house with a view to strengthen her position in the Land Registration Court. This is the intent that has been found by both the Courts. The Trying Magistrate says that

"It is quite probable that Ramkewal with the help of the co-accused wanted to push his mistress into the house of her husband in order to prove that she lived in the house of the Sardar and thus to bring success to Ramratia in the Land Registration Case."

The finding of the District Magistrate is in the terms which I have quoted above. Now this intent is not such an intent as is specified in Section 441. In order to constitute criminal trespass there must be an intent to commit an offence or to intimidate, insult or annoy any person in possession of property. *Musammat* Ramratia being the widow of Sardar Ahir, had a *bona fide* claim to be in possession of the house. There is no reason to doubt the *bona fide* of the claim that as a widow she would be entitled to be there. That certain consequences followed upon her entry into the house is no ground for holding that the intent of the accused was such as is defined in section 441. *Musammat* Beradri was assaulted in the course of the occurrence; but it cannot reasonably be supposed that the intent of the petitioners was to assault *Musammat* Beradri. The finding of the Courts below that the entry was made by *Musammat* Ramratia with a view to strengthen her case in the Land Registration Court is, in my opinion, fatal to a conviction under Section 448, where the claim was a *bona fide* one.

With regard to the conviction under Section 352, Indian Penal Code, nothing has been said on the merits. The assault was a cowardly one and some sentence must be imposed. The difficulty is that the District Magistrate has not apportioned the fine between the two sections. I would, therefore, set aside the fine imposed by the Magistrate with the conviction under Section 448, Indian Penal Code, and fine the petitioners Rs. 10 each, and in default one week's rigorous imprisonment, under Section 352.

Order accordingly.

1925 Patna, 168.

JWALA PRASAD, A. C. J. AND

KULWANT SAHAY, J.

Hargobind Ray and another—Plaintiffs-Appellants

v.

Keshwa Prasad Singh and others—Defendants-Respondents.

S. A. Nos. 1019, etc. of 1922, decided on 5th August, 1924, against the decision of the Dt. J., Shahabad, dated 1st June, 1922.

(a) *Crim. Pro. Code, Ss. 146 and 145 (4) (6)—Provisions of S. 146 differ from provisions of S. 145 (6)—Plaintiff going to a Civil Court after attachment under S. 146 has to show that he has rights in the land and he was entitled to possession.*

Provisions of S. 146 differ from those of S. 145 (6). What the plaintiff has to show to the Court when he comes to it after attachment under S. 146 is that he has rights in the lands attached and that he is entitled to possession. Provisions of S. 146 differ from those of S. 145 (6). S. 145 (6) provides that the Magistrate shall issue an order declaring a party to be entitled to possession of the subject-matter in dispute until evicted therefrom in due course of law in case he decides that the party was in possession or should, under the first proviso to sub-section 4, be treated as being in possession, of the subject-matter in dispute.

(b) *Civil Pro. Code, O. 17, R. 6—Amendment can be allowed in appeal.*

An amendment under O. 17, R. 6 may be allowed at any stage of the case, *i.e.*, even in appeal.

(c) *Pleadings—Pleas and facts constituting them should be express.*

Pleas should be definitely taken and the facts constituting them should be expressly stated.

(d) *Words—'Amaldastak' is an order to take possession.*

An *amaldastakh* is not a lease. It does not ordinarily create any tenancy right. It is an order or *hukoomnama* to go and take possession. An

amaldastak does not prevail over subsequent settlement by the landlord with other tenants.

P. Dayal, J. Sahay, S. M. Mullick and *S. N. Roy* —for Appellants.

L. N. Singh, N N. Sinha, B. B. Saran, D. N. Varma and *S. Sahi* —for Respondents.

Kulwant Sahay, J.—These appeals arise out of suits brought by the plaintiffs for a declaration that they are *kastkars* in respect of the lands in dispute in each case and that the defendants have got no right to bring the said lands in their *khas* possession on the strength of the decree alleged by them as proprietors of Naubarar or in any other way. There was a further prayer in the plaint to the effect that it may be held that the proceedings taken under sec. 146 of the Criminal Procedure Code were improper, illegal, null and void, and inoperative, and that the plaintiffs are entitled to maintain *khas* possession. The circumstances under which the suits were brought may be shortly stated as follows:— It appears that the lands in dispute are in Sheopur Diar. Originally there was a mahal known as Sheopur Diar Gangbarar which was a temporarily settled estate. This temporarily settled estate was measured and it was found that there was a formation of new lands to the extent of 569 bighas. This new reformed land was made a new mahal with the name of Sheopur Diar Naubarar and a Government revenue of Rs. 1,102 was fixed for this mahal and it was settled with the proprietors of Sheopur Diar Gangbarar. This occurred in the District of Ballia in the United Provinces. Subsequently this mahal was transferred to Shahabad for revenue purposes. In 1903 the Naubarar mahal was put up for sale for arrears of Government revenue and was purchased by the Maharani of Dumraon. There was, however, a dispute between the Maharani and the original proprietors of Sheopur Diar who were known as the Sheopur Babus as regards possession and in 1911 a suit was brought by the present Maharaja of Dumraon for possession of the estate which had been purchased at the revenue sale. This suit was decreed by the first Court on the 22nd January 1916 and possession was delivered to the Maharaja on the 23rd April 1916. It is necessary to note that the 23rd April 1916 corresponds to the 5th Baisakh 1323 F. At this time the plaintiffs in the present suit were in possession of the lands in dispute and they opposed the Maharaja in his efforts to take *khas* possession. The Maharaja in order to take *khas* possession of the lands which were held by the plaintiffs in the present suits granted *amaldastaks* to the contesting tenants defendants in the present suits with the object that they should bring the lands into their possession and dispossess the plaintiffs. The *amaldastaks* have not been produced in these suits but it is stated that they were granted in Sawan 1323 F., and were for a period of one year only. As soon as these *amaldastaks* were granted a dispute cropped up between the tenant-defendants and the plaintiffs as regards possession of the disputed lands with the result that proceedings under sec. 144 of the Criminal Procedure Code were instituted. In those proceedings it was found that the crops had not been sown by the tenant-defendants. Indeed the Police reported that the first party who are the tenant-defendants in the present suits and the Maharaja had not sown the land and it was not expected that the first party on the strength of the *amaldastaks* from the Dumraon estate would go into such "den of lions" as the Sheopur Diar is, to take possession of the lands, and it is noticeable that the *amaldastaks* were granted in Sawan 1323 F., after the season for cultivation had commenced in Joyth or Asarh 1323 F. The result was that the Magistrate made an order in the sec. 144 proceedings on the 30th August 1916 directing the defendants not to go on the lands in dispute. Against the order of the Magistrate the defendants came up to the High Court and the High Court was of opinion that having regard to the circumstances of the case the proper procedure to adopt was to initiate proceedings under sec. 145 of the Criminal Procedure Code. Accordingly proceedings were initiated under sec. 145 but the learned Magistrate was unable to come to a finding as to who was in actual possession and accordingly by an order dated the 30th April 1917 the lands were attached under sec. 146 of the Criminal Procedure Code. It is to be noted that before the final order was passed attaching the lands under section 146 the Magistrate on the 22nd February 1917 had made an order of attachment before passing the final order.

The present suits were instituted in April 1920 with the prayers set out above. After written statements had been filed, the plaintiffs and the Maharaja of

Dumraon, whom for the sake of convenience we may call the landlord-defendant in these suits, entered into a compromise, the effect of which was that the plaintiffs were granted by the landlord the lands in dispute in each of these suits with rights of occupancy therein at a rental of Rs. 7-2-6 per bigha. There were further stipulations as regards the landlord recovering the money which had been collected by the Magistrate during the period the lands were under attachment as representing the usufruct of the lands during the period of attachment. When the petitions of compromise were filed in these suits the tenant-defendants were not willing to let the matter rest there, and they showed their intention to contest the suits. The result was that although the matter was compromised between the plaintiffs and the landlord-defendant the suits were tried at the instance of the tenant-defendants.

The learned Subordinate Judge dismissed the suits on the finding that the plaintiffs had failed to prove any tenancy right in the land before the compromise entered into after the institution of the suits.

There were appeals to the learned District Judge against the decrees in each case made by the Subordinate Judge. The learned District Judge has decreed five of these suits and dismissed seven with the result that we have 12 appeals before us, 7 by the plaintiffs and 5 by the tenant-defendants. The learned District Judge has dealt with each appeal in a separate Judgment but having regard to the view that we take in the case all the 12 appeals may be disposed of by one judgment. It is to be noted that the suits were instituted after an order of attachment under sec. 146 of the Criminal Procedure Code. Under sec. 146 the Magistrate if he decides that none of the parties was in possession or is unable to satisfy himself as to which of them was in possession of the subject in dispute may attach the lands in dispute until a competent Court has determined the rights of the parties thereto or the persons entitled to possession thereof. The provisions of sec. 146 are different from the provisions of sub-sec. (6) of sec. 145 which provides that if the Magistrate decides that one of the parties was or should under the first proviso to sub-sec. (4) be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law. What is required of the plaintiff who comes to Court after an attachment of lands under sec. 146 of the Criminal Procedure Code is to show to the Court that he has got rights in the lands in dispute and is entitled to possession thereof. Having regard to what has happened in the present suits it is unnecessary for the plaintiffs to prove any antecedent right in order to succeed. If during the pendency of the suits the landlord agreed to let the plaintiffs into possession of the disputed lands and confers rights upon them which would entitle them to retain possession of the land that would be quite sufficient to entitle the plaintiffs to a decree declaring their rights to the lands in dispute which would entitle them to get the properties released from attachment made by the Criminal Court. In the present cases the landlord-defendant has by agreement acknowledged the plaintiffs as occupancy tenants and has fixed a certain rent and therefore the title of the plaintiffs to the lands in dispute is complete. The contesting defendants who claim under *amaldastaks* granted by the landlord-defendant in Sawan 1323 F. do not deny the fact of the compromise or the fact that under the compromise the plaintiffs have acquired a valid title under the landlord. What they contend is that before the plaintiffs acquired this title they had already acquired title under the *amaldastaks*. Now no evidence has been adduced by the defendants that the *amaldastaks* were really intended to give them any tenancy right in the lands in dispute. The *amaldastaks* have not been produced and in their written statements they do not claim any higher right than the right to be on the lands for one year which right terminated in any event in Sawan 1323 F. which corresponds to July 1917, much earlier than April 1921 when the compromise was effected between the plaintiffs and the landlord-defendant. The plaintiffs in their plaint had stated that the *amaldastaks* were nominal and collusive documents and were granted on behalf of the landlord-defendant to his creatures and it was not a valid and operative document and did not confer any title on the tenant-defendants. The landlord-defendant in his written statement stated that under the *amaldastaks* the tenant-defendants entered into possession of the lands in dispute and

brought them under cultivation and grew crops thereon but he does not say that any tenancy right was conferred on the tenant-defendants. The tenant-defendants in their written statements merely alleged that they took settlement of the lands from the Dumraon Estate under *amaldastaks* granted for one year and brought them under cultivation and grew crops thereon. Neither the landlord-defendant nor the tenant-defendants state what rights were conferred by the *amaldastaks*. The facts found in the present cases clearly show that the *amaldastaks* were never intended to be a real settlement conferring any tenancy right upon the tenant-defendants. Having regard to the fact that there is a total absence on the side of the tenant-defendants of anything to show that they have acquired any tenancy rights in the lands under the *amaldastaks* and to the fact that the Plaintiffs have admittedly acquired occupancy rights under the compromise with the landlord-defendant, I am of opinion that the Plaintiffs are entitled to a decree declaring their title as occupancy tenants of the lands in dispute. According to the Defendants themselves the lands were *sir zerait* lands of the landlord and they adduced specific evidence on the point that the lands were *sir zerait* lands of the landlord and that they were let into them under the *amaldastaks*. It is a patent fact that in Baisak 1323 when possession was delivered to the landlord the Plaintiffs opposed his taking *khas* possession. Having regard to the fact that the landlord was unable to take *khas* possession himself and sought the help of the tenant-defendants to grow crops, to the fact that as soon as they wanted to go on the lands there was a proceeding under sec. 144 of the Criminal Procedure Code and an order was made against them and that this was followed by an order for attachment under sec. 146 of the Criminal Procedure Code, it is clear that the tenant-defendants never as a matter of fact actually entered upon the land and therefore could secure no tenancy right whatsoever. They were merely agents of the landlord, employed by him to take possession on his behalf. In this view of the case the Plaintiffs are entitled to succeed. I would therefore decree Appeals Nos. 1019, 1044, 1048, 1049, 1050, 1067 and 1092 which are the appeals by the Plaintiffs to this Court and I would dismiss Appeals Nos. 1041, 1045, 1061, 1158 and 1221 which are the appeals of the tenant-defendants. The Plaintiffs are entitled to their costs in this Court and in the Courts below.

Jwala Prasad, A. C. J.—I entirely agree with my learned brother. I would only add a few words. It appears to me that the Courts below have misconceived the scope of the suits and the defence set up. According to the Plaintiffs the tenant-defendants to whom *amaldastaks* were granted had no separate existence. The lands were claimed by the Maharaja on the strength of *dakhaldahani* (delivery of possession) awarded to him in the title suit against the proprietors of Sheopur Diar on the 23rd April 1916. His case was that the lands were previous to the delivery of the same to him in the *khas* possession of the proprietors of Sheopur Diar as their *zerait* and *khudkasht* lands and consequently he was entitled to *khas* possession of the lands in dispute. The Plaintiffs claimed that the lands were not in the direct possession of the out-going proprietors and were in their possession as raiyats thereof and consequently the Maharaja of Dumraon on the strength of his delivery of possession from the Civil Court was not competent to dispossess them. According to the Plaintiffs the tenant-defendants were simply creatures or agents employed by the Maharaja of Dumraon under cover of *amaldastaks* to recover for him possession of the properties by ousting the Plaintiffs therefrom. This was the case expressly set up in para. 14 of the plaint and the relief is therefore directed against the Maharaja himself whose claim to *khas* possession was opposed upon the strength of the decree obtained by him. That relief is as follows: "It may be held that the Plaintiffs are *kastkars* in respect of the lands in dispute, and that the Defendants have got no right to bring the said lands in their *khas* possession on the strength of the decree alleged by them as a proprietor of Naubarar or in any other way." The Plaintiffs never accepted the tenant defendants as lessees of the property. They were simply supposed to be the weapons used by the Maharaja to dispossess the Plaintiffs and the *amaldastaks* never conferred any right such as that of tenant or raiyat. This relief the Plaintiffs according to their case obtained without the necessity of an adjudication by the Court by means of a compromise with the Maharaja in which he accepted the

Plaintiffs as his tenants with occupancy rights in the lands in question. Therefore the moment the compromise was effected the Plaintiffs obtained what they sought in relief No. 1 quoted above. The right of occupancy conferred by the compromise was the only thing they then needed in order to get possession of the property from the hands of the Magistrate who had attached the lands under sec. 146 of the Criminal Procedure Code. My learned brother has clearly given the meaning and scope of an order under that section and the time up to which the Magistrate can keep properties in his possession attached under that section and that time is in the words of the section "until a competent Court has determined the rights of the parties thereto or the person entitled to possession thereof." In the Criminal Court the parties to the sec. 145 proceedings were the Maharaja as landlord, the Plaintiffs claiming as *kastkars* and the tenant-defendants under the *amaldastaks*. These were the parties interested in the order made under secs. 144, 145 and 146 and these were the persons interested in having their rights determined by a competent Civil Court so as to recover *khas* possession of the properties from the hands of the Magistrate. These were the parties in the suits in the Civil Court brought by the Plaintiffs. The Plaintiffs set out their own right and title in the plaint as that of *kastkars* from before the decree and *dakhaldahani* of the Maharaja but their real claim was that they were occupancy tenants of the land. The Maharaja disclosed his case and he claimed the lands as his *sir zerait* or *bakasht* which would entitle him to recover *khas* possession of the properties with the right to settle the same with anybody he pleased. The tenant-defendants in their written statements joined hands with the Maharaja and their statements are exactly the same as his on the crucial point; *vide* para. 12 of the written statement of the Maharaja and para. 5 of the written statement of the Defendants in Suit No. 133. Now what are the rights claimed by the Maharaja and *amaldastak*-holders in their written statements. Their claim is that the lands are *sir zerait* or *bakasht* of the proprietor and that the tenant-defendants took settlement of the same from the Dumraon Raj under *amaldastaks* for one year 1324F and brought them under cultivation and grew crops thereon. The Maharaja's written statement is virtually the same though slightly changed in the wording in order to preserve to himself the right against the *amaldastak* people also and he simply says that the *amaldastaks* were given to the Defendants and under the *amaldastaks* the said persons entered into possession of the lands. He does not even say that the lands were given to them as tenants. Now we can well understand the mind of the Maharaja Bahadur. He never cared to create any tenancy right. The Plaintiffs challenged not only the *bona fides* of that document but the rights created therein and their suits are entirely for the determination of the right of the contending parties who were before the Criminal Court in the sec. 146 proceedings. The *amaldastaks* were the title deeds. That would have shown what rights were held by the tenant-defendants. It is curious that there is a total absence in the written statements of the tenant-defendants of any claim to tenancy in the lands based upon their holding lands in the village as settled raiyats. There is even an absence of claim of a raiyati interest in the lands in suit. They were bound to disclose their case and their rights. It is not open to them now to urge that they had rights of a different character or of a higher character. Under the rules of pleading pleas should be definitely taken and the facts constituting the pleas should be expressly stated. The Plaintiffs' case was liable to be attacked on several grounds, the most important of which was that the tenant-defendants had acquired a right of occupancy in the land or a raiyati interest. No such right has been claimed. The compromise was arrived at, at a late stage after written statements had been filed. The compromise does not at all alter the situation and does not entitle the Defendants to change their case set out in their written statements. It was open to them before the written statements were filed. In the changed circumstances brought about by the compromise the Plaintiffs were no doubt entitled to amend their plaint. The learned District Judge says that the admission of the proprietor's right to settle the lands was without any prejudice, for the Maharaja would not like to have to declare that he had no right to settle the lands for that might prejudice him in connection with other cases in this or other *diaras*. The object of the Plaint-

iffs was to obtain occupancy rights, they did obtain that and the fact of the Maharaja's right to settle did not at all affect their case. The compromise therefore entitled them to amend their plaint but this the Court below refused and the reason given for refusal is not sufficient nor valid for under the new Code of Civil Procedure, O. 17, r. 6, amendment may be allowed at any stage of the case and we have allowed amendments even in the appeal stage. In the altered circumstances of the present case amendment should have been allowed. Now when the Plaintiffs and the tenant-defendants only were allowed to fight with each other we further think that the Courts below were wrong in not allowing the Plaintiffs to bring the *jinswar* papers on the record and use them. However, these matters do not affect the case in the view that we have taken of it. In the evidence which I have scrutinised there is not a word or suggestion relating to any title except the *amaldastaks*. They expressly say that the lands in suit were *sir zerait* of the proprietor. Therefore if they had *amaldastaks* for a year their right to claim the lands as occupancy or non-occupancy raiyats is barred by sec. 116 of the Bengal Tenancy Act. They held under a written lease and after expiry of the lease they were only trespassers, but in this case they could not get possession even, and before the ploughing season their dispute arose and in fact their *amaldastaks* came into existence after the ploughing season, and during the sowing season they were forbidden to go near the land and after that time at the time of harvest in Falgun 1324 F. the lands were attached. There was no occasion for them to make use of their *amaldastaks*. In the absence of the documents being produced the Plaintiffs are entitled to say that the *amaldastaks* did not create any tenancy right but was an order or *hookumnama* to these people to go and take possession for considerations which would be shown upon them later on. From what I know of *amaldastaks* this is the only meaning. The consideration is in the future and their service return to the Raj is in taking possession of the land. *Amaldastaks* are not leases. For all these reasons I agree with the view of my learned brother. The decree will be in accordance with the terms of the compromise entered into between the Plaintiffs and the Maharaja and against the tenant defendants on contest declaring that the lands in suit are the occupancy holdings of the plaintiffs and that they are entitled to possession thereof and to have the attachment removed by the Magistrate under sec. 146. On behalf of the Maharaja of Dumraon, Defendant in these cases, the learned Vakil states that he has not contested the claim of the Plaintiffs and no costs should be saddled upon him. No doubt at one stage he set up the tenant-defendants and now he has compromised the dispute with the Plaintiffs. He has now no concern with the litigation between the plaintiffs and the defendants and there will be no costs against him.

Appeals Nos. 1019, 1044, 1048, 1049, 1050, 1067 and 1092 allowed.

Appeals Nos. 1041, 1045, 1061, 1158 and 1221 dismissed.

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* 1925 Patna 173.

DAWSON MILLER, C. J. AND FOSTER, J.

Magni Ram Bungar and others—Appellants

v.

Sridhur Choudhury and others—Respondents.

P. C. A. No. 5 of 1924, decided on 17th June, 1924.

* *Civil Pro. Code, S. 109 (a) and (c)—Refusal to appoint a receiver does not come under S. 109 (a)—The contingency (in case receiver was appointed) of two receivers being appointed by different High Courts for the same property and a conflict of jurisdiction arising therefrom was held not to invite the application of S. 109 (c).*

In a mortgage deed, the mortgagee was given the right in the event of suit being filed, to apply for the appointment of a Receiver to take possession of the land and the deed provided that he might do that without any further consent on the part of the mortgagor. Owing to certain complications due to other legal proceedings, the High Court on appeal refused to appoint a Receiver in the mortgage suit by the mortgagees.

Held that this was not a final order within the meaning of S. 109 (a) of C. P. C. The appointment of a Receiver is in no way a matter which finally determines the rights of the parties. Though but for the special complications which had arisen, upon an application being made on the mortgage suit being filed the Court would have appointed a Receiver forthwith in this case, the matter is one entirely for the discretion of the Court and whichever way the Court decided it certainly does not finally determine any of the rights of the parties which have arisen out of the mortgage bond. [P. 174, Cl. 28 P. 175, C. 1.]

The fact that a Receiver had already been appointed by another High Court and that therefore if another Receiver were appointed according to the mortgagee's wishes there would apparently be conflict of jurisdiction between the two Courts and therefore a question would arise as to what was to be done in such contingency was held to be not in itself sufficient to require the exercise of jurisdiction under S. 10 (c). 22 Cal. 928 and 13 C. L. J. 507 Ref. to. [P. 175, C. 1.]

Hasan Imam and *S. K. Mitter*—for Appellants.

S. M. Mullick, *A. B. Mukherjee* and *N. N. Sen*—for Respondents.

Dawson Miller, C. J.—This is an application for leave to appeal to His Majesty in Council from a decision of this Court setting aside an order of the Subordinate Judge of Dhanbad appointing a Receiver of the properties, the subject of the suit.

The suit was a mortgage suit instituted by the petitioner against Nil Money Choudhury and the mortgage which was to secure an advance of 8 lakhs of rupees hypothecated certain property for that purpose. Amongst other terms in the mortgage deed it is provided that if default shall be made in payment of any instalment of interest or if the mortgagor should make any breach of any of the covenants and conditions to be performed by him the mortgagee shall be entitled to call in the whole of the principal and interest notwithstanding the fact that the date of repayment shall not have arrived and in the event of a suit being filed it shall be lawful for the mortgagees without any further consent on the part of the mortgagor to apply for the appointment of a Receiver to take possession of the mortgaged property. The property in this case was certain coal lands and collieries. In the plaint the plaintiffs claimed in addition to their ordinary remedies in a mortgage suit that a Receiver should be appointed. Before the suit came on it appears that the mortgagor Nil Money Choudhury and his brother Sridhar Choudhury the latter not being a party to the mortgage bond had instituted a suit in the Calcutta High Court for dissolution of partnership it being contended that they were in partnership and that the mortgaged property the subject of the present suit was part of the partnership assets. In that suit a Receiver was appointed and put in charge of the partnership assets. The learned Subordinate Judge of Dhanbad before whom the mortgage suit came for trial in a preliminary application asking for the appointment of a Receiver after discussing at some length the questions raised in that application ordered a Receiver to be appointed. It should be mentioned that before the present suit was instituted the plaintiff had obtained leave from the Calcutta High Court to add the Receiver appointed by that Court as a party to the suit. In the result the Receiver Mr. H. N. Mitter who had been appointed in the proceedings in the Calcutta High Court was appointed Receiver on behalf of the mortgagee in the mortgage suit by the Subordinate Judge of Dhanbad.

From that decision Sridhar Choudhury the brother of the mortgagor appealed to the High Court at Patna. The appeal was heard before a Bench of two Judges who overruled the decision of the lower Court and set aside the order appointing a Receiver. One of the grounds if not the main ground for that decision was that a Receiver having been appointed by the Calcutta High Court there would be a conflict of jurisdiction if this High Court were to appoint another Receiver or even the same Receiver in the interests of other parties. From that decision we are asked for leave to appeal to His Majesty in Council.

In my opinion this was not a final order within the meaning of section 109 (a) of the Civil Procedure Code. The appointment of a Receiver is in no way a matter which finally determines the rights of the parties. It was pointed out, however, that in the present case the appointment of a Receiver was one of the remedies which the mortgagee was entitled to in certain events and that his right to such appointment was a substantive part of the claim in the mortgage suit. I do not take this view. In the clause which deals with the matter in the mortgage bond the right that is given to the mortgagee in certain events seems to me to be practically no more than a right he would have without such a clause. The only right he is given is, in the event of a suit being filed, to apply for the appointment of a Receiver to take possession of the coal land and it stipulates that he may do that without any further consent on the part of the mortgagor. But in any event it is always for the Court to say in its discretion whether it will appoint a Receiver or not. But for the complications which have arisen by the appointment of a Receiver by the Calcutta High Court, in this case I have no doubt whatever that, upon an applica-

tion being made on the mortgage suit being filed the Court would have appointed a Receiver forthwith. The matter, however, is one entirely for the discretion of the Court and whichever way the Court decided it certainly does not to my mind finally determine any of the rights of the parties which have arisen out of the mortgage bond. For these reasons I do not think that the case falls under section 109 (a) of the Civil Procedure Code.

We have been asked to say, however, that the case is of such importance that we ought to exercise our jurisdiction in granting leave under section 109 (c) and certify that this is a fit case for appeal to His Majesty in Council. It is true that a question arises in this case as to what is to be done where there would be apparently a conflict of jurisdiction between two different Courts if the order were acceded to. I do not think, however, that this is in itself any sufficient ground for allowing an appeal to be carried to His Majesty in Council. It seems to me that in the existing circumstances the Receiver who is now fully aware of the claims of the mortgagee will be acting at his peril if he deals with the property in any way contrary to his interests. Moreover it is always open to the mortgagor to apply in the proceedings now going on in the Calcutta High Court if he considers that his interests are in any way being jeopardised. In the only cases which have been drawn to our attention in which this matter has been considered namely, the case of *Chundi Dutt Jha* v. *Pudmanund Singh Bahadur* (1) and *Mahomed Musaji Saleji* v. *Ahmed Musaji Saleji* (2), it was laid down on both occasions that an application such as this asking for leave to appeal to His Majesty in Council from an order refusing or granting the appointment of a Receiver was not such an order as fell within the provisions of section 109. It may be that the present case is somewhat unusual and raises questions which have not been determined on a previous occasion but at the same time I do not think the matter is one of such importance that we ought to exercise our powers under section 109 and grant this application. The application should be dismissed with costs. Hearing fee 5 gold mohurs.

Foster, J.—I agree.

Application dismissed.

(1) (1895) 22 Cal. 928.
(2) (1911) 13 C. L. J. 507=10 I. C. 439.

*1925 Patna 175.

ROSS AND SEN, JJ.

Radhe Sahi and others—Appellants

v,

King-Emperor—Respondent.

Criminal Appeal No. 120 of 1924, decided on 14th August, 1924, from the decision of the Sub. Judge, Muzafarpur, dated 23rd June, 1924.

* *Penal Code, Ss.* 148, 149 *and* 302—*Unlawful assembly—Prosecution failing to give true account of the offence—Accused need not plead the right of private defence.*

Where accused are charged as being members of an unlawful assembly the common object of the assembly being to beat a certain person, then in the absence of prosecution presenting a true account how that person was killed it is not necessary for the accused to plead private defence and show that they had not exceeded that right. [P 179, C. 1.]

Aziz and *Janak Kishore*—for Appellant.

Asstt. Govt. Advocate and *Jadubans Sahay*—for Respondent.

Ross, J.—The six appellants have been sentenced to transportation for life on conviction on charges under sections 148 and 302 read with 149 of the Indian Penal Code. The charge under section 148 was that they were members of an unlawful assembly the common object of which was to beat Munshi Rai, and that they were armed with deadly weapons. As Munshi Rai was killed in the course of the riot, there was a further charge under section 302 read with section 149 of the Indian Penal Code.

The case for the prosecution is that on the 19th August 1923, two men named Ramasis and Saheb Mahto were sitting on a Machan in the field of one Nepal Mahto one or one and a half *gharis* before sunset. They are residents of Chanaotoli *alias* Jahangirpur, a village chiefly inhabited by Chanaos. Munshi Rai of the neighbouring village Lachminiatola, which is inhabited chiefly by Rajputs, and Babhans, was coming from village Deokali, where he had gone to visit the temple and was returning towards his home. When he came near the *Machan* Saheb and Ramasis asked him to take tobacco. He stopped there and took tobacco whereupon Saheb seized him by one of his arms Ramasis by the other and thirty and forty people armed with various weapons came from the adjoining field of Bishundeyal. The appellant Radhe gave Munshi Rai a blow with a *garansa* on his shoulder and the appellant Ganga gave another blow

with a *garansa* on his right knee. Munshi Rai fell and then a cry was raised that he was killed and his assailants dispersed.

The reason for this occurrence was that the Chanaos had recently adopted the sacred thread and this had aroused the resentment of the Rajputs who had proceeded to commit various acts of oppression against them; and a further motive is assigned in the fact that Ramasis, who was an employee of the Sheohar Raj had instituted a false rent suit against Munshi Rai in 1326.

The defence as gathered from the written statements of the accused was that ever since the Chanaos adopted the sacred thread the Rajputs and Babhans had been oppressing them. There had been numerous acts of aggression and oppression which had been reported to the authorities between the 20th of July and the 17th of August. A constable and some *Chaukidars* and *Dafadar* had been deputed to the village to prevent a breach of the peace; and on the 19th August they were informed that the Rajputs were looting the crops of the Chanaos on the south and on the north of the village. The constable and the *Dafadars* went to the south and were unable to prevent the looting. They went to the north where they saw some people running away and were informed that two Rajputs had been killed.

The case was tried with the assistance of three assessors, all of whom disbelieved the case of the prosecution that Munshi Rai was waylaid. The opinion of the assessors was that he had probably gone with the other Rajputs to loot the crops of the Chanaos and it was in these circumstances that he received his injuries. All the assessors were of opinion that the Chanaos were acting in defence of their crops and should be acquitted.

The learned Sessions Judge disbelieved the story of the offering of tobacco to Munshi Rai. He did not think that it was necessarily Munshi for whom the Chanaos were lying in wait but thought that they were ready to attack any Rajput who came in their way. With regard to the death of the second Rajput which had been brought to the notice of the police the learned Sessions Judge says that no evidence was given about him, nor was his dead body forthcoming. He was further of opinion that there was no evidence that Munshi Rai took part in any looting and that there was nothing in the evidence to show that the accused were acting in self-defence; and that while the looting on the south of the village had been established there was no proof of looting on the north. He therefore accepted the evidence of the prosecution and convicted the appellants.

The first point that falls to be considered is the state of feeling prevailing at the time between the Chanaos and the Rajputs. Exhibit B is an information to the police given on the 20th of July 1923 about the breaking of the sacred thread of a Chanao by certain Rajputs and threats that they would loot his house. On the 24th of July a Head constable who had gone to the village to enquire into certain complaints that had been made found an assembly of 500 Rajputs armed with *lathis* and other weapons prepared to commit disturbance over this sacred affair. With difficulty he persuaded them not to commit a breach of the peace and the Magistrate ordered proceedings to be drawn up under section 107 of the Criminal Procedure Code against six Chanaos and forty-two Rajputs. Ext. C of the 1st August and Ext. D of the 2nd August and Ext. E of the 3rd August are to the same effect as Ext. B. Ext. F reports an actual assault on a Chanao by a certain Rajput on the 10th August. On the 14th and the 15th of August there were occurrences of looting crops which ended in conviction. On the 20th of August a complaint was lodged by Ganga, one of the appellants, of an occurrence on the 17th of August when he was assaulted by certain Rajputs and had his sacred thread broken. This event immediately preceded the occurrence which is the subject of the present case.

The first information was given at midnight on the 19th, the Police Station being five miles from the place of occurrence. There was therefore considerable delay on the part of Rambahadur, the informant, who deposed to having witnessed the occurrence, before going to the police. The explanation that he gave of the delay was that he had to come from a long distance and the river was full. But this explanation is not sufficient and it is not complete. He says that after the occurrence he had taken the dead body of Munshi Rai east of the Barhamasthan and then he and Dharkhan Rai the nephew of Munshi Rai, crossed at the Sugiaghat and went to the *thana*. But from the evidence in the case it appears that much more had happened in

the interval, as to which the informant was silent before the Police.

As to the actual facts of the occurrence the evidence in this case falls into two parts. In the first place there is the evidence of the Rajput witnesses who all tell the same story. That story is, roughly speaking, the same as the first information. But there is another body of evidence which consists of the depositions of the constable and the *dafadar* and *chowkidars* who were on duty in the village and it is necessary to examine that evidence also in order to discover what actually happened. The constable sent two *chowkidars*, Janab Ali and Abdur Rahman to the Police Station and an information was recorded at 1 A.M. on the 20th August 1923 (Ext. 6.) to the effect that a little before sunset the Rajputs with a view to cut by force the *Makai* crop of the Chanaos collected in a mob at Jahangirpur, some towards the south and some towards the north. The constable and the *dafadar* and the *chowkidars* went to stop the mob in the southern direction and in the meantime they heard that Munshi Rai of Lachminiatola and a Rajput of Gossinpur belonging to the mob on the northern side had been assaulted. By the time the constable and *dafadar* and the *chowkidars* went towards the mob on the north the Rajputs had run away with the wounded men. Then the *chowkidars* went to the house of Munshi Rai and learnt that the wounded Munshi Rai was in his house, but his relations said that he had been attacked on his way back from Deokali by some Chanaos who had killed him and caused his body to disappear ; and the relations did not allow the *chowkidars* to go inside the house. It was at this stage that these *chowkidars* were dispatched by the constable to the Police station to give information. These facts have been stated in fuller detail by Ramsagar Singh, constable, prosecution witness No. 20. He adds the fact that it was Ramasis who informed him that the mob had assembled ; and that he received the information while he was sitting at Saheb Mahto's door. He further said that Saheb Mahto was not at his house on the 18th or 19th. As to the loot on the south of the village, that has not been disputed on behalf of Crown ; and, as to the loot on the north, the constable says that he saw that five or seven *kathas* of Makai crop had been cut and some men were running away. He went to the house of Munshi and found a lame man who denied that a dead body had been brought there. Then he sent Janab Ali and Abdur Rahman to the Police Station and posted *chowkidars* round the house so that the dead body might not be removed. Then Rambahadur the first informant took him inside and showed him the dead body. He further added in cross-examination that three fields seemed to have been looted at the place where the blood was. The crops were partly ripe and partly unripe. This evidence is corroborated in all details by the *dafadar* Fasihuddin who further says that a Rajput of Sundarpur told him that Munshi Rai of Lachminiatola and Kodai Rai of Gossainpur had been killed by a mob of Chanaos. He was then deputed by the constable to look for the other dead body and went to Gossainpur but could not find out what had become of the body. The Chowkidars Janab and Garib further corroborate these witnesses. This is evidence offered by the prosecution as true evidence and no reason has been shown for disbelieving it. The Sub-Inspector who investigated the case found that the Makai crop had been cut in four fields near the field where the blood was found. He noticed damage on the morning of the 20th on the north of the village and it was on the 21st that the damage on the south was pointed out to him. To my mind there can be no doubt that this body of evidence represents the actual state of things on the afternoon of the date of occurrence. Active looting was going on at two places, on the south and on the north of the village ; and it was while the police were going from the south towards the north and when they saw men actually going away from the scene of looting on the north that they received the information that not only Munshi Rai had been killed but another Rajput also. All these facts throw the greatest doubt on the story set up by the Rajput witnesses that Munshi Rai was way-laid.

The learned Sessions Judge evidently had some doubts about that part of the case. The story of offering tobacco is incredible, considering the relations between the parties and he rightly rejected it. That Munshi Rai had been to Deokali is deposed to by two witnesses, Paltu Sonar the tenant of a Rajput and Rajnandan Singh who is a Rajput and a connection of the deceased. This evidence seems to me

to be suspicious for several reasons. The *post mortem* examination reveals the fact that there was partially digested rice and *dal* in the stomach of the deceased and these witnesses have come forward in the Sessions Court with a story that the deceased stopped at Sheohar on his way back from Deokali and took rice and *dal*, a most improbable story in itself and one which was never mentioned to the Police or in the Court of the committing Magistrate. Then Paltu gives the detail that Munshi Rai was carrying a *lota* and an umbrella and a *kurta*. This is the only reference to the *kurta* in the whole case. By the time the Sub-Inspector went to the scene of occurrence on the morning of the 20th, the body of Munshi Rai had been carried back to the field where he had been attacked and *lota* and an umbrella were found beside the body. But no witness ever noticed these articles on the field the evening before. This seems to be a matter of the gravest suspicion and it is evident that these articles were placed beside the body in order to give support to the story that Munshi had been out of the village on a peaceable expedition. No witnesses from the Deokali temple which he is said to have visited were examined. The place selected for the waylaying of Munshi Rai was hardly suitable for the purpose as it is close to the Rajput villages and at a distance from the Chanaos. There seems to have been a good deal of uncertainty about this part of the case in the mind of the prosecution at the beginning as not only was there delay in the lodging of the first information, but Rambahadur made discrepant statements before the Sub-Inspector as to the place from which he had seen the waylaying of Munshi Rai, naming first one Machan and then another which was separated from it by a considerable distance. I disbelieve altogether the story that Munshi Rai had been to Deokali and was waylaid on his return.

The occurrence itself as alleged by the prosecution does not seem probable. No reason is given for the sudden disappearance of the accused. They went away without any reason. But still more important and in fact the most important point in the case, is the removal of the body by the Rajputs. The learned Sessions Judge has suggested that they may have been unwilling to leave it on the field or to produce it before authorities unimportant than the Sub-Inspector. But this in my opinion does not explain their denial of the presence of the body in the house when the constable went there. There was nothing to be feared from the constable and there was no reason why the presence of the body in the house should have been denied. This strongly suggests that the Rajputs were the aggressors and were endeavouring to conceal their casualties. This view is confirmed by the episode of Kodai Rai of Gossainpur. Evidence was given before the Magistrate that this other Rajput had also been killed and that his body had been made away with. The Magistrate refers to this in his commitment order where he says that "A good deal of evidence has been led in this case to show that some of the accused had been seen carrying Kodai's body towards the Bagmati". That evidence was entirely dropped at the trial and yet it is clear from the statements of the Police witnesses which have already been referred to, that they were informed that Kodai Rai had been killed and that search was made for his body. The fact that Munshi Rai's body was removed by the Rajputs would suggest that the body of Kodai Rai, if he was killed, had also been removed by his fellow castemen. And if it is a fact that two Rajputs were killed, this not only throws the gravest suspicion on the tale of the waylaying of Munshi Rai, but adds strongly to the probability that what happened was that these men met their deaths in the course of the looting of the Chanaos' fields. Rambahadur did not mention the fact of the concealment of Munshi Rai's body in the first information; and the prosecution has given no real explanation of it. It seems to me that the inference that strictly follows from the concealment of the body is that the Rajputs felt that they were not in a position to go to the Police; that they were conscious that they were the aggressors; and that this death had been the consequence of their own act.

It was suggested by the learned Assistant Government Advocate that the number and the nature of the injuries on Munshi Rai are not consistent with the theory that he was killed in a riot. But it is by no means certain that all the injuries were *anti mortem*; and, in any case, I see nothing in this which negatives the defence. It cannot be inferred from these injuries that Munshi Rai was entirely alone. He may

have been isolated from the others; and the evidence to my mind leaves no doubt that looting by the Rajputs were going on the north of the village and that it is in the course of that looting that Munshi Rai came by his death.

In all these circumstances it seems clear that the case which has been presented to the Court by the prosecution is not a true account of how Munshi Rai was killed. It was therefore unnecessary for the accused to plead private defence or to show that they had not exceeded the right of private defence. The case for the prosecution being in my opinion definitely untrue, it seems to me that the convictions cannot stand and must be set aside. The accused must be acquitted. Those who are on bail will be released from bail and those who are in jail will be set at liberty.

Accused acquitted.

1925 Patna, 179.

ROSS AND SEN, JJ.

Lachmi Narain Shankar—Decree-holder—Appellant

v.

Mahomed Abrahim Hussain Khan—Judgment-debtor—Respondent.

Appeal from Original Order No. 148 of 1923, and decided on 7th August, 1924, against a decision of the Sub.-J., Patna, D. 16th April, 1923.

(a) *Court of Wards Act, Ss. 6 (e) 7, and 35—After declaration under S. 6 (e) any property coming to the proprietor either by inheritance or by otherwise is property which the proprietor is disqualified to manage—Its management automatically vests in the Court of Wards—An order under S. 35 is an order once for all—Possession by Court of Wards completes charge of the Court of Wards.*

The Court of Wards is empowered under s. 6 of the Court of Wards Act to take over charge of the property of a disqualified proprietor within the Court's jurisdiction. The disqualification attaches to the person and after a proprietor is declared disqualified under s. 6 (e) he is disqualified to manage his own property. Any property therefore that comes to him by inheritance or otherwise after he has once been declared disqualified and the Court of Wards has taken over his property under s. 35 of the Act must be property which he is disqualified from managing and the management whereof must automatically rest in the Court of Wards. The order for possession does not take effect until possession of property is actually taken, until such possession is taken the Court of Wards is not in charge of the property and the ward may be free to deal with it as he likes. An order under s. 35 is an order made once for all and after the order has once been made all that is required to complete the charge of the Court of Wards is the taking of possession. [P. 181, Cls. 1 & 2.]

(b) *Civil P. C., s. 47—Court of Wards Act, S. 6 (e)—Proprietor declared disqualified—Execution proceedings against the properties of the proprietor—Objection by Court of Wards is objection by judgment-debtor through manager, Court of Wards.*

Where under S. 6 (e) of the Court of Wards Act a proprietor is declared to be disqualified and the Court of Wards is in possession of his properties then under S. 47 of Civil P. C. any objection taken by the manager of the Court of Wards in execution proceedings against the properties of the proprietor is an objection taken by the judgment-debtor through the general manager of the Court of Wards. [P. 180, C. 1.]

N. C. Sinha and B. B. Ghose—for Appellant.

L. N. Singh—for Respondent.

Ross, J.—The facts out of which this appeal arises are these. Manjhle Nawab was declared a disqualified proprietor under sec. 6 (e) of the Court of Wards Act of 1879 in 1903 and the Court of Wards took charge of his property in that year. On the 19th March 1919, his brother Badshah Nawab died and one-third of his property was inherited by the ward. On the 4th of July 1919, the ward executed a Hundi in favour of the Appellant. On the 12th of November 1919 a notification was published in the Gazette declaring that the properties inherited from Badshah Nawab by Manjhle Nawab had come under the management of the Court of Wards on the 19th of March 1919; but no formal order under sec. 35 of the Act, declaring that the Court of Wards had determined to take this inherited property under its charge and directing that possession should be taken of such property on behalf of the Court, was made. The Appellant brought a suit on his Hundi in 1922 against Manjhle Nawab personally and obtained a decree. He proceeded to execute the decree against the inherited property when objection was taken by the judgment-debtor through the general manager of the Court of Wards under sec. 47 to the effect that the properties which had been attached were not liable to be attached and sold in execution of any decree under the provisions of sec. 60 A of the Court of

Wards Act, and that the suit in which the decree was passed was not framed according to law and contravened the provisions of sec. 51. The learned Subordinate Judge gave effect to this objection and dismissed the execution petition.

The decree-holder now appeals and it is contended on his behalf in the first place that the Court of Wards has no *locus standi* to apply under sec. 47 of the Civil Procedure Code inasmuch as it was neither a party nor a representative of a party to the suit; secondly, that the Court of Wards was not legally in possession of the inherited property at all as no fresh order under sec. 35 was made; thirdly that sec. 51 was bar to the suit; and, fourthly, that the property is not exempt from the execution under sec. 60 A of the Act.

The first contention is without substance because the objection taken under sec. 47 is an objection taken by the judgment-debtor through the general manager of the Court of Wards.

Sec. 51 provides that, in every suit against any ward of Court, the manager of the ward's property shall be named as guardian for the suit and shall represent the ward. Now there is no bar to a disqualified proprietor contracting on his personal covenant: see *Zahoor Ali Khan* v. *Rutta Koer* (1) and *Dhunput Singh* v. *Shoobhudra Kumari* (2). It was held in *Mohammed Abdus Salan* v. *Rani Kamalmukhi* (3) that "it now seems to be settled that where a Court of Wards is in possession of the property of a disqualified proprietor under sec. 6 (*e*) of the Act, a suit brought against such a proprietor based upon a contract may proceed without causing the defendant to be represented by the manager of the Court of Wards." In my opinion, therefore, the fact that the manager of the Court of Wards was not made a party to the suit is no ground for the executing Court to refuse to execute the decree.

Then with regard to sec. 60 A, it is contended by the Appellant that this section does not prevent him from proceeding against the inherited property because this property is not legally in charge of the Court and also because the only prohibition imposed by that section is in respect of the execution of a decree passed on a contract entered into at a time when the property against which the decree-holder desires to levy execution was in charge of the Court. It is contended that at the time when this contract was entered into, the Court of Wards had admittedly not taken possession of the inherited property; and, consequently, under sec. 35 the Court of Wards could not be held to have been in charge of the inherited property at that time. Consequently it is argued that the creditor was entitled to look to that property for satisfaction of his debt, as the debt was contracted when the property was free. Now if the debt had been by way of mortgage of his property, something might have been said in support of that contention; for, in such a case the fact that the Court of Wards subsequently took charge of the property could not be held to affect the security. But the present suit was brought on a personal covenant only; and it was brought at a time when the property of the ward was under the charge of the Court of Wards. Sec. 60 A seems to prohibit the levying of execution against any property under the charge of the Court of Wards in such circumstances, unless the leave of the Court has been taken. The expression in the section is "While his property was under such charge" and not, as it ought to have been if the contention of the learned Vakil for the Appellant is sound "While such property was under such charge." All that is required to bar the levy of execution against any property of the ward is that the contract which is the basis of the decree should have been entered into without the leave of the Court while his property was under the charge of the Court. Now it is not disputed that the property of Manjhle Nawab was under the charge of the Court from 1903.

The only question remaining therefore is whether this inherited property is legally under the charge of the Court of Wards and this depends upon the construction of sec. 35 of the Act. Sec. 7 gives the Court of Wards power to take charge of all the property of a disqualified proprietor within its jurisdiction. Sec. 35 provides that, "Whenever the Court has determined to take the person or property of a disqualified proprietor under its charge. . .

(1) (1867) 11 M. I. A. 468 =9 W. R. 9.
(2) (1882) 8 Cal. 620=11 C. L. R. 285.
(3) (1918) 5 Pat L. W. 92=46 I. C. 316.

. . . the Court shall make an order declaring the fact and directing that possession be taken of such person and property or of such property on behalf of the Court, and the Court shall be held to be in charge of such property from the time when possession shall have been so taken." The form of the order issued by the Court of Wards in such cases is to be found at p. 60 of the Court of Wards Manual and the operative words are as follows: "Under secs. 7 and 35 of the said Act IX (B. C.) of 1879, the Court of Wards also declares that it has determined to take under its charge the property of the disqualified proprietor above named, and it directs that possession be taken of such property on behalf of the said Court." It is contended on behalf of the Appellant that such an order which admittedly was made when the estate of Manjhle Nawab came under the Court of Wards in 1903 could not cover after-acquired property. In my opinion, there is nothing to restrict the words of the section under which the order was made in this way. The Court declares that it has determined to take the property of the disqualified proprietor under its charge. The order itself refers to sec. 7 of the Act which empowers the Court of Wards to take charge of all the property of such proprietor. The disqualification attaches to the person; and, after a declaration under sec. 6 (*e*) of the Act, the proprietor is to be held disqualified to manage his own property. Any property, therefore, that comes to him by inheritance or otherwise, after he has once been declared a disqualified proprietor and the Court of Wards has taken over his property under sec. 35 of the Act, must be property which he is disqualified from managing and the management whereof must automatically vest in the Court of Wards. The order no doubt does not take effect until possession of the property is actually taken; and, until such possession is taken, the Court of Wards is not in charge of the property and the ward may be free to deal with it as he likes: but this is a matter on which I express no opinion. In the present case possession was admittedly taken in November 1919; and, if that possession was lawfully taken, then sec. 60 A is clearly a bar to the levying of execution against it. I can see no ground for holding that possession was not lawfully taken because no fresh order under sec. 35 of the Act was made. In my opinion such an order is made once for all; and, after the order has once been made, all that is required to complete the charge of the Court of Wards is the taking of possession.

This appeal must be dismissed with costs and the application in revision is also dismissed.

Sen, J.—I agree.

Appeal dismissed.

1925 Patna, 181.

DAWSON MILLER, C. J. AND FOSTER, J.

Ramsaran Mahton and others—Defendants—Appellants

v.

Syed Muhamad Aradut Hussain—Plaintiff—Respondent.

Civil Appeals Nos. 170 and 276 to 278 of 1922, decided on 3rd July 1924, from a decision of the Addl. Sub.-J., Patna, dated 1st December 1922.

(a) *B. T. Act, S. 50—After publication under S. 115 presumption under S. 50 will not apply.*

Where the record of rights has been finally published under sec. 115 the presumption under sec. 50 is no longer available to the tenants whether they rely upon payment of rent at a uniform rate before or after the publication of the record of rights. [P. 183, C. 1.]

(b) *B. T. Act, S. 115—The word 'Thereafter' refers to a period subsequent to a publication of record of rights.*

The word "thereafter" refers to a period subsequent to the publication of the record of rights. But what is provided is that the presumption under sec. 50 shall not, thereafter, that is to say after the particulars mentioned in sec. 103 have been recorded, apply. [P. 182, C. 2.]

A. K. Rai—for Appellants.

S. C. Mitter—for Respondent.

Dawson Miller, C. J.—These appeals arise out of suits instituted by the landlord, the proprietor of *mouza* Dhanaut against a number of his tenants claiming enhancement of rent under section 30 of the Bengal Tenancy Act.

The learned Munsif after hearing the evidence arrived at the conclusion that the

landlord was entitled to enhancement at the rate of 2 annas in the rupee.

The tenants appealed from this decision and the landlord filed a cross-appeal claiming that the rate of enhancement ought to be more than the 2 annas found by the Munsif. The learned Subordinate Judge dismissed the appeal of the tenants and allowed the appeal of the landlord. He found by calculation under section 32 of the Bengal Tenancy Act that the rate at which the enhancement should be allowed worked out at 3 annas 8 pies in the rupee and that the Munsif had taken too lenient a view of the case in favour of the defendants by reducing it to 2 annas. He considered that the Court had no option; that it could not reduce the enhancement which was found by calculation under section 32 to be the proper rate of enhancement. He considered, therefore, that the plaintiff was entitled to the full enhancement worked out in accordance with that section but as he had only claimed 3 annas 6 pies he decreed enhancement at that rate.

From this decision the tenants have appealed. It would appear that they called evidence to show that they had been in occupation of their holdings for a period of 20 years before the suit paying rent at the same rate. They further contended that they were not liable to enhancement at all as they were tenants at fixed rates. In support of this contention they prayed in aid the provisions of section 50 of the Bengal Tenancy Act. The learned Subordinate Judge, however, considered that that section in the circumstances of the case had no application, because the Record-of-Rights had been finally published and recorded within the meaning of section 115 of the Bengal Tenancy Act and that the presumption arising under section 50 no longer existed after final publication of the Record-of-Rights. It has been argued on behalf of the appellants before us that section 115 of the Bengal Tenancy Act applies only in bar of the tenants' right to rely upon the presumption under section 50 in so far as they rely upon occupancy for 20 years after the publication of the Record-of-Rights and that if they can shew that they have been in occupation paying the same rent for 20 years before the publication of the Record-of-Rights then section 115 has no operation. According to what I should consider to be the ordinary and natural interpretation of section 115 the presumption under section 50 ceases to apply in all cases except in so far as the Act may otherwise determine once the particulars mentioned in section 102, clause (*b*) have been recorded under Chapter X. In support of their contention the appellants rely upon a case decided in the year 1908 in the Calcutta High Court by Mr. Justice Doss, *Maharaja Radha Kishore Manikya Bahadur* v. *Umed Ali* (1). In that case the landlord brought a suit for enhancement of rent. It was held that notwithstanding the provisions of section 115 of the Act the tenant was entitled upon proof of uniform payment of rent for 20 years before the Record-of-Rights was framed to the benefit of the presumption arising under sub-section (2) of clause 50. The learned Judge considered that the word "thereafter" in section 115 referred to a period subsequent to the publication of the Record-of-Rights. There can be no doubt, in my mind, that the word "thereafter" does refer to a period subsequent to the publication of the Record-of-Rights, but what is provided is that the presumption under section 50 shall not thereafter, that is to say after the particulars mentioned in section 102 have been recorded, apply. This decision so far as I am aware has not received any support in other cases. It was referred to in a latter case of the Calcutta High Court in *Pirthichand Lal Chowdhury* v. *Basant Ali* (2) and on that occasion a Full Bench of the Calcutta High Court expressed the view that the wording of section 115 was plain enough and might without anything else lead to the conclusion that as soon as a final record is framed under section 103-A clause (2) the particulars mentioned in section 102 clause (*b*) should be taken to have been recorded and the presumption under section 50 should cease to apply thereafter to that tenancy. The question, however, in that case was whether the presumption arising under section 50 was still available to the tenant in proceedings under section 105 although the Record-of-Rights had been finally published. Their Lordships considered the history of the matter and pointed out that from 1885 up to the year 1898 the tenant always had the benefit of the presumption under

(1) (1908) 12 C. W. N. 904.
(2) (1909) 10 C. L. J. 342=3 I. C. 449=13 C. W. N. 1149, (F. B.)

section 50 in all proceedings under sections 105 and 106 and they did not think that section 115 was intended to take away that benefit. They regarded proceedings under section 105 as proceedings which would have to be recorded eventually and when a decision was given under that section the Record-of-Rights might be amended and was always liable to amendment until proceedings under that section had come to an end. That case, however, is no authority in support of the plaintiff's contention in the present case. Indeed in so far as this Court is concerned the matter has been considered on more than one occasion. At least four cases have been drawn to our attention which are to the same effect. I need only refer to two of them. In *Kesho Prasad Singh* v. *Ramjas Pande* (3), it was decided by a Division Bench of this Court that after the publication of the Record-of-Rights the tenants are not, in view of section 115 of the Bengal Tenancy Act, entitled to the benefit of the presumption which arises under section 50, clause (2) and, therefore, in order to establish that they are entitled to their holdings on payment of a fixed rent in perpetuity they must prove by evidence that they have held the land at a rate of rent which has not been changed since the time of the Permanent Settlement. Incidentally they found that production of rent receipts shewing payment at a uniform rate for 33 years was not sufficient to prove that the rate of rent had not changed since the date of the Permanent Settlement. Again in the case of *Gobind Lal Sijuar* v. *Ram Sahu* (4), it was decided that under section 115 of the Act a tenant cannot rely upon the presumption under section 50, clause (2) after the final publication of the Record-of-Rights except in a suit instituted under section 106 challenging the entry itself within three months from the date of final publication. These cases and others which it is unnecessary to refer to seem to shew that there has been a uniform course of decisions in this Court which lay down the view that once the Record-of-Rights has been finally recorded as provided in section 115 then the presumption under section 50 is no longer open to the tenants whether they are relying upon a payment of rent at a uniform rate either before or after the publication of the Record-of-Rights. In my opinion this point must be decided against the appellants.

The only other question which was raised was that the learned Judge in arriving at the rate of enhancement had not stated any particulars or figures shewing how he arrived at it. What he does say is that by calculation under section 32 of the Act the rate at which the enhancement should be allowed is found to be 3 annas 8 pies. It is contended that this is not sufficient and that not having given his figures or his methods of calculation the appellants are not in a position to criticise the manner in which he arrived at his figure of 3 annas 8 pies. The appellants, however, had at their disposal full information as to the rates which were taken into consideration in arriving at that figure and if they were prepared to shew that the result of the learned Judge's calculation was wrong in any particular we certainly should have heard their argument about it. The learned Vakil for the appellants, however, is unable to shew us in what particular he could satisfy the Court, if we remanded this case, that the learned Judge had arrived at a wrong result. In the circumstances it seems to me that we should not be justified in sending back this case for further hearing merely because the learned Judge has not set out in detail the figures by which he arrived at his result. In second appeal we will never send back a case for further consideration merely because it is suggested that if the matter went back some different result might possibly be arrived at. It has not been pointed out to us at all in what particulars these figures are wrong. In my opinion these appeals must be dismissed with costs.

Foster, J.—I agree.

Appeal rejected.

(3) (1923) Patna 324=2 Pat. 92.
(4) (1921) 2 P. L. T. 642=68 I. C. 433.

1925 Patna, 183.

KULWANT SAHAY, J.

Jagarnath Singh—Petitioner

v.

King-Emperor—Opposite Party.

Criminal Rev. No. 356 of 1924, decided on 4th July 1924, from the order of the Dt. and S.-J., Monghyr.

(a) *Crim. Pro. Code, S. 421—Writing is not necessary for summary dismissal of appeal, but reasons for dismissal are necessary.*

An appellate Court is not required by law to write a judgment when dismissing an appeal summarily. It is no doubt necessary that in dismissing the appeal summarily the appellate Court should give the reasons for dismissing the same. A mere order to the effect that the appeal is summarily dismissed, without giving any reason whatsoever, would be bad in law. [P. 184, C. 2.]

(b) *Penal Code, Ss.* 186 *and* 189—*Separate convictions under both sections are bad when the accused is found to have refused to follow the Court peon when arrested under civil warrant and threatened to use violence—Whole occurrence falls under S.* 189, *Penal Code.*

The accused was arrested in execution of a civil warrant and was required to pay the decretal amount and failing payment to follow the Court peon. The accused refused to follow the peon when he was arrested and threatened to use violence towards him. *Held*; that the whole occurrence amounts to one offence under S. 189, I. P. C. and two separate convictions under Ss. 186 and 189 were bad in law. [P. 184, C. 2.]

Janak Kishor—for the Petitioner.

Asstt. Govt. Advocate—for the Crown.

Judgment.—The petitioner has been convicted by the Deputy Magistrate of Jamui under sections 186 and 189 of the Indian Penal Code. He has been sentenced to simple imprisonment for fifteen days and to pay a fine of Rs. 50 under section 186; and simple imprisonment for six weeks and to pay a fine of Rs. 50 under section 189, I. P. C. His appeal has been summarily dismissed under section 421 of the Code of Criminal Procedure by the learned District Magistrate and an application for revision has also been dismissed by the learned Sessions Judge.

The facts are shortly these. It appears that one Mr. Christian obtained a decree for money against the petitioner. He took out execution of the decree and applied for the arrest of the petitioner in execution of the decree. The warrant of arrest was issued by the Munsif and made over to the peon Ajodhya Singh. Ajodhya Singh reported that he went to the place of the accused, showed him the warrant, arrested him and demanded the payment of the decretal amount and, failing payment, he directed him to follow him. The accused, however, refused the Court's order to pay the amount and cried out "Go out, I do not obey the Court's order and I would not pay the amount." The peon became frightened and left the place. The Munsif thereupon lodged a complaint under sections 186 and 189 of the Indian Penal Code, and the accused was placed on his trial and convicted and sentenced as stated above. The finding of the trying Magistrate is that the peon was obstructed in the discharge of his duty and he was also threatened and deterred from discharging his duty as a public servant.

The first point taken by the learned Vakil for the petitioner is that the District Magistrate was wrong in dismissing the appeal summarily without writing out a judgment. Now, section 421 of the Code of Criminal Procedure empowered the District Magistrate to dismiss the appeal summarily and it is not necessary that in dismissing an appeal under section 421, the Magistrate should write out a judgment as required by section 367 of the Code. The learned Vakil relies upon the case of *Gurubari Behara* v. *King-Emperor* (1). That case is a clear authority for the proposition that an appellate Court is not required by law to write a judgment when dismissing an appeal summarily. It is no doubt necessary that in dismissing the appeal summarily the appellate Court should give reasons for dismissing the same. A mere order to the effect that the appeal is summarily dismissed, without giving any reason whatsoever, would be, according to the authorities, bad in law. In the present case the Magistrate gives his reasons for dismissing the appeal summarily; and, having regard to the fact that the issue for decision in the case was a very simple issue of facts and there were no complications in the case, I am not prepared to say that the dismissal of the appeal under section 421 was in the present case bad in law.

The second point taken by the learned Vakil is that upon the finding arrived at, the utmost that can be said is that only one offence was committed and the conviction for two offences under sections 186 and 189 was not justifiable. In my opinion, this contention is sound. What has been found is that the petitioner refused to follow the peon when he arrested him and threatened to use violence towards him. In my opinion that the whole occurrence amounts to one offence under section 189, I. P. C. and two separate convictions under

(1) (1917) 2 Pat. L. J. 695=4 Pat. L. W. 153=43 I. C. 439=19 Cr. L. J. 151.

sections 186 and 189 are bad in law. I would therefore set aside the conviction and sentence under section 186, I. P. C.

As regards the conviction under section 189, it has been contended that the facts found do not amount to an offence under section 189, I am, however of opinion that the trying Magistrate was right in his finding that the facts do amount to an offence under section 189. As regards the sentence, however, the learned trying Magistrate has observed that he would have let off the accused with a punishment of fine only; but, having regard to the fact that the accused was an elderly man and has lived to an age to know that laws are to be obeyed and debts to be honoured, he thought that a severe sentence was required. I am of opinion that the fact of his being an elderly man does not aggravate the nature of the offence. I am informed that the petitioner has already undergone imprisonment for more than three weeks.

Having regard to the circumstances of the case I am of opinion that the sentence already undergone is sufficient to meet the ends of justice. I, therefore, reduce the sentence of imprisonment under section 189, I. P. C. to the period already undergone. The sentence of fine under section 189 will stand. The fine imposed under Section 186, I. P. C., if paid, will be refunded.

One conviction quashed;
sentence reduced.

1925 Patna, 185.

DAWSON MILLER, C.J. AND MULLICK, J.

W. H. Meyrick and others—Plaintiffs-Appellants

v.

Dipa Pandey and others—Defendants-Respondents.

Letters Patent A. No. 90 of 1923, decided on 10th April 1924, from the judgment of Foster, J., reported in 1924 Patna 820.

(a) *Bengal Tenancy Act, S. 29—Consolidation of distinct holdings with separate rentals is not creation of new holding and rent can be enhanced only within the limits of S. 29.*

The Court must determine whether a new holding has been created, though it may include the land of the original holding or whether the parties had recourse to a colourable device to evade the provisions of section 29. [P. 186, C. 1].

Where the parties held two separate holdings with specific and definite rentals which were consolidated into one holding.

Held that there was no new holding and that rent must not be enhanced beyond the limits fixed by S. 29. [P. 186, C. 1].

(b) *Landlord and Tenant—Acquiescence—Tenant is not precluded from objecting to collection of illegal rent, by his past acquiescence—Rent—Evidence Act, S. 115.*

A claim for rent is a recurring claim and it is open to the tenant at any time to take an objection on the ground that the claim contravenes the provisions of the law. [P. 186, C. 2.]

Lachmi Narain Sinha and *R. B. B. Saran*—for Appellants.

Muhammad Hassan Jan—for Respdts.

Mullick, J.—This appeal arises out of a suit for rent in respect of the years 1324 to 1327 F. S. of the 10 annas kist in respect of a holding measuring 3 bighas 3 cottahs. The facts found are that in 1308 the defendants took settlement from the plaintiffs or their predecessors of a parcel of 16 cottahs at a rent of Rs. 4 per annum. In 1309 they took settlement of another parcel of 2 bighas 7 cottahs at a rent of Rs. 11-12-0 for a term of 7 years from 1309 to 1315. In 1316 the defendants took a settlement not only of the 2 bighas 7 cottahs the lease in respect of which had expired in 1315 but also of the parcel of 16 cottahs the lease in respect of which had expired in 1310. The rent for this total area of 3 bighas 3 cottahs was 20 maunds 19 seers of grain per year. On the expiry of this lease the defendants again in 1323 contracted to pay rent for the 3 bighas 3 cottahs at 21 maunds 10½ seers of grain for the period 1323 to 1331 F. S. The present suit was instituted on the 22nd December 1919 for the rent of the period between 1324 to 1326 and for a portion of the year 1327 as above stated.

The defence in the trial Court was that the defendants were occupancy raiyats in respect of both parcels, namely, the 16 cottahs parcel and the 2 bighas 7 cottahs parcel and that the consolidated rental of 20 maunds 19 seers which they had agreed to pay by the kabuliyat of 1316 violated the provisions of section 29 of the Bengal Tenancy Act which requires that the money rent of an occupancy raiyat shall not be enhanced by more than 2 annas in the rupee. It is stated in the *kabuliyat* that the money value of the grain was estimated at Rs. 61 and it was admitted that if the provisions of section 29 applied to the case then there had been an enhancement contrary to law.

The Munsif found that the defendants were occupancy raiyats in respect of both parcels and that by consolidating the two parcels into one and by taking a *kabuliyat*

for the total area of 3 bighas 3 cottahs the plaintiffs could not be allowed to take themselves out of the restrictions provided by section 29. He accordingly decreed the suit for the admitted jama that is to say for a total rental of Rs. 15-12 per annum.

The Subordinate Judge in appeal confirmed this decree.

There was then an appeal to this Court which was heard by. Mr. Justice Foster and he also has taken the same view as the Subordinate Judge and found that section 29 of the Bengal Tenancy Act is a bar.

The first point urged in this Letters Patent Appeal is that there has not in fact been any enhancement in respect of a holding. It is urged that by the consolidation of 1316 the two separate parcels of 16 cottahs and 2 bighas 7 cottahs lost their identity and that there was in this case no enhancement in respect of a holding.

The plaintiffs rely upon a judgment of the Calcutta High Court in *Raj Kumar Sarkar* v. *Faizuddi Tarafdar* (1). In that case, some additional land was added to a holding and the whole was assessed at an enhanced rental. The new *kabuliyat* specified the rental assessed upon the old land as well as the rental assessed upon the new land and it was urged that a new holding had been created and that there was no enhancement of rent in respect of an old holding which could attract the operation of section 29 of the Bengal Tenancy Act. The learned Judges of the Calcutta High Court held that the question must be answered with reference to the circumstances of each individual case and the matter was one of substance and not of form. The Court must determine whether a new holding has been created though it may include the land of the original holding or whether the parties had recourse to a colourable device to evade the provisions of section 29. In this case it is quite clear that the defendants held two separate holdings at specific and definite rentals which were consolidated into one holding at an enhanced rental very much beyond what is permissible under section 29. I cannot see that any case is made out which would permit us to hold that there was some unassessed land added to the 2 *bighas* 7 *cottahs* and that a new holding was created which had no reference to the rentals of the lands held under the previous contracts.

(1) (1915) 22 C. L. J. 81=30 I. C. 283.

It has been urged that the 16-*cottah* parcel was not in the possession of the defendants at the time of the lease of 1316 and that between 1311 and 1315 the landlords were in possession of it. It is suggested that the defendants had no occupancy right in this parcel and that it was *khas* land upon which no rent had been assessed and which was added to the 2 *bighas* 7 *cottahs* in which the defendants had an occupancy right at the time of the lease of 1316. If that were so, there might be some justification for urging that a new holding was formed and that the rental of Rs. 61 assessed upon the area of 3 *bighas* 3 *cottahs* was not an enhancement of the rent of any original holding in the possession of the defendants. But the fact seems to be, and it has been found by the learned Subordinate Judge that the defendants were settled *raiyats* of the village and that at each successive lease they at once acquired occupancy rights in the parcels covered by the lease. Therefore, in 1308, they became occupancy-*raiyats* of the 16-*cottah* plot and in 1309 they became occupancy-*raiyats* of the 2 *bighas* 7 *cottahs* plot. A rental of Rs. 61 is clearly an enhancement of more than 2 annas in the rupee on the consolidated rental of these two holdings. The contention, therefore, that the plaintiffs are debarred from claiming more than 2 annas in the rupee must be accepted.

Then it is urged that the defendants by acquiescing in the payment of rent at the rate of 20 *maunds* 19 *seers per annum* for the years 1316 to 1322 have precluded themselves from raising any objection under section 29 of the Act There is no justification for this contention. A claim for rent is a recurring claim and it is open to the tenant at any time to take an objection on the ground that the claim contravenes the provisions of the law.

It is also suggested, though somewhat faintly, that although the tenant may not surrender his occupancy-right, he may agree with his landlord that he will not object to pay a rent which is contrary to the provisions of the law. For this proposition also there is no foundation.

The result is that the judgments of the Courts below must be affirmed and the appeal dismissed with costs.

Dawson Miller, C. J.—I agree.

Appeal dismissed.

*1925 Patna, 187.

ADAMI AND BUCKNIL, JJ.

Mt. Bhagwati and others—Appellants

v.

King-Emperor—Opposite Party.

Criminal Revision No. 605 of 1923, decided on 14th January 1924, against order of commitment by the 1st Class Magistrate, Buxar, dated 29th August 1923.

Crim. Pro. Code, S. 531—Commitment order without jurisdiction can be set aside even in the abence of prejudice.

The High Court has got power to quash a commitment order passed by a Magistrate ordering an accused person to stand his trial in a Sessions Court which has no territorial jurisdiction over the place where the offence alleged was committed. [P. 188, C. 2.]

S. P. Varma and *H. P. Sinha*—for Applicants.

Gour Chandrapal—for Opposite party.

FACTS :—This was an application for quashing the commitment order passed by the 1st Class Magistrate, Buxar, against the applicants. Mt. Bhagwati, it was alleged was married to one Deonarain about 8 years back and the husband and wife lived in Shahabad District, in Bihar and Orissa. Mt. Bhagwati was the first applicant. Her mother Mt. Ramdasi lived at Nilphamari in the Province of Bengal. She was the 2nd applicant. One Lachmi Narain who was 1st accused was alleged to have married Mt. Bhagwati in Bengal at Nilphamari, her former husband, Deonarain, being still alive. Ram Pershad, the father of Lachmi Narain was the 4th applicant and Lachman Ram was the grandfather of the 1st applicant and Ragunathram, her uncle was the 6th applicant.

Bucknill, J.—(After stating the facts, as set out above):—It is not clear from the Committing Magistrate's order exactly what part Bhagwati's mother took with regard to the alleged abetment of the offence of bigamy with which Bhagwati and Lachmi Narain are substantively charged ; nor is it in the least clear what parts Lachmi Narain's father or Bhagwati's uncle and grandfather took in abetting the offence. The learned Counsel who has appeared for the applicants here, stressed the distinction which must be drawn between the first applicant, her second husband and the third applicant on the one part and the rest of the applicants who were charged with abetting the offence of bigamy. So far as can be seen from the committing order, the only charge which has been made against the first and third applicants is in effect that of the bigamous marriage outside the jurisdiction, not only of the Magistrate at Buxar and the Sessions Judge of Arrah, but also of this Province. With regard to the abetment, it is not clear, as I have said, where it is alleged it took place ; but I can see nothing in the order which, possibly, with the exception of the case of Bhagwati's mother, could be taken to show that the abetment alleged against Bhagwati's grandfather and uncle took place other than within the jurisdiction of our local provincial Courts.

With regard to the father of Lachmi Narain (*i.e.*, of Bhagwati's second husband) I can see nothing in the committing order which indicates where his abetment is alleged to have taken place ; and I can only imagine that such abetment is presumed to have taken place at the locality where his son was married to Bhagwati. The commitment order is indeed extremely unilluminating and inexhaustive.

The question of what jurisdiction over these different applicants was held by the Magistrate of Buxar and by the Sessions Judge of Arrah was not apparently raised before the Committing Magistrate but was only brought up when the matter came up before the Sessions Judge : but a point of jurisdiction can be raised at any stage. Here, it is not a point which can be dismissed without very careful consideration. In the Criminal Procedure Code it will be observed that section 531 points out :

"No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong sessions division, district, subdivision or other local area, unless it appears that such error has in fact occasioned a failure of justice."

It is common ground that an order of committal to the Session Court is an order under this section. It is not, however, at all clear that the provisions of this section contemplate a case in which there has been an order by a Court which had no territorial jurisdiction at all ; such as in a case in which jurisdiction could only properly have been exercised by some Court outside the territorial limits of the jurisdiction of a Provincial High Court. There is, however, nothing in the section itself which limits in any way its operation. But under section 177 of the Criminal Procedure Code it will be observed that it is laid down that ;

"Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed: "

and by section 179 it is further laid down that :

"When a person is accused of the commission of any offence by reason of anything which has been done and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued ;"

by section 180 which reads :

"when an act is an offence by reason of its relation to any other act, which is also an offence, or which would be an offence if the doer were capable of committing an offence, a charge of the first mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done."

It is, in *Illustration* (*a*) pointed out that

" A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed, or by the Court within the local limits of whose jurisdiction the offence abetted was committed."

Now, as I have said already, the position here, as shown in the—somewhat unsatisfactory—committal order, with regard to the two persons who are said to have been the actual contracting parties in the bigamous alliance, indicates an offence committed outside the borders of this Province. There arises, therefore, with regard to them, little doubt that the Court of the Sessions Judge at Arrah has no jurisdiction to try them for an offence committed at Nilphamari in Bengal.

With regard to the abettors, the committal order leaves one in the dark as to the alleged venue of the abetment. The abetment, however, of the father of Bhagwati's second husband (Lachmi Narain) does not appear, on the face of the committal order, to have taken place within the limits of the jurisdiction of the Sessions Court of Arrah : though he is said to have a house at Jamshedpur in another district of this Province. The question arises then, as to what should be the procedure which should be adopted by this Court? There are authorities which seem to indicate that, in certain cases, a transfer to a Court which undoubtedly has jurisdiction is proper, where a committal order has been made by a Court which has no jurisdiction. But, where extra provincial jurisdiction is concerned, I take it that this Court has no power to order such a transfer to the jurisdiction of a Court in another Province : though it might suggest through a proper channel that action might be taken by an appropriate tribunal in another province where jurisdiction over the matter in question seemed to lie : and, therefore, no question of transfer can well arise in this case. On the other hand, it has been suggested that, possibly, it would be best not to interfere with the committal order but simply to inform the Sessions Judge that he has no power to try the substantive offence with which the first and third applicants are charged ; leaving the complainant to take such steps as he may be advised to take in the proper Court; wherever that may be.

The third alternative in this case is to quash the committal order so far as it relates to those persons whose offence, if any, seem clearly, on the face of the committal order, not to have occurred within the limits of the jurisdiction of this Province. Now those persons to whom this last alternative applies are clearly Mussammat Bhagwati, the woman who is said to have bigamously married Lachmi Narain and Lachmi Narain himself. The offence committed by those two persons is said to have been committed, if at all, at Nilphamari in Bengal, outside this province. I am also inclined to think that, on the face of this obscure committal order, the same remarks must also apply to Ram Prasad the father of Lachmi Narain : for, although in the committal order it states that he has a house at Jamshedpur which is in this Province where Bhagwati and Lachmi Narain are said to have been recently residing, I can find nothing showing, before the offence was committed, that any abetment by Ram Prasad took place in this Province. In my view therefore, the committal order with regard to these three persons should be set aside and quashed, leaving it to the complainant to take such steps as he may be advised to take in a Court which has proper jurisdiction. With regard to the other three applicants, namely, (No. 2) Mussammat Ramdasi the mother of Bhagwati ; (No 5) Lachman Ram her grandfather and (No. 6) Raghunath Ram her uncle : here, again there is nothing to indicate in the committal order, except with regard to Mussammat Ramdasi, whether the abetment of the offence of bigamy took place other than inside this Province. It is probable that with regard to the mother, if there was by her any abetment of the offence it took place both in and outside this Province.

With regard to Bhagwati's grandfather and uncle, I can see nothing in the committal order which indicates that they ever left this Province although there may be something in evidence which we have not seen which shows to the contrary effect. With regard to these three persons, the committal order must stand.

The result is, that with regard to the first, third and fourth applicants, the committal order will be quashed and with regard to the second, fifth and sixth, the committal order will be maintained.

I think that I ought, with regret, to say that in this case the commitment order was not well drawn up, conveyed insufficient information and shows signs either of haste or lack of what is requisite in such a record.

Adami, J.—I agree.

Committal order quashed in some cases. Allowed to stand in the case of others.

1925 Patna, 189.

DAS AND ROSS, JJ.

Beni Madho Singh —Appellants

v.

Chander Prasad Singh—Respondents.

Appeal Nos. 20 of 1921 and 250 of 1920, decided on 25th January 1924, from Original Decrees of Sub-Judge, Gaya, dated 27th July 1920.

Hindu Law—Joint Family—Purchase of contiguous share and mortgage for the purpose, bind family.

Where the manager of a joint Hindu family purchased a share in a village, part of which was already owned by the family, and in order to pay off the mortgage decree which was binding on the purchased share, executed mortgage of the joint family property.

Held that though the purchased property yielded a small profit, the purchase was not speculative but was prudent and was binding on the family. [P. 190, C. 1.]

Ali Imam and *J. P. Sinha* —for Appellants in Appeal No. 250 of 1920.

N. N. Sinha and *Kailasapati*—for Respondents.

Kailasapati—for Appellants in Appeal No. 20 of 1921.

S. N. Mullick and *J. P. Sinha*—for Respondents.

Ross, J.—First appeal No. 250 of 1920 is an appeal by the plaintiffs in a suit on two mortgages. The first bond was executed on the 23rd of July 1920 by Jamna Prasad Singh, father of defendants Nos. 1 and 2 and grandfather of defendant No. 3, in favour of Janardan Singh, the predecessor of plaintiff No. 1, for a consideration of Rs. 20,000 which was advanced at a rate of interest of Rs. 1-4-0 per cent. per mensem. The second bond was executed on the 24th of May 1917 by defendants Nos. 1 and 2 in favour of plaintiff No. 1 for a consideration of Rs. 2,600 which was advanced at compound interest of Rs. 1-4 0 per cent. per mensem with yearly rests. The Subordinate Judge gave the plaintiffs a decree in respect of the second bond (Ex. 8), but dismissed the claim on the first bond (Ex. 3). First Appeal No. 20 of 1921 is an appeal by the defendants.

The bond (Ex. 3) recites that the executant had purchased 4 annas share in mauza Pharha Rahimabad at an auction sale held for arrears of Road Cess and obtained possession thereof. The aforesaid share was subject to encumbrances created by the former proprietor and a decree had been obtained by the mortgagee in execution of which the interest had been sold for Rs. 19,010-9-6 and purchased by the decree-holder himself. In order to get the sale set aside the executant borrowed Rs. 10,000. A further sum of Rs. 9,425 was borrowed to repay the loans due to one Sital Prasad under two mortgage bonds executed on the 27th of April 1909 (Ex. 7), and on the 3rd of June 1909 (Ex. 6). A further sum of Rs. 575 was required to meet household expenses. The learned Subordinate Judge has dismissed the claim on this bond holding as to the first item that the purchase of an encumbered estate was an imprudent act and therefore not binding on the family property. As to the second item he has held that the case is governed by the decision in *Sahu Ram Chandra* v. *Bhup Singh* (1) and as to the third item, he has held that the evidence is insufficient to establish legal necessity.

Now as regards the first item it appears that a share of 1 anna 6-pies and odd already belonged to the defendants' family and it was natural that, if money was being invested in immoveable property, opportunity should be taken of the sale for arrears of road-cess of a share in this village to make the purchase. The interest on the advance comes to Rs. 1,500 a year. The income has been estimated by the Subordinate Judge at Rs. 1,600.

(1) (1917) 39 All. 437 =44 I. A. 126=21 C. W. N. 698=1 P. L. W. 557=15 A. L. J. 487=19 Bom. L. R. 498=26 C. L. J. 1=33 M. L. J. 14=39 I. C. 280=(1917) M. W. N. 439=22 M. L. T. 22=6 L. W. 213 (P. C.).

The respondents contend that this valuation is too high. This was a matter which was especially within the knowledge of the defendants and they did not produce any evidence. They left it to the plaintiffs to give what evidence they could. That evidence consists of a statement of Dwarka Prasad, plaintiffs' witness No. 3, to the effect that Jamna had told him that the income of his 2-annas share of *mauza* Pharha was Rs. 2,500 or Rs. 3,000. The plaintiffs also put in evidence a plaint (Exhibit 30) wherein the present defendants stated that the gross income from the 3-annas 6-pies and odd share in *mauza* Pharha was not less than Rs. 3,000 a year. They also produced a deposition of the defendant No 1 made in 1919 (Exhibit 19) giving a similar figure. If Rs. 3,000 is the income of 3½-annas share, then the income of 2-annas would be Rs. 1,715; the Government revenue is Rs. 46-10-0 and the road-cess is about Rs. 53, so that a deduction of about Rs. 100 will have to be made; no allowance need be made for collection charges as the defendants already had a share in the village. According to this calculation the Subordinate Judge has not over-estimated the value of the property. But in any case, it was the duty of the defendants to place before the Court the best materials for its decision of this question, as pointed out by the Judicial Committee in *Murugesam Pillai* v. *Gnana Sambanda Pandara Sannadhi* (2). The defendants had the documents which would have shown definitely what the value of the share was. They have not produced them and the Subordinate Judge's figure must be accepted. It follows, therefore, that the purchase was not in itself imprudent but was one which actually yielded a small profit. It was in no sense speculative because the defendants, being co-sharers in the village, were in a position to know the value of the equity of redemption of this 2-annas share. At fifteen years' purchase the 2-annas share of the defendants would be worth Rs. 25,000 and at twenty years' purchase, Rs. 32,000 and the loan was Rs. 10,000 only. During the argument the learned Counsel for the appellants offered to accept a decree in full and to take over this share, allowing the respondents Rs. 32,000 for it; but this offer was not accepted. This also shows that the purchase was not an imprudent one. The learned Vakil for the respondents referred to the evidence of the immorality of Jamna Prasad Singh; but this is immaterial, because it is not said that that the immorality had any connection with this debt. But it is said that he was encumbering the estate and that he would never be in a position to repay this loan because of his dissolute habits. But even without repayment the transaction was profitable as has been shown above; and in any view, to use the words of the Judicial Committee in the leading case.

"If the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt:"

Hunooman Persaud Panday v. *Mt. Babooee Munraj* (3). No allegation of this kind is made against the plaintiffs in the present case. Reference was also made to the case of *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (4) where the Judicial Committee held that:

"The *karta* of a joint family cannot impose on a minor member of it the risk and liability of a new business started by himself and other adult members."

I cannot see how this decision, which relates to the starting of a new commercial business, has any application to the present question, which is, whether

(2) (1917) 40 Mad. 402=44 I. A. 98=21 M. L. T. 288=32 M. L. J. 369=15 A. L. J. 281=1 P. L. W. 457=5 L. W. 759=21 C. W. N. 761=19 Bom. L. R. 456=25 C. L. J. 589=39 I. C. 659=(1917) M. W. N. 487 (P. C.)

(3) (1854-57) 6 M. I. A. 393=18 W. R. 81=2 Suth. 29=1 Sar. 552 (P. C.).

(4) 1922 P. C. 237=49 Cal. 560=49 I. A. 108=26 C. W. N. 954=20 A. L. J. 409=24 Bom. L. R. 700=35 C. L. J. 498=43 M. L. J. 41=(1922) M. W. N. 364=30 M. L. T. 228=16 M. L. W. 586 (P. C.)

a *karta* of a Hindu family is entitled to borrow money in order to purchase a share in a village in which the family already has a share, in a transaction which is not on the face of it a losing one. In *Manna Lal* v. *Karu Singh* (5), the Judicial Committee upheld a mortgage whereby Rs. 1,000 was borrowed for payment of premium of a lease. In my opinion this transaction was for the benefit of the family and is binding on the family property.

As to the second item it is conceded by the learned Vakil for the respondents that the earlier mortgages of 1909 were antecedent debts and that this part of the case is governed by the decision in *Raja Brij Narain Rai* v. *Mangla Prasad* (6), But these debts are attacked as immoral debts. The case for the defence is that the money borrowed under these bonds amounting to Rs. 8,000 was actually spent in profligacy. Now the first loan of Rs. 4,000 was said in the bond (Ex. 7) to have been taken to help to pay for the purchase of immoveable property. The second loan of Rs. 4,000 (Ex. 6) was taken to perform Ruksati of executant's sister and to pay land revenue and road-cess. These are the recitals in the bonds for what they are worth. The evidence offered by the defence is of three witnesses. Jeonandan Pd. (D. W. 2) says that Jamna Prasad "borrowed Rs. 8,000 in course of one month and spent all of it on Rasulan (a prostitute) and on wine." In cross examination he says that in his presence Jamna borrowed Rs. 4,000 from Sital Babu and about a month after he told him that he had again borrowed Rs. 4,000 from the said Sital Prasad and from this money Jamna made gold ornaments for Rasulan. This witness is a brother-in-law of Jamna Prasad and an interested person. The next witness is Jageshar Singh (D. W. 8) who says that the entire sum of Rs. 8,000 came into his hands and all of it was spent over prostitutes. This witness was a servant of Jamna Prasad. His statement is without details and unsupported by documents or accounts. It is not shown how he came to know of the way in which the money was spent. The last witness is Elahi Buxh (D. W. 11), a person of no consideration, who says that he was Rasulan's musician. Without deciding that it is open to the respondents to question an antecedent debt on the ground of immorality, I consider that they have failed to prove that the actual money borrowed from Sital Prasad under these bonds was spent in an immoral fashion. The evidence is in my opinion too vague and the witnesses are of too little weight. This item must therefore be allowed.

With regard to the third item of Rs. 575, the learned Vakil for the respondents does not seriously contest it. The Subordinate Judge has disallowed the major portion of this on the ground that the money was taken for executing the bond (*Exhibit* 3) and as the bond was not executed for justifying necessity this charge also must be disallowed; but if the bond was executed for the benefit of the family as has been held above, then it follows that this item must also be supported. The balance consists of Rs. 275 which was said to be required for the repair of the ancestral house. This also depends on the evidence of Dwarka Prasad (P. W. 3) who says that he enquired about the house repairs from Hazari Lal at Gaya who used to live with Jamna Prasad. In my opinion the evidence is sufficient to prove this small item.

As this case has not been decided on the ground that it was the pious duty of the sons to pay their father's debt, no question as to six years' limitation arises.

I would hold therefore that the first and the third items of debt were incurred for the benefit of the family and for legal necessity and that the second item is binding as being incurred in discharge of antecedent debt. The plaintiffs are therefore in my opinion entitled to a decree on Ex. 3 as well as on Ex. 8. The appeal of the respondents against the decree on Ex. 8 was not pressed. The result is that appeal No. 250 of 1920 must be decreed with costs and the decree of the Subordinate Judge varied by decreeing the plaintiffs' claim in full. There will be the usual mortgage decree.

Appeal No. 20 of 1921 is dismissed.

Das, J.—I agree.

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(5) (1920) 1 Pat L. T. 6 = 56 I. C. 766 (P.C.).

(6) 1924 P. C. 50 = 46 All 95 = 51 I. A. 123 = 21 A. L. J. 934 = 5 L R. P.C. 1 = 28 C. W N. 253 = 46 M. L. J. 23 = 5 Pat. L. T. 1 = 2 Pat. L. R. 41 = (1924) M W. N. 68 = 19 M. L W. 72 = 33 M. L. T. 457 = 26 Bom. L. R. 500 = 11 O. L. J. 107 (P.C.).

** **1925 Patna 191.**

ADAMI AND BUCKNILL, JJ.

Ramai Ho—Appellant

v.

King-Emperor—Opposite Party.

Criminal Ref. No. 9 of 1924, decided on 30th April 1924, from an order of the Sessions Judge of Manbhum Sambalpur, dated 4th April 1924.

** (a) *Crim. Pro Code*, S. 164—*Evidence of Recording Magistrate that he had followed all the provisions of the section is sufficient.*

Where the Magistrate who recorded the confession did not sign the certificate which is prescribed by the Code as now amended; and signed the certificate which was in use under the old Code, and where the accused was not asked if he made the statement voluntarily, but was asked the following question only;—"Are you prepared to make a statement of your own free will?"; and where the record of the confession too did not show that the appellant was warned that he was not bound to make a confession and that if he did, it might be used in evidence against him; but where the Magistrate himself was called as a witness and in his evidence, he said in clear terms, that he cautioned the accused, explaining to him that he was not bound to make any statement and that if he did so it might be used in evidence against him.

Held, that the confession, as recorded, was admissible in the case especially since the Magistrate had been examined and had shown that he had observed the provisions of the law. (9 Mad. 224; 1922 Lah. 237, *Dist*; 2 Pat. L. T. 773, Foll) [P. 192, Cs. 1 and 2.]

(b) *Crim. Pro. Code*, S. 164—*Retracted confession must be corroborated.*

A retracted confession cannot be given any weight, unless it is well corroborated by reliable evidence. [P. 192, C. 2.]

B. K. Prasad—for Appellant.

Sultan Ahmed—for Opposite Party.

FACTS.—The appellant had been convicted of the murder of a woman by name Mathuri Kui, and sentenced to death by the lower Court. The motive for the murder was alleged to be some dispute between the appellant and the family of the deceased as to ownership of certain land.

Adami, J.—[After discussing the facts, his Lordship proceeded:—]

The chief evidence then as to the occurrence is the statement of these two witnesses, the production of the blood-stained *tangi* by the appellant himself, and the confession which the appellant made.

With regard to this confession Mr. *Prasad* has urged before us that it is inadmissible in that the Deputy Magistrate who recorded it did not sign the certificate which is prescribed by the Code as now amended; he signed the certificate which was in use under the old Code. He urges too that the appellant was not asked if he made the statement voluntarily. With regard to this, the question put to the appellant by the Deputy Magistrate was:

"Are you prepared to make a statement of your own free will?"

And surely that is equivalent to asking him whether he made the statement voluntarily. The record of the confession too does not show that the appellant was warned that he was not bound to make a confession and that if he did, it might be used in evidence against him. However, owing to this omission, the Deputy Magistrate himself was called as a witness and in his evidence he has said, in clear terms, that he cautioned the accused, explaining to him that he was not bound to make any statement and that if he did so, it might be used in evidence against him.

Mr. *Prasad* has relied on two cases, that of *Queen-Empress* v. *Viran* (1) and *Farid* v. *The Crown* (2), in arguing that owing to defects the provisions of section 533 of the Code of Criminal Procedure cannot cure the defect and make the confession admissible. In the former case, the confession was found to have violated all the provisions of section 164.; in the latter case there was a failure to ask whether the confession was made voluntarily and I am not inclined to agree with the finding in the latter case. In the case of *Maksud Ali* v. *King-Emperor* (3), Jwala Prasad and Sultan Ahmed, JJ., decided that the evidence of the recording Magistrate that he had observed all the provisions of section 164 was sufficient. In my mind, there is no doubt that the present confession as recorded is admissible in this case, especially since the Deputy Magistrate has been examined and has shown that he observed the provision of the law.

His Lordship while discussing evidence, referred to the confession attributed to the appellant and proceeded:—

We have to remember that the confession of Ramai was retracted and he went so far as to state that he never made any statement at all to the Deputy Magistrate. This confession, therefore, cannot be given any weight unless it is well corroborated by reliable evidence and I think that in the evidence of Palo and Damu, as well as in the evidence of the witnesses as to what subsequently occurred, we have strong corroboration of the confession.

[His Lordship continuing his discussion on the evidence, concluded by confirming the conviction and sentence passed by the lower Court.]

Bucknill, J.—I agree. *Sentence confirmed.*

(1) (1886) 9 Mad. 224.

(2) (1922) Lah. 237=2 Lah. 325=23 Cr. L. J. 149=5 P. W. R. Cr. 1922.

(3) (1921) 2 Pat. L. T. 778=60 I.C. 56=22 Cr. L. J. 200.

1925 Patna 193 (1).

ADAMI, J.

Banambar Chhotra—Petitioner.

v.

Nata Behra—Opposite Party.

Cr. M. C. No. 36 of 1924, decided on 14th May, 1924, against the order of the Deputy Magistrate of Khurda, dated the 8th March, 1924.

Criminal trial—Stay should be ordered where matter is in issue, in a Civil suit filed before the complaint.

Where the matter to be decided in a criminal case is identical with an issue which has to be decided in a Civil Court between the parties which was instituted prior to the complaint in the criminal case.

Held, stay should be ordered. [P. 193, C. 1.]

C. P. Das—for the Petitioner.

Judgment:—This is an application for stay of a case instituted against the petitioner under section 420, I. P. C., on the ground that the matter to be decided in the criminal case is identical with an issue which has to be decided in a Civil suit between the parties which was instituted prior to the complaint in the criminal case. It appears that the complainant borrowed Rs. 200 from the petitioner on the 31st May, 1921. The complainant failed to repay this sum according to the petitioner and therefore instituted a suit for the money lent which was due on a hand note. After the institution of this suit the opposite party complainant made a complaint to the effect that he had gone to the petitioner and repaid his debt but the petitioner had failed to return to him the pro-note and therefore he had been cheated. It is quite clear that the question in the Civil suit will be the same as has to be decided in the criminal case, namely, whether in fact the opposite party repaid the petitioner and if so whether the hand note had been returned or not. As a matter of fact the petitioner filed the hand note that is complained of in the Civil Court. I think that this is a case in which the criminal proceedings should be stayed and that it should be left for the Civil Court first to decide whether the complainant's plea of payment and refusal of the petitioner to return the hand note is a genuine plea or not.

The hearing of the criminal case will therefore be stayed pending a decision of the Civil suit.

Stay ordered.

* 1925 Patna 193 (2).

DAS AND ROSS, JJ.

Dasarate Meshy and others—Appellants.

v.

Jay Chand Sutradhar and others—Respondents.

S. A. No. 262 of 1924, decided on 15th February, 1924: Court-fee matter.

* *Court Fee—Alternative reliefs.*

Where out of two reliefs which are identical in actual money value, one requires a higher Court-fee, the Court-fee is payable on the relief requiring the higher Court-fee. [P. 194, C. 1.]

S. K. Mitra—for the Appellants.

Government Advocate—for the Crown.

STAMP REPORTER'S REPORT.—This was a suit for certain reliefs in the alternative. One relief sought was for possession of schedule IV land and the alternative to this relief was a declaration that defendant No. 5 was a tenant under the plaintiffs for the said land. As an alternative to the above reliefs a prayer for partition of schedule I land *minus* the schedule II land was made. The suit was valued at Rs. 49 and a Court-fee of Rs. 3-12-0 was paid on the plaint. The suit was dismissed. The plaintiffs appealed and valued their appeal to the lower appellate Court at Rs. 49 and paid a Court-fee of Rs. 3-12 0 in the lower appellate Court. The appeal having been dismissed, they have preferred this second appeal valued at Rs. 49 and stamped with a Court-fee of Rs. 3-12-0. The Court-fee paid in each of the three Courts is insufficient. It is a settled law that where the plaintiff sues in the alternative for one of two reliefs, the larger of the two reliefs sought determines the amount of the stamp: *Kashinath Narayan* v. *Govinda* (1) and *Mukhlal Gir* v. *Ramdheyan Rai* (2) a Patna case. The stamp for the relief for possession in the present suit is Rs. 3-12 0 only. The stamp for the relief for the declaration or the partition is Rs. 15. Therefore, the relief for the declaration or for the partition is larger than the relief for possession. Therefore, the Court-fee leviable in each Court is Rs. 15. Rs. 3-12-0 having been paid, the plaint, the memo. of appeal to the lower appellate Court and this memo of second appeal are insufficiently stamped by Rs. 11-4-0 each, total

(1) (1891) 15 Bom. 82.
(2) (1918) 44 I.C. 143.

Rs. 33-12-0. This is due from the plaintiffs-appellants.

If the appellants can show that the plaint was filed before 24th August, 1922, the deficit on the plaint will be Rs. 6-4-0 only and the total deficit due from them will be Rs. 28-12-0.

ORDER OF REGISTRAR.—This is a Court-fee matter.

The learned Vakil disputes the Stamp Reporter's note arguing that, because the value of the relief for partition cannot anyhow exceed the value of the relief for exclusive possession, the relief for partition is not the higher of the two reliefs and that, therefore, the principle that Court-fee is payable on the higher of two reliefs does not apply in this case. If this were so, then the appellant would escape paying Court-fee on the relief for partition and I cannot interpret *Kashinath Narayan* v. *Govinda* (1) in this way. I prefer to interpret it as implying that where two reliefs are identical in actual money value, but different in respect of the Court-fee leviable on each, then Court-fee is payable on the relief carrying the higher Court-fee; this is in accordance with the practice of this Court and with Desai's Court Fees Act, page 95, 5th edition, and the cases cited there.

I, therefore, hold that Rs. 15 is the Court-fee leviable on this memorandum of second appeal. Rs. 3-12-0 having been deposited, the memorandum of appeal is insufficiently stamped by Rs. 11-4-0. There is a similar deficiency on the memorandum of appeal to the lower appellate Court as also on the plaint.

If the deficit Court-fees be not paid in on or before the 23rd instant, place before the Bench for orders.

Order of Court:—The view taken by the learned Registrar is perfectly right. The deficit Court-fee must be made good within a fortnight from to-day, failing which the appeal will stand dismissed without further reference to the Bench.

Reference answered.

* 1925 Patna 194.

MILLER, C.J. AND MULLICK, J.

Uchit Kopri and another—Defendants-Appellants.

v.

Adhik Mandal and others—Plaintiffs-Respondents.

Letters Patent Appeal No. 74 of 1923, decided on 4th December, 1923, against the decision of Mr. Justice Bucknill.

* (a) *Registration Act, S. 28—A small item of property included only for registration will not invalidate registration if the property is intended to be transferred.*

The mere fact that a small item of property situated in a particular district is included in a deed in order to give jurisdiction to the Registrar of that district to register the deed, will not invalidate the registration if the parties intended the property to be transferred by the deed. [P. 195, Cs. 1 and 2.]

(b) *Words—Mukarrari.*

The use of the word mukarrari does not by itself imply that any permanent interest was intended to be created. It merely indicates fixity of rent. [P. 197, C. 1.]

(c) *Words—Malguzar.*

Primarily the word Malguzar means rent payer; it may also equally be applied to a tenure-holder or a raiyat. In North Behar, however, it is generally applied to a tenure holder. [P. 197, C. 1.]

S. Ahmad and *S. Saran*—for the Appellants.

S. Imam and *S. Dayal*—for the Respondents.

Dawson Miller, C. J.:—The suit out of which this appeal arises was instituted by the respondents as plaintiffs against the appellants as defendants to eject the defendants from certain lands on the ground that the plaintiffs were the occupancy *raiyats* of the land and the defendants were under-*raiyats* holding under them. The plaintiffs also claimed mesne profits from the date of the expiry of the notice to quit, which was duly served, until the date of possession. The plaintiff's title to the land as *raiyats* is based upon a purchase by registered deed in the year 1914 from Nunoo Lal and Dwarka Nath, the previous tenants.

The defendants disputed the validity of the plaintiffs' title on the ground that the sale-deed was not properly registered. They further contended that the plaintiffs and their predecessors were tenure-holders and not occupancy *raiyats* and that they, defendants, had acquired occupancy rights as

raiyats under the plaintiffs. They further relied upon a certain representation contained in a rent-receipt granted by the plaintiffs to the effect that they were tenure-holders and pleaded that this created an estoppel.

The Munsif before whom the case came for trial found all the issues in favour of the plaintiffs and decreed their suit.

His decision was upheld by the Subordinate Judge on appeal and again by Mr. Justice Bucknill on second appeal to this Court.

The present appeal is preferred by the defendants under the Letters Patent from the decision of Mr. Justice Bucknill.

The first point which was urged before us in this appeal was, that the transfer to the plaintiffs by Nunoo Lal and Dwarka Nath in 1914 was invalid as it was not properly registered. It appears that the land transferred by the sale-deed measured 56 *bighas* 10 *cottahs*. The 56 *bighas* which is the land in dispute in this case are situated in the Purnea District and the 10 *cottahs* are situated in the Bhagalpur District. It is conceded that the 10 *cottahs* were included in the sale-deed for the purpose of enabling the sale-deed to be registered in the Bhagalpur District where in fact the registration took place at the sub-registry office at Madipura. It was not contended that the 10 *cottahs* of land at Madhipura had no existence nor was any objection taken in the written statement that the registration was not valid and no issue was framed upon this point. The 6th issue, however, was framed thus:—

"Is the *kobala* propounded by the plaintiffs a legal and valid document or not?"

This issue was not pressed at the trial and the Munsif found that it had been abandoned. Before the Subordinate Judge on appeal the appellants contended that the registration was invalid, a point which does not appear to have been taken in the trial Court. They relied upon a deposition given by the first plaintiff in an earlier case in 1915 in the Munsif's Court at Purnea which had presumably been put in evidence at the trial in which he stated: "The *kobala* was executed at Madhipura. I purchased 10 *cottahs* of land at Madhipura—it is still in possession of Nunoo Lal for the purpose of getting the *kobala* registered there." It was found by the Subordinate Judge that the land was in fact purchased and even if it was purchased with the express intention of giving jurisdiction to the Sub-Registrar at Madhipura to register the deed, there is nothing illegal or improper about this. It was for the learned Judge to say whether the purchase of the 10 *cottahs* was a genuine transaction or not. He found that it was and this appears to me to dispose of this point.

It was next contended that what was purchased by the plaintiffs was not a holding but a tenure and that the defendants were not under-*raiyats* but *raiyats* holding under the plaintiffs as tenure-holders and could not, therefore, be given notice to quit. The learned Subordinate Judge treated the case as one in which the *onus* was on the plaintiffs to prove that the defendants were under *raiyats* and that they (the plaintiffs) were *raiyats* and not tenure-holders and no objection is taken by the appellants to his ruling upon this point. He went carefully through the evidence upon this part of the case and came to a clear finding that Nunoo Lal and Dwarkanath, the predecessors-in-interest of the plaintiffs had acquired the land for the purpose of cultivation only and had *khas* possession by cultivating the land and not by collecting rents from tenants. The rent receipts for the rent paid to their landlord were produced and they were therein described as *raiyat-jotedars* and it was found that for nearly fifty years the proprietors Ugranarain and Fatehnarain had treated Nunoo and Dwarka as cultivating *raiyats*. It was further shown that some of the defendant's co-sharers had purchased a share of the proprietary interest of the plaintiff's landlords and that they had collected rent from the plaintiffs describing them in the rent receipts as *raiyat-jotedars*. There were other documents also, notably a plaint in a rent-suit instituted by one of the defendant's co-sharers against Nunoo Lal, in which the interest of the plaintiffs' predecessors was described as that of *raiyats* in possession of the land through *dar-raiyats*. The evidence to the contrary given on behalf of the defendants was very meagre and was not accepted by the learned Subordinate Judge. It was contented, however, that the area of the land transferred to the plaintiffs was over 100 standard *bighas* and that, therefore, there was a presumption arising under section 5 (5) of the Bengal Tenancy Act that the tenant was a

tenure-holder until the contrary was shown. The learned Judge found as a fact that the area was 56½ *bighas* as stated in the *kobala* of 1914 and that no such presumption arose. It was pointed out, however, on behalf of the appellants that although in the *kobala* the total area of the land was described as 57 *bighas* 1 *cottah* it was also stated to measure 167 *bighas* 10 *cottahs* when measured by a *laggi* of 4 cubits which is the standard measurement and that the smaller area had been arrived at by measurement with a *laggi* of 6½ cubits. The evidence on behalf of the plaintiffs was that the standard pole in the *chakla* where the land in suit was situated was 4½ cubits and not 6½ cubits. If this be accepted the actual standard measurement would be under 100 *bighas*. This evidence appears to have been uncontradicted by the defendant's witnesses and the learned Judge accepted that evidence as correct and found that the area was under 100 *bighas*. As a finding of fact this is conclusive. The finding however, was criticised by the appellants as being contrary to the evidence in the *kobala* itself which described the area of the land when measured by a 4 cubits pole as over 100 *bighas*. This statement in the *kobala* does not appear to have been drawn to the notice of the learned Judge and no mention is made of it in the judgment. It is contended that it is conclusive of the area and that the learned Judge ought to have given effect to the presumption arising out of the Statute in considering the evidence as to the nature of the plaintiffs' interest. I am not prepared to say that the statement in the *kobala* is conclusive as to the area of the land. It was undoubtedly evidence and very strong evidence of the area but there was evidence of a contrary nature which was apparently uncontradicted by the defendants who appear not to have relied upon the statement in the *kobala* before the Subordinate Judge, but even assuming that it must be taken that the land in suit measured over 100 standard *bighas* and that a presumption arose therefrom in favour of the appellant's contention that the plaintiff's interest was that of tenure-holders the learned Judge did undoubtedly place the *onus* upon the plaintiffs to prove that their interest was that of *raiyats* and after reviewing the whole of the evidence agreed with the finding of the trial Court and came to a clear conclusion that the plaintiffs had discharged the burden of proof which lay upon them. In these circumstances, it seems to me that the finding of the learned Subordinate Judge on this part of the case ought not to be disturbed.

The last point which was urged before us was that in the year 1324 F. the plaintiffs granted a rent-receipt to the defendants which contains at the foot the following entry : "let out the *jama zamain mukarrari*" and it is signed by the plaintiffs, the first plaintiff Adhik Lal Mandal being described as *Sadar Malguzar*. This receipt was granted after some dispute between the plaintiffs and defendants and after their differences had been referred to a *panchayat* and a compromise arrived at. It was contended that the use of the word *Mukarrari* and the description of the plaintiff as *Sadar Malguzar* are an admission that the defendants held a permanent interest at a fixed rent and that the plaintiffs are tenure-holders and that as this was arrived at as the result of a compromise by which some *nazarana* was paid to the plaintiffs the plaintiffs are estopped from denying the truth of the representation made in the rent-receipt. What the exact nature of the compromise was does not appear to have been explained beyond what can be gathered from the rent-receipt. The use of the word *mukarrari* does not in itself imply any permanent interest but merely fixity of rent. In dealing with this part of the case the learned Munsif observed as follows :—"The word *mukarrari* means fixity of rent and is not intended to convey the meaning of occupancy *raiyat*. It is urged that the rent of an under-*raiyat* cannot be fixed in perpetuity and so it must mean occupancy *raiyat* with rent fixed. What the parties meant by the expression *mukarrari* in Exhibits. A and B-1" (the latter being the counterpart of the former) "there is no evidence to show and I am left to speculate as to its meaning not from evidence but from a mere supposition not borne out by the other circumstances. As far as the Glossary goes no such meaning attaches to the word *mukarrari* and I am not justified in interpreting it in that light. It is quite probable that the parties intended that the rent must be fixed once for all and that this may operate as an admission of the plaintiffs as to fixity of rent. Beyond that it cannot take away the plaintiffs' right in ejectment."

The learned Subordinate Judge took the same view but neither of them was apparently asked to attach any importance to this description of the first plaintiff as *Sadar Malguzar* as this is not dealt with in either of the judgments. The word *malguzar* means, primarily, rent payer. It may equally be applied either to a tenure-holder or a raiyat and although the word *malguzar* is one of several used locally in North Bihar to mean tenure holder, the document is not so clear and unambiguous as to amount to a representation on behalf of the plaintiffs that they were treating themselves as tenure-holders and the defendants as *raiyats* holding under them. It is, as Mr. Justice Bucknill pointed out in dealing with this part of the case, "extremely unlikely in view of the position which had always been maintained by the plaintiffs and their predecessors that that position would have been completely thrown away by an admission in a document such as this." The findings of each of the lower Courts are very strong as to the status of the plaintiffs and defendants and I am not prepared to hold that a chance expression of at least doubtful import in a rent-receipt is a clear representation by the plaintiffs acted upon by the defendants and amounting to an estoppel. In my opinion this appeal should be dismissed with costs.

Mullick, J.:—I agree.

Appeal dismissed.

1925 Patna 197.

DAS and ROSS, JJ.

Mt. Reshma Kuari — Decree-holder-Appellant.

v.

Rameshwar Ojha and others—Judgment-debtors-Respondents.

Miscellaneous Civil Appeal No, 258 of 1923, decided on 31st March, 1924, against the decree of the District Judge of Muzaffarpur, dated 3rd August, 1923.

(a) *Execution—Continuation.*

Where the properties sought to be attached in two applications are different, the latter is not the continuation of the former, nor where the former application has been dismissed for default of the decree-holder. [P. 197, C. 2.]

(b) *Limtation Act, S. 19—Scope.*

S. 19 applies to execution applications. [P. 198, C. 1.]

B. C. De for G. C. Pal—for the Appellant.

Parmeshwar Dayal and *D. N. Varma*—for the Respondents.

Das, J.:—The only question in this appeal is whether the application for execution is barred by limitation. The decree was obtained on the 29th November, 1918 and on the 31st July, 1919 the decree-holder applied for execution by attachment and sale of 3 specific properties mentioned in the application. On the 21st August, 1919 attachment was effected. The judgment-debtor did not appear and on the 16th September 1919 the Court settled the sale proclamation and fixed the 15th November, 1919 for sale. On the 12th November the judgment-debtor appeared and filed an objection petition under Order 21. rule 66 of the Code. It will be noticed that the time for making the objection had expired and as a matter of fact the sale proclamation was settled before this objection was filed in Court. The Court, however, did not decide the objection on that date but adjourned it to the 15th November, 1919. On the 15th November, 1919, the decree-holder's pleader appeared in Court and said that he had no instructions and the Court passed the order in these terms: "The execution case is dismissed for decree-holder's default without costs to any party." On the 30th October, 1922, the present application for execution was presented and it was at once objected by the judgment-debtor that it was barred by limitation. Both the Courts have given effect to the objection of the judgment-debtor.

It is first contended that the application of the 30th October, 1922 should be treated as a continuation of the application of the 31st July, 1919. But two difficulties present themselves. In the first place the concurrent finding of the Courts below is that the execution case was dismissed for decree-holder's default and it is well established that a subsequent application for execution can only be regarded as a continuation of the former one when the latter is dismissed without any fault or laches on the part of the decree-holder in the process of execution. The second difficulty is that the properties now sought to be sold in execution of the decree are not the same as the properties which were attached on the 21st August 1919. It is true that two of the properties are the same, but there is a third property which is sought

to be sold and which is different and was not sought to be sold in the application which was initiated on the 31st July, 1919. In my opinion, the decision of the Court below on this point must be affirmed.

But then there is another question which has been raised before us by Mr. B. C. De and it is this. I have already stated that on the 12th November, 1919, the judgment-debtor presented an objection under Order 21, rule 66. Section 19 of the Limitation Act provides : "Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."

There was some difference of opinion at one time whether section 19 applied to applications for execution. The Madras High Court answered the question in the negative, whereas all the other High Courts answered the question in the affirmative, but there is no difficulty under the present Limitation Act. Explanation 3 added to section 19 of the Limitation Act of 1908 makes it clear that the provisions of the section are applicable to execution proceedings. It is, therefore, open to the decree-holder to contend that there was an admission of a present liability by the judgment-debtor in his signed petition of the 12th November, 1919, but it is not possible for us to decide this question finally. We have not the petition before us and it is impossible to say whether there was in that petition an admission of a present liability to satisfy the decree of the 29th November, 1918. The Court below must consider this point.

We allow the appeal, set aside the order passed by the Court below and remand the case to that Court for decision on the point now raised by Mr. B. C. De.

There will be no order as to costs.

Ross, J. :—I agree.

Appeal allowed.

1925 Patna 198.

KULWANT SAHAY, J.

Mahadeo Lal and others—Defendants-Appellants

v.

Sri Gobind Lal Sahu and others-(Plaintiffs) *Sanker Pande and others* (Defendants)-Respondents.

Appeal from Appellate Decree Nos. 1439, 1544 and 1546 of 1921, decided on 18th January, 1924, against the decree of the Officiating District Judge, Shahabad, dated the 5th September, 1921.

Transfer of Property Act, S. 76—Mortgagee in possession can settle-bakasht lands—The tenant is a non-occupancy tenant.

A mortgagee in possession having all zamindari rights can settle bakasht lands with tenants during the mortgage and the tenant would, in any event, get non-occupancy right. [P. 200, C. 2.]

N. C. Sinha—for the Appellants.

S. M. Tahir, Rai Tribuban Nath Sahay and *D. C. Varma*—for the Respondents.

Judgment :—These three appeals have been preferred by the principal defendants against the decision of the District Judge of Shahabad, dated the 5th September, 1921, whereby he reversed the decrees of the Munsif of Sasaram, and decreed the plaintiffs' suits for possession of certain lands. The facts are shortly these: The plaintiff is admittedly the *zemindar* of the village. He holds 3 annas share *pucca* which is equivalent to 9 annas, 7 pies, 4 *krants* under a Collectorate partition in *Mauza* Neoras. On the 5th April, 1904, the plaintiff executed a *bharna*-deed in respect of his interest in the village in favour of the predecessor-in-interest of *pro forma* defendants. The deed was executed to secure repayment of an advance of Rs. 2,641 made by the ancestor of the *pro forma* defendants to the plaintiff and the stipulation in the deed was that the mortgagee would remain in possession of the plaintiff's share in the village for the period from 1312 to 1319. A sum of Rs. 750 was fixed as the annual *jama* or rental payable by the mortgagee to the mortgagor out of which the mortgagee was to deduct a sum of Rs. 450 annually and to appropriate the same towards repayment of the sum advanced by him and the balance of Rs. 300 was to be paid yearly to the mortgagor. The plaintiff's case is that the

lands in dispute in these three suits were the *zirait* lands of the proprietor; that at the time of the execution of the *bharna*-deed the plaintiffs were in possession of these lands and when the *pro forma* defendants came into possession of the village, they took possession of these lands as *zirait* lands; that during the Survey and Settlement proceedings, which came to an end some time in November, 1912, the *pro-forma* defendants got the names of the principal defendants in each of these suits recorded as tenants of the lands in dispute. *Tanaza* was filed before the Survey authorities but the objection was disallowed and the principal defendants were recorded as occupancy tenants of the lands in dispute. The plaintiff's case was that there was no *bona fide* settlement in favour of the principal defendants and, as a matter of fact, the *pro forma* defendants themselves continued in possession of these lands and the names of the principal defendants were caused to be recorded with the object of retaining possession of these lands even after the expiry of the term of the *bharna*. They, therefore, prayed for a declaration that the lands were *zirait* lands of the plaintiff; that the *pro forma* defendants had no right to settle the lands with the principal defendants; that, as a matter of fact, no such settlement had been made and that the principal defendants were trespassers and they prayed for recovery of possession of these lands. The *pro forma* defendants did not enter appearance and the suit was contested by the tenant-defendants and their allegation was that the lands in dispute were their ancestral occupancy holdings. In paragraph 11 of the written statement these defendants alleged that the plaintiffs' allegations that the *bharnadars* had no right to settle the lands and that the defendants are not *kashtkars* of the disputed lands, were altogether wrong and false, that the disputed lands constituted the *kasht* of the defendant, and that the Survey entries were correct.

Before the Munsif, where the case came on for trial, the principal issues were Issues Nos. 4 and 5. Issue No. 4 was—Was the disputed land *zirait* of the plaintiff and was it in possession of defendants Nos. 3 to 7 and are the contesting defendants trespassers thereon?

Issue No. 5 was—Whether the defendants Nos. 3 to 7 had right to settle the *bakasht* land. The learned Munsif came to the conclusion that the lands were not the *zirait* lands of the plaintiffs. He held further that the lands were the occupancy holdings of the principal defendants. As regards Issue No. 5 he held that under the terms of the *bharna*-deed the *pro forma* defendants were entitled to settle the lands with the principal defendants and, relying on the case of *Atal Chandra Rishi* v. *Lakshmi Narayan Ghose* (1), he held that even if the principal defendants were not the occupancy tenants of the land from before the alleged settlement by the *pro forma* defendants they had in any event, acquired non-occupancy right under a settlement made by the *pro forma* defendants. He accordingly dismissed the plaintiffs' suit. Against this decision the plaintiffs went on appeal before the learned District Judge and the learned Judge has reversed the decision of the Munsif and decreed the plaintiffs' suit for possession.

The learned Judge considered the two principal issues, *viz.*, Nos. 4 and 5 stated above. As regards Issue No. 4 the learned Judge says that it is not necessary to come to any decision as to whether the lands are *zirait* lands of the plaintiffs or not. He refers to the fact that the plaintiffs are admittedly the *zemindars* and, relying upon the principle laid down in the case of *Narsing Narayan Singh* v. *Dharam Thakur* (2), he holds that it was not incumbent upon the appellants that they should prove the *zirait* character of these lands before they can succeed. He then refers to the entry in the Record of Rights which is in favour of the defendants and he says that the entry in the Record of Rights has been rebutted by the evidence produced on behalf of the plaintiffs.

As regards the Issue No. 5, the learned Judge holds that the deed of 5th April, 1904 was a pure usufructuary mortgage and that the *pro forma* defendants did not acquire the rights of a tenure-holder and, therefore, could not settle tenants on the land beyond the term of the *bharna*-deed.

As regards the question whether the principal defendants were occupancy tenants of the land in dispute from before the execution of the *bharna*-deed there is a finding of fact by the learned District Judge which cannot be upset in second appeal. One of the reasons given by him

(1) (1909) 10 C.L.J. 55=2 I.C. 417.
(2) (1904) 9 C.W.N. 144.

for holding that the presumption raised by the Record of Rights in favour of the defendants has been rebutted, namely that there is nothing to show on what the Record of Rights is based, is no doubt wrong. The entry being in favour of the defendants it was not necessary for them to show on what it was based, but it was for the plaintiffs to prove that it was incorrect. Later on, however, the learned Judge refers to evidence produced by the plaintiffs and he is of opinion that this evidence rebuts the presumption raised by the Record of Rights. This is a finding of fact which is binding upon me in second appeal.

The only question left for decision is as to what was the effect of the settlement alleged to have been made by the *pro forma* defendants with the principal defendants. The learned Judge, on a construction of the *bharna* deed, has come to the conclusion that the *pro forma* defendants had no right to settle the lands with the principal defendants. I am unable to agree with the learned Judge on this point. On referring to the deed itself it appears that all *zemindari* rights were given to the mortgagee. The deed provides that the mortgagee would remain in possession of the mortgaged property for the period from 1312 to 1319 and what was transferred to the mortgagee was all lands, *i.e. dih*, arable, waste, *talkeerai* and all *zemindari* rights appertaining to the same. The only reservation made in the deed was as regards cutting of certain trees and transplanting the same. The deed therefore is a deed by which all the *zemindari* rights of the mortgagors had been transferred to the mortgagee. One of the ordinary rights of a *zemindar* is to settle lands with tenants and if, in the ordinary course of management of the mortgaged property, the *pro forma* defendants settled the lands with the tenant defendants, such settlement would be good in law and the settlement holders would, in any event, acquire a non-occupancy right in the land. This was the view taken by this Court in the case of *Sheo Barat Singh* v. *Pajarath Mahton* (3). There also a usufructuary mortgage had been executed in favour of certain persons and the usufructuary mortgagees during the continuance of the mortgage settled lands with certain tenants. After expiry of the term of the mortgage the mortgagor brought a suit for possession against the settlement-holders and this Court held that the mortgagee was entitled to settle lands with tenants during the continuance of his mortgage. It was held that, under sections 72 and 76 of the Transfer of Property Act, it is one of the rights of the mortgagee to settle land with tenants. It has been pointed out by the learned Vakil for the respondent that in that case the land in dispute was found to be tenancy land, that is, land in possession of tenants before the mortgage was executed; whereas there is no such finding in the present case. To my mind this does not make any difference so far as the present case is concerned. The case of the plaintiffs that the lands were the *zirait* lands of the *malik* was found to be not true by the Munsif. The learned Judge on appeal does not consider this question and it is conceded that they cannot be proved to be *zirait* in the strict sense of the term. In that event, the lands at most would be *bakasht* lands and to my mind a mortgagee in possession, with all *zemindari* rights vested in him, has a right to settle such *bakasht* lands with tenants during the continuance of the mortgage and the persons with whom the settlement is made would in any event acquire a non-occupancy right.

It has next been contended by the learned Vakil for the respondent that the settlement of the land by the *pro forma* defendants amounted to an encumbrance and a mortgagee in possession has no right to create an encumbrance beyond the term of his mortgage and the mortgagor is entitled to take possession of the mortgaged property free from such encumbrance and reliance has been placed upon the decision of the learned Chief Justice and Jwala Prasad, J. in M. A. No. 90 of 1920—*Mahadeo Prasad Sahu* v. *Gajadhar Prasad Sahu* (4). That decision has no bearing on the facts of the present case. The decision in that case turned upon the construction of a compromise decree which clearly provided that the appellant in that case was entitled to take possession of certain properties free from encumbrance created by the respondent and their Lordships held that the settlement in that case amounted to an encumbrance. In the present case there

(3) (1919) 52 I. C. 473.

(4) 1924 Pat. 362=1 Pat. L.R. 145.

is no reservation in the *bharna* deed such as was made in the compromise decree in that case, Mr. Tahir for the respondents further contends that the case made by the tenant defendants was that the lands in dispute formed their ancestral occupancy holding and that there was no allegation in the written statement that these defendants were in possession by virtue of a settlement from the *pro forma* defendants, and that the case made by them having filed, these defendants were not entitled to fall back upon a case of settlement from *pro forma* defendants not made by them in the written statement. It is true that no case of settlement was clearly made in the written statement, but, as I have already stated, they did make an allegation in paragraph 11 of the written statement that the *pro forma* defendants had a right to settle lands and an issue was distinctly raised on this point, and was considered by both the Courts below and it is too late now to say that no such case was made. It may be mentioned here that there is no finding in the judgments of either the trial Court or of the Court of appeal below that the settlement by the *pro forma* defendants was not a *bona fide* settlement. In fact, the point does not appear to have been pressed by the plaintiffs although an allegation to this effect was made in the plaint. In this view of the case the present action in ejectment treating the principal defendants as trespassers cannot be maintained. I would therefore, set aside the decree of the learned Judge and restore the decree of the Munsif. The appellants will be entitled to the costs of this Court.

Appeals allowed.

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* **1925 Patna 201.**

JWALA PRASAD AND ROSS, JJ.

Musammat Duljin Sona Kuer—Plaintiff-Appellant

v.

Musammat Bibi Ale Fatima and others—Defendants-Respondents.

Appeal from Original Order No. 110 of 1921, decided on 2nd August, 1923, against the decree of the Subordinate Judge of Patna, dated 21st January, 1921.

* (a) *Contract Act, S. 69—'Interested' does not mean only persons with a real interest.*

The word 'interested' ought not to be construed as meaning only a person with a real interest. If a person *bona fide* believes that he has interest in property and not merely for laying a claim makes some payment for those who are bound to make it he is entitled to reimbursement under S. 69.

(b) *Civ. Pro. Code, S. 10—Does not bar suit nor justifies dismissal.*

A suit cannot be said to be premature under S. 10 if there is a valid cause for it. S. 10 does not bar a suit nor can a Court dismiss a suit under the section. [P. 207, C. 1.]

(c) *Interest—Rate of.*

The rate of interest recoverable from a judgment-debtor has no reference to the purpose towards which the money is applied. It is determined by the market rate then prevailing.

(d) *Contract Act, Ss. 70 and 69.—Scope.*

A person believing in good faith makes necessary payments for the preservation of the estate pending certain litigation about it and if his opponent gets the estate in the litigation he is entitled to be reimbursed by the opponent if the person has failed, through no fault of his, to reimburse himself out of the rent of the estate. [P. 208, C. 2.]

P. K. Sen, Rai Guru Saran Prasad and *Raghunandan Prasad*—for the Appellant.

Sultan Ahmad, Nurul Hussain and *Hassain Jan*—for the Respondents.

Jwala Prasad, J.:—This is an appeal by the plaintiff against the decision of the Subordinate Judge of Patna, dated the 21st January, 1921. The facts are undisputed.

Bibi Fasihan, was a Muhammadan lady of rank, belonging to the Sunni sect of Mussalmans. She possessed considerable property. On the 21st of November, 1891, she executed a mortgage-bond in favour of Girdhar Das and others, mortgaging the following properties:—

1. *Mahal* Kurmi Chak,
2. *Mahal* Kasba Barowna,
3. Bankipur Machhiarawan,
4. Karnauti Khurd and Buzrug, and
5. Abdulla Chak.

The mortgagees obtained a mortgage-decree on the 2nd September, 1903, on foot of their mortgage which was made absolute on the 4th September 1905, in accordance with a compromise entered into by the parties whereby five years' time was given for payment of the entire decretal amount. The decretal amount not having been paid within the time allowed, the decree-holders put their decree in execution against Bibi Fasihan, and on her death against her heirs.

Bibi Fasihan died on the 2nd July, 1909, leaving behind her four daughters, named Fatima, Saera, Salema and Habiba, a son named Mohammad Umar by her first husband, and another son named Kalimuzaffar by her second husband. Before her death, between the 7th of May and the 8th of June, she executed several deeds of gift, two of them being in favour of Kalimuzaffar *alias* Cheddi, one in favour of her daughter, Habiba, and one in favour of her son Muhammad Umar. By these deeds of gift she gave her properties to her aforesaid children, the bulk of them to Kalimuzaffar. No deed of gift was executed in favour of her three daughters, Bibi Fatima, Saera and Salema. The donees, under the aforesaid deeds of gift, got their names registered as proprietors in the Collectorate in respect of the share conveyed to them by the lady and took possession of their respective properties and began to deal with them and to give leases, mortgages, etc., in favour of other persons. The three daughters, Fatima, Saera and Salema, in whose favour no gift was made by the lady, brought suits on the 26th of March, 1912 in the Court of the Subordinate Judge of Patna to have the aforesaid deeds of gift declared invalid and to recover their full shares of the properties left by their mother. These suits were subsequently transferred to the file of the District Judge of Patna where Fatima and Saera's suit was No. 6 of 1913. and Salema's suits were numbered 9, 10, 11 and 12 of 1913. All these suits were disposed of by the District Judge on the 8th April, 1914. The result of his decision was that all the deeds executed by the lady except the deed of gift of the 7th May, 1909, in favour of Kalimuzaffar were set aside. The parties affected by the decision of the District Judge appealed to this Court and by the decision of this Court, dated the 18th July, 1917, the appeals were disposed of, with the result that all the deeds, including the deed in favour of Kalimuzaffar, were set aside. The operative portion of the decision of this Court is as follows :—

"The deeds of gift, therefore, do not stand in the way of the heirs of Bibi Fasihan taking their shares under the Muhammadan Law. Her husband, Abdus Subhan, inherited a share of $\frac{1}{4}$ of the lady's properties, her two sons Umar and Kalimuzaffar each took 6/32 and each of her four daughters Fatima, Saera, Salema and Habiba took 3/32 of the properties left by her. The heirs of such of the aforesaid persons as have died since the death of the lady have succeeded to the shares inherited by their predecessors. The properties left by *Mt.* are, therefore, liable to be distributed among her heirs and the heirs of her heirs unaffected by dealings or transfers of interests in excess of their legal shares. As the donees and the heirs have been dealing with the properties since 1909 and the matter is complicated by claims of creditors and others it is useless to give each of the heirs a decree for his or her share in the ordinary way. The result of passing such decree would be endless litigation. The proper course appears to be to direct a general administration of the property of *Mt.* Fasihan under the orders of the Court. I would dismiss with costs Appeals Nos. 73 and 219 arising out of Suit No. 6, Appeal No. 42 arising out of Suit No. 9, and Appeal No. 339 arising out of Suit No. 11. I would allow with costs Appeal No. 112 arising out of Suit No. 6 and Appeal No. 581 arising out of Suit No. 6 and setting aside the deed of May 7th, 1909, I would declare that the heirs of the deceased are entitled to the shares specified above in the property of *Mt.* Fasihan. I would remand Suits Nos. 6 and 9 of 1913 to the Court below in order that in the presence of the parties a preliminary decree may be passed with reference to Order 20, rule 13, ordering such accounts and enquiries to be taken and made and giving such directions as may appear to be necessary. It will probably be necessary to appoint a Receiver or Commissioner to carry out the administration. Arrangement must be made to pay off the debts of the deceased as soon as possible. Those heirs or representatives of heirs who have been in possession of parts of the property should be debited with what they or persons claiming under them have received."

In Suit No. 6 of 1913 which was instituted by Bibi Fatima and Saera, in addition to the relief sought by the plaintiff to have the deeds of gift executed by Bibi Fasihan declared null and void, there was a further claim for administration of the estate and for partition of it among the heirs and for other reliefs. Suit No. 9 of 1913 was instituted by Salema to have the two deeds of gift executed in favour of Kalimuzaffar

alias Cheddi of the 9th May and 5th June, 1909 set aside and to have her declared in possession of her legal share in the properties of Bibi Fasihan. These two suits were, by the decision of this Court, referred to above, remanded to the Court below for the purposes of the joint administration of the properties of Bibi Fasihan and for the drawing up of a preliminary decree under Order 20, rule 13. We are, therefore, concerned with these two suits only, the other suits having been now fully and finally disposed of.

In accordance with the aforesaid directions of this Court the preliminary decree was drawn up by the District Judge on the 27th September, 1917.

While the litigation about the estate of Bibi Fasihan was going on, Muhammad Umar, one of her sons, who had a *hiba* deed executed in his favour by his mother, dated the 6th June, 1909, executed a mortgage-bond in favour of Dulhin Sona Kuer. That mortgage was executed on the 4th February, 1913, and was in respect of a sum of Rs. 85,000. The properties mortgaged in this bond by Muhammad Umar were thirteen *Mouzahs* out of a total of twenty which were conveyed to him by his mother under the deed of gift referred to above. Two of the mortgaged properties, namely, *Mouza* Kasba Barowna and Karnauti Khurd, and Bazrug had already been mortgaged by Bibi Fasihan along with certain other properties mentioned above on the 21st November, 1891 to Girdhar Das and others. Therefore, Girdhar and others were prior mortgagees in respect of these two properties covered by the mortgage of Dulhin Sona Koer.

Dulhin Sona Koer obtained a mortgage-decree on the basis of the aforesaid bond on the 25th February, 1915, and after it was made absolute she put the same into execution and purchased the aforesaid 16 annas of *Mahals* Kasba Barowna and Karnauti Khurd and Buzrug on the 20th June, 1916. In the meantime, Girdhar Das had put his decree into execution. That execution case was numbered 362 of 1914. *Mahal* Bankipur Machhiarawan, one of the properties mortgaged in the deed of Girdhar Das, was covered by the deed of gift in favour of Kalimuzaffar. On the 28th July, 1915, he paid Rs. 65,000 as the rateable share of the debt over the said properties to the decree-holder who agreed not to sell *Mahal* Bankipur Machhiawaran until after the other properties were sold and the sale-proceeds found insufficient to pay off the entire decretal amount; and he put in a petition to that effect in Court. His prayer was granted and *Mahal* Bankipur Machhiarawan, which was lot No. 1, was directed to be sold after all the other properties were sold, by the order of the Court dated the 28th July, 1915 (Exhibit 2). Girdhar Das, therefore, proceeded to sell the other properties and *Mahal* Kasba Barowna was sold for Rs. 36,500, Kurmi Chak for Rs. 41,000 and Abdulla Chak for Rs. 18,000. The sale took place on the 26th February 1916.

Muhammad Umar, Bibi Habiba and Sona Koer then instituted proceedings under Order 21, rule 90, to have the sale of *Mahal* Kurmi Chak and Kasba Barowna set aside. The sale was set aside on the 15th December, 1916. On the 15th January, 1917, one Janki Das and others purchasers of these properties appealed to this Court against the order of the Subordinate Judge setting aside the sale of the aforesaid properties. This appeal was disposed of on the 5th June, 1918, in terms of a compromise arrived at between the parties. In the meantime, in the administration proceedings which were pending before the District Judge, Mr. Jamil Ahmad was appointed Receiver on the 25th January, 1918 and he was, therefore, made a party respondent in the aforesaid appeal pending in the High Court as representing the estate of Bibi Fasihan. The decree of this Court, dated the 5th June, 1918, runs as follows :—

"By consent it is ordered that upon the judgment-debtors respondents paying to the appellants the consolidated sum of Rs. 15,000 on account of all and every claim the appellants may have against the judgment-debtors respondents the Appeals Nos. 7 and 8 of 1917 will be dismissed. The appellants will then be entitled to withdraw from the Court all and every amount deposited on account of the purchase-money in respect of the properties but the appellants will not be entitled to claim credit for any sum of money paid by them into the Government Treasury on account of Government revenue. If the above sum of Rs. 15,000 is not deposited here in Court to the credit of the appellants on or before the 26th June, 1918, the Appeals Nos. 7 and 8 will stand decreed with costs."

After the sales were set aside by the Subordinate Judge on the 15th December,

1916, the decree-holder was directed on that very day to deposit the necessary expenses and furnish materials in order that the execution and the sale of the properties might be proceeded with. On the 2nd January, 1917 the proceedings, therefore, continued and the plaintiff paid Rs. 36,500 to Girdhar Das, being the amount for which *Mahal* Barowna had been sold, and upon her doing so he obtained an order similar to that which was obtained by Kalimuzaffar referred to above, with respect to this property Barowna. The order of the Court was that Barowna should be sold after lots Nos. 3 and 4, *i.e.*, Kurmi Chak and Karnauti. As regards the money that was paid by her the Court's order was in the following words:—

"Let Rs. 36,500 be credited against the decree and let sale proclamation issue as prayed for in the petition."

Upon this the plaintiff paid Rs. 15,000 to the Receiver (defendant No. 20 in this case) to enable him to pay the amount directed by the compromise decree of the High Court to be paid to the purchaser of the aforesaid two *Mouzahs* before the sale could be set aside. The Receiver having got the money from the plaintiff, the Receiver paid the said sum to the purchaser and the aforesaid Miscellaneous Appeals Nos. 7 and 8 of 1917 in the High Court were dismissed on the 15th June, 1918, the result of which was that the sales of Barowna and Kurnauti were set aside.

Now in September 1916, the plaintiff as purchaser of the aforesaid properties in execution of her mortgage-decree against Muhammad Umar obtained delivery of possession through the Court. There was then still due to the plaintiff about Rs. 37,000 under her decree. She also got possession of other properties purchased by her except those that had already been sold for arrears of Government revenue, namely, Ibrahim Lodi, Syedpur Behrna and Supeasang.

After his appointment the Receiver wanted to take possession of these properties but the plaintiff refused to deliver up possession to him, and, on a reference being made to the District Judge, the matter was decided against the plaintiff on the 22nd March, 1918. The plaintiff then moved this Court in revision (No. 75 of 1918) against the decision of the District Judge. Her application was, however, dismissed by this Court on the 7th November, 1918, *vide* judgment, Exhibit B-1. It was held that the plaintiff having taken a mortgage and purchased the property during the pendency of the litigation, started at the instance of the heirs of Bibi Fasihan, impugning the validity of the gifts in favour of the plaintiffs'-mortgagor Muhammad Umar and others, she could not resist the taking of possession of the property by the Receiver who was appointed by the Court in the administration suit No. 6 of 1913. This Court further held that inasmuch as the plaintiff did not satisfy the whole mortgage-debt of Girdhar Das-Kesho Das she could not be subrogated to the position of the prior mortgagee. Her application for leave to appeal to His Majesty in Council was dismissed by this Court on the 27th May, 1919—*vide* judgment, Exhibit B. The result of this decision was that the Receiver took back possession of the aforesaid properties from the plaintiff on the 21st August, 1919.

Musammat Sona Koer applied on the 21st June, 1919 to the District Judge (*a*) to grant permission to execute her decree against the Receiver or (*b*) to direct the Receiver to pay Rs. 36,500 to her. On the 26th June, 1919, the District Judge granted prayer No. 1 on the same condition as was imposed upon Bibi Aley Fatima by order of the Court, dated the 19th May 1919. No order appears to have been passed with regard to her prayer to direct the Receiver to pay the sum of Rs. 36,500.

On the 10th December, 1919, she appears to have repeated her application for directing the Receiver to pay the said sum. In that petition she further asked that in case the money was not paid she may be given permission to sue the Receiver. This application was referred to the Receiver for report who submitted his report on the 19th December, 1919. In his report he stated that the *Musammat* was in possession of some of the properties yielding an income of Rs. 10,000 for which she was liable to account and also for mesne profits and that she had withdrawn the surplus sale-proceeds amounting to about Rs. 40,000 and odd in respect of village Supasang appertaining to the estate and that she being a party to the administration suit her claim to the aforesaid sum of Rs. 36,500 could be considered in the administration proceedings, and the Receiver further added that her application was premature and not

entertainable. The Court recorded the following order :—

"Read Receiver's report, dated the 19th December, 1919, on the petition of *Musummat* Sona Koer filed on 10th December, 1919, for payment of Rs. 36,500 with interest and for grant of permission to sue the Receiver : Ordered, permission is granted".

Accordingly the present suit was instituted and she filed her plaint on the 2nd January, 1920. She claims in this suit the aforesaid sum of Rs. 36,500 with interest at the rate of one per cent. per mensem from the date of payment, *viz.*, 2nd January, 1917, up to the date of the filing the plaint, amounting to Rs. 49,640.

Defendants Nos. 1 to 6 are the heir of Muhammad Umar, defendant No. 7, is Kalimuzaffar, defendants Nos. 8 to 11 heirs of Bibi Solema, defendants Nos. 12 to 15 heirs of Bibi Fatima, defendants Nos. 16 to 18 heirs of Bibi Saera, defendant No. 19 is Bibi Habiba and defendant No. 20 is the Receiver. Defendants Nos. 1 to 6, 8 to 11 and 16 to 20 filed different sets of defence on substantially the same grounds. In short their objections were that the suit is not maintainable in its present form, that the estate of Bibi Fasihan was not benefited by the plaintiff's payment : nor can she recover the same from the defendants, that the plaintiff withdrew the sum of Rs. 40,000 odd from the Collectorate out of the sale-proceeds of *Mahal* Supasang and other villages and the said sum should be set off against the plaintiff's claim and that her suit is barred under section 10 of the Civil Procedure Code.

The aforesaid pleas gave rise to the following issues :—

"1. Is the suit as framed maintainable ?

"2. Has the plaintiff a valid cause of action against the defendant No. 20 ?

"3. Whether the defendants are entitled to any set off. If so, can they claim it without payment of Court-fee and for what amount ?

"4. Is the plaintiff entitled to contribution ? If so against which defendant ?

"5. Can the plaintiff maintain the present suit in the face of proceedings of the administration suit pending before the District Judge and in face of section 10, Civil Procedure Code ?

"6. Is the plaintiff entitled to get interest, and if so, at what rate ?

"7. To what relief, if any, is the plaintiff entitled ?

The learned Subordinate Judge decided all these issues in favour of the defendants with the result that the plaintiff's suit has been dismissed. She has, therefore, come to this Court in appeal.

I will first dispose of Issue No. 5. The learned Subordinate Judge records the following finding upon this issue :—

"It requires no decision in face of the above finding, but I have already remarked above, that it would have been better had the plaintiff put forth her claim in the Administration Court."

In the previous paragraph, the Court in dealing with Issues Nos. 1, 3, and 4, remarked as follows :—

"Admittedly plaintiff withdrew a large sum of money out of the surplus sale-proceeds from the Collectorate and admittedly she has been in possession of the property, the income of which was also considerably large. The plaintiff is admittedly to account for these items. But it is urged for the plaintiff that all these accounts will be taken in the administration suit which is pending before the District Judge, and if she is found liable she would be called upon to pay. In other words plaintiff wants to take away her own money and ask the defendants to wait till the administration suit is decided. I think all these questions can be fully tried by the Administration Court and no preference should be given to plaintiff's claim over that of the defendants, at least the equity requires so. Hence there seems to be no reason to grant any relief to the plaintiff in this suit."

Continuing the Subordinate Judge says : "For these reasons I am of opinion that the suit is not maintainable, that if plaintiff wants any relief she may come under the provisions of the mortgage law with a suit properly so framed in the light of the observations made above. I, therefore, decide these issues against the plaintiff and in defendant's favour."

The Subordinate Judge also quoted a passage from the judgment of Mullick, J., (Exhibit B-1) to the effect that the mortgage of the plaintiff was affected by the litigation which was pending at the time when the plaintiff took her mortgage and until the administration suit was over, it could not be known how much of the property would come into the hands of the plaintiffs as a representative of Muhammad Umar, and it might be that no residue

might be left which might come into the plaintiff's hands.

These are the grounds upon which the learned Subordinate Judge considered the case of the plaintiff to be premature. But the suit has been dismissed upon the principal ground that the plaintiff paid the money in question to Girdhar Das and Kesho Das voluntarily in order to secure benefit to herself and not with a view to confer any benefit to the estate of Bibi Fasihan, and that, as a matter of fact, the estate of Bibi Fasihan was not at all benefited, in other words according to the learned Subordinate Judge the plaintiff cannot recover the amount paid by her either by way of contribution from the other co-heirs of Muhammad Umar, she representing Umar's interest, nor can she recover the property from them under the provisions of sections 69 and 70 of the Indian Contract Act. In other words, the learned Subordinate Judge is of opinion that she can under no circumstances recover the money from the defendants in the present case. Therefore, whether the claim is premature or not does not affect the decision of the learned Subordinate Judge, for the plaintiff in no circumstances is entitled to press her claim against the heirs and legal representatives of Bibi Fasihan or her estate now in the hands of the Receiver. This view of the matter makes it certain that unless the plaintiff establishes her claim to recover the amount paid by her from the estate of Bibi Fasihan the Receiver of the Court in the administration suit cannot possibly grant any relief to her.

The Receiver in his report referred to above did not definitely state that the claim was untenable, but from the attitude assumed by the Receiver in the subsequent stage of the case, and particularly in the written statement, it is impossible to conceive that the plaintiff had the remotest chance of getting her relief in the administration suit. The Court did not venture to enquire into her claim when she put it forward just after her discomfiture in this Court *vide* judgment dated the 7th November, 1918 (Exhibit B-1). Her first application, as stated above, was made in June, 1919 and the consequent dispossession of the property in August 1919. Her second application was made on the 10th December, 1919 while the claims of other creditors either of Bibi Fasihan or of her heirs were being dealt with by the Receiver and the Court administering the estate of Bibi Fasihan; but no definite decision was arrived at with respect to the claim of the plaintiff because of complications having arisen on account of the purchase of the properties by Girdhar Das, the prior mortgagee; but the sale of these properties was set aside, and when the matter came before this Court in revision it was held that the plaintiff's mortgage was affected by the doctrine of *lis pendens* and that she could not be subrogated to the position of a prior mortgagee. The lower Court's order of the 19th December, 1919 referred to above contained in three words, "permission is granted" does not give any reason for the said order, far less does it promise any investigation into the claim of the plaintiff. Probably as the estate was being administered by the Court and as the claim of the plaintiff had to be enforced against the estate, the permission of the Court would be necessary. If that was so, the bar, if any, to institute the present suit was removed by the order of the Administration Court. In face of that order and in view of the fact that there was never any intention on the part of the Receiver or of the Court to investigate the claim of the plaintiff, to my mind it seems that there was no option left to her but to have her claim established in Court by a separate suit.

In order to apply section 10 of the Code of Civil Procedure as a bar to any further proceeding with the trial of the present case, it is necessary to show that the matter in issue involved in the present case was also directly and substantially the same as in the administration suit. The claim of the plaintiff to recover the aforesaid sum upon the facts alleged in the plaint was not at all pending in the administration case as the aforesaid order of the Court clearly indicates.

Again the section does not bar the suit but it only says that the trial of it shall not be proceeded with, and thirdly that the Court under that section has no jurisdiction to dismiss a suit but can only postpone the determination of the same until the cognate case pending in another Court is disposed of. In other words the Code provides for the trial of only one of two or many suits if the same issue is directly and substantially involved, in order to save time and possibly a conflict in the views

taken by different Courts of concurrent jurisdiction with respect to the same matter. Nor does the section dispense with the necessity of instituting such suits.

> Under this section a suit cannot be said to be premature provided that there is valid cause for it. No authority is needed to support the aforsaid proposition for the section itself is clear, *vide* however the case of *Nemagada* v. *Paresha* (1). The learned Subordinate Judge is, therefore, wrong in holding that the present suit is either barred or that it is premature; he is also wrong in dismissing the suit upon that ground.

The next question is, and that is the material question in the case, is the plaintiff entitled to recoup herself from the estate of Bibi Fasihan? It is not denied that Rs. 36,500 paid by her to Girdhar Das was a debt over the estate of Bibi Fasihan under the mortgage executed by Bibi Fasihan on the 21st of November, 1891 and that after her death in 1909 her heirs and representatives took her estate burdened with that debt; and, before they can distribute among themselves the assets of the estate and the properties of the deceased, it is incumbent upon them to discharge the said debt. Rupees 36,500 is part of the mortgage-decree for the payment of which each and every property included in the mortgage is severally and jointly liable.

Subsequent to the mortgage Bibi Fasihan chose to execute certain deeds of gift referred to above in favour of some of her children preferring them to others, Muhammad Umar was one of her children on whom her favour seem to have been bestowed and he was given 16-annas of the properties, whereas his share therein was only three annas. In 1912 some of Bibi Fasihan's heirs objected to the deeds of gift made in favour of some of her children on the ground that their shares in the properties of Bibi Fasihan were reduced on account of the deeds in question and this naturally led to litigation.

The plaintiff in this case took a mortgage of 16 annas of some of the properties conveyed to Muhammad Umar by his mother after the suits that were instituted by the daughters of Bibi Fasihan, namely, Fatima, Saera and Salema. The plaintiff, no doubt, took the mortgage subject to the final decision in the case which was then pending and which has now resolved itself into the administration of the estate of Bibi Fashian. Her claim under the mortgage is, as held by this Court, affected by the doctrine of *lis pendens* and possibly after the final administration her claim might be either reduced or wholly extinguished by reason of there being nothing left in Muhammad Umar which she could take as his mortgagee. But that is the question which has to be decided because the plaintiff in her capacity as mortgagee is claiming under the mortgage executed by Muhammad Umar. We, in this case, are not concerned with that. Her position as mortgagee is relevant only in order to find out whether she had any interest or supposed interest in the properties of Bibi Fasihan so as to impel her heirs to pay the debt over the estate.

Now at the time when the plaintiff paid the money, the sale of the mortgaged properties was set aside but the properties had really not gone out of danger. The execution was proceeding and there was no order of the High Court in the appeals that were filed by the purchasers against the order of the Subordinate Judge setting aside the sales, to stay further proceedings in the execution, and from the record of the execution case we find that the Court as well as the decree-holder was strenuously pursuing the properties in question and orders for the issue of sale proclamation had already been passed. Kalimuzaffar, defendant No. 7 had already paved the way as to what should be done by one interested in the properties which were the subject of the mortgage of Girdhar Das-Kesho Das. To him, as to Umar, 16 annas of another property *Mahal* Machhiarawan was given by their mother under the deeds of gift. He settled with the decree-holder to pay a proportionate sum of the decree and to have this property sold last of all. Thus this property would be exempt from sale in the event of the entire sum due under the decree being realised by the sale of other properties or the liability would be in any case considerably diminished.

The plaintiff also resorted to the same remedy. She paid Rs. 36,500 as the proportionate share of *Mahal* Barowna and got an order from the Court with the consent of the decree-holder to sell it after Kurmi Chak and Karnauti. This arrangement will not in any way affect the liability of the properties which were mortgaged to Girdhar Das and Kesho Das. That

(1) (1898) 22 Bom. 640.

payment, whatever be the arrangement between the parties, was to go towards the satisfaction of the decree and as a matter of fact the Court directed that the said money be credited towards the satisfaction of the decree.

No doubt the record of the case has grown into an enormous magnitude and the case has been complicated on account of the number of villages and the diversity of the interests held by the heirs. But the very statement of the case, so far as the present point is concerned, makes it simple. The order of the Court, as observed above, was that the amount paid by the plaintiff be credited towards the decree and this was done. Now this decree the heirs of Bibi Fasihan are bound to discharge. If the plaintiff had not paid the proportionate amount of the decree *viz.*, Rs. 36, 500, it would have been realised by the sale of the mortgaged properties which had not then been sold, and it is immaterial whether the liability in the final adjustment of the decree in question would have fallen upon *Mahal* Barowna.

Now whose property was saved by this payment of Rs. 36, 500? It was the property of Bibi Fasihan. Then the question that might be asked by the heirs of Bibi Fasihan is "why do you lay claim to the property Barowna and others." If the money was not paid by the estate, then the heirs of Bibi Fasihan would be bound to pay it; if not, the estate of Bibi Fasihan would be sold, and in that event probably the interest of the plaintiff would also have been extinguished. But that is no consideration for holding that the estate of Bibi Fasihan was not benefitted by that payment. The Receiver as a matter of fact went to the length of paying Rs. 15,000 as compensation under the compromise decree of the High Court in order to prevent the sale of the properties including Barowna for whose sake—not for the sake of the plaintiff but for the sake of the heirs of Bibi Fasihan—the money was paid. Therefore, I have no hesitation in holding that the money was paid for the benefit of the property which at that time the plaintiff thought belonged to her, or there was a possibility of her having an interest in it; but at the same time the Receiver, as representing the heirs of Bibi Fasihan, thought that the property was, as a matter of fact, Bibi Fasihan's. The question then is whether the lady was interested in making the payment. She is a mortgagee of the estate of Muhammad Umar. Muhammad Umar is admittedly an heir of Bibi Fasihan and has an interest in the estate left by her though not of 16 annas yet of 3 annas at least in all the mortgaged properties of the estate of Bibi Fasihan. If the property had been sold in execution of a prior mortgage-decree and not redeemed either by the mortgagor or the puisne mortgagee, the puisne mortgagee would be sure to suffer and that was the position in which the plaintiff was placed. Therefore the plaintiff was interested in the payment of the money. It was through the Court that she obtained a title under her sale certificate in execution of her decree and delivery of possession; she lost possession of the property on account of the decision of this Court but she was always entitled to call upon the persons representing the estate of Bibi Fasihan to pay the debt that she had discharged in order to re-imburse her. This is to be gathered from the observation of Lord Macnaghten in the case of *Dakhina Mohan Roy* v. *Sarada Mohan Roy* (2). In that case the plaintiff obtained possession under the decree of the High Court of a revenue-paying estate and he paid the rents and cesses in default of which payment the estate would have been sold. The High Court decree was afterwards reversed by the Privy Council. In 1885 the defendant obtained possession of the estate in execution of the High Court decree, and the plaintiff claimed the revenue and cesses paid by him while he was in possession of the property. Their Lordships observed:

"It seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to re-imburse himself out of the rents."

Now if Muhammad Umar had made the payment, would he not have been entitled as heir of the three annas share in the estate of his mother to ask the other co-heirs to contribute towards it? We find

(2) (1894) 21 Cal. 142=20 I.A. 160=6 Sar. 366 (P.C.).

that this principle was accepted in the practical dealings with the estate in question in the administration proceedings, and Kalimuzaffar one of the heirs, having a seven annas share paid off Rs. 65,000 in order to save the property Machhirawan, the sixteen annas of which was given to him, from being sold. The Receiver without any objection makes that sum a charge upon the estate of Bibi Fasihan and the Court sanctions it. Dulhin Sona Koer then stepped into the shoes of Umar by reason of his mortgage which was a transfer of the property held by him in the true sense of the word and as defined in the Transfer of Property Act. Therefore, what Umar could do Sona Koer could also do. If she paid the money, as she did, she has as much right as Umar had (and this was recognised in the case of Kalimuzaffar) to ask the other heirs to contribute towards the payment and to recoup her on account of the money that she had advanced. Upon this principle, therefore, not only, sections 69 and 70 will apply but various other sections of the Indian Contract Act, *viz.*, sections 43, 68, 69, 70 and 72. In a case of this kind one is not to be pinned down to a particular section of the Act but all the sections read together laid down the principle upon which one paying money out of his own pocket is entitled to recoup himself from those who either derive benefit out of it or are bound to pay. It is also immaterial whether the person paying the money had a real interest or not. The word "interested" used in section 69 cannot have such a narrow meaning. If *bona fide* one believes that he has an interest in property and not only as a pretext for having a claim against those who are bound to make the payment, there is no reason why the law should not compel the person ultimately benefitting by the payment to return the money to the payer.

In this connection I would like to refer to the authorities quoted in the judgment in Second Appeal No. 1067 of 1921 delivered by me on the 28th June, 1923 [*Rang Lal Sahu* v. *Kali Shankar Sahai* (3)]. The principles of those cases would apply therein but did not apply to the second appeal which was disposed of by me.

I, therefore, hold that the plaintiff is entitled to get back the money paid by her from the estate of Bibi Fasihan and that this should be treated in the same way as the payment made by Kalimuzaffar.

We, therefore, set aside the decision of the Subordinate Judge and in its stead make a decree to the effect that the plaintiff is entitled to recover the sum of money claimed by her from the estate of Bibi Fasihan.

Then the question is whether she is entitled to recover the rate of interest of one per cent. per month as claimed by her and which was stipulated in her mortgage-bond. This was the rate of interest and perhaps compound interest agreed to by Bibi Fasihan when she executed the mortgage-bond in favour of Girdhar Das-Kesho Das. The learned Vakil on behalf of the respondents contends that 6 per cent. per annum should be allowed to the decree-holder inasmuch as that is the rate directed by the decree of the Subordinate Judge to be paid to Girdhar Das. That is no doubt the rate of interest on the amount of Girdhar Das' decree but the payment made by the plaintiff was out of her own pocket and if the Receiver of the judgment-debtors had had to borrow money from outside in order to pay the decree they would have had to pay the market-rate of interest. That is the test which is applied to all such cases, and in our experience we know that when a decree has to be paid by a creditor he does not borrow money at the rate of interest mentioned in the decree but he borrows it at the market-rate, so the purpose for which the money was applied would not determine the rate of interest but the rate of interest which was prevailing at the time. No evidence has been given in this case as to what the market-rate of interest was at the time, nor has it been shown that the rate of interest mentioned in the bond is excessive or more than the market-rate prevailing at the time. Therefore, the bond rate must be deemed to be the market rate in the absence of any evidence to the contrary. But in the circumstances of the case compound interest is not allowable; nor has it been claimed. Therefore, simple interest only at the rate of one per cent. per month will be allowed.

The result is that the decree of the Court below is set aside and in lieu thereof there will be a decree in favour of the plaintiff to recover from the defendants the sum of money claimed by her with future interest at

(3) 1924 Patna 235 = 2 Pat. 890 = 1923 Pat. H.C.C. 353.

the rate of 6 per cent. per annum. The heirs of Bibi Fasihan are liable to the extent of the assets of the estate which have come into their hands. Bibi Fasihan's estate being in charge of the Receiver he shall administer it in the administration suit and the decretal amount in question together with interest will be paid by the Receiver out of the joint assets of the estate of Bibi Fasihan. In doing so, the Receiver will take into account the liabilities of Dulhin Sona Kooer and her successors-in interest of the estate. These liabilities will be set forth in the judgment in Civil Revision Cases Nos. 177, 291, 300, 309, 310 and 312 of 1923 which have been heard along with this appeal.

The appeal is decreed with costs.

Ross, J.:—I agree.

Appeal accepted.

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* 1925 Patna 210.

DAS, J.

Narayan Singh—Plaintiff A-ppellant.

v.

Nawab Saiyid Dildar Ali Khan and another—Defendants-Respondents.

A.A.O. No. 156 of 1920, decided on 8th May, 1924, against the decree of the Sub-Judge of Hazaribagh, dated the 6th April, 1920.

(a) *Tenure—Ghatwalli Tenure may be alienable by custom—Inalienability is destroyed by cessasion of service.*

Ghatwalli tenures may be alienable by custom. But if the Government releases or abolishes the services in some effective and lawful manner the incident of inalienability will pass away. In Kharagdhi, Ghatwalli Tenures are alienable by custom. [P. 212, C. 2.]

(b) *Tenure—Service Tenure require duty of service of a personal nature to make it a service tenure.*

Where there is no duty or service of a personal nature imposed upon the grantee of the tenure and he is merely required to appoint Police patrols and to pay for them, the tenure is not a service tenure and not ghatwalli in its nature. Mere compulsion to pay rent or revenue imposed upon the grantee does not make the tenure a service tenure. [P. 214, C. 2.]

* (c) *Court Fee—Can be claimed on relief apparently claimed.*

The question of Court-fees has to be decided with reference to the claim. The Court cannot insist on Court-fee on consequential relief not actually asked on the ground that the plaintiff has cast the reliefs in such a form as to conceal the real nature of the relief, though if consequential relief is not asked when it could have been asked, the suit may be dismissed. [P. 215, C. 2.]

* (d) *Possession—Presumption of possession.*

Where title is not proved the law will raise from definite physical control of part of land, a presumption of possession of that which the possessor has shown a clear and un-ambiguous intention to possess. [P. 216, C. 1.]

N. C. Sinha, N. C. Ghosh and *Bindeshwari Pershad*—for the Appellant.

Saiyid Abdul Aziz, Naimatullah, Nuruddin and *Ragho Prasad*—for the Respondents.

Das, J.:—I entirely agree with the decision of the learned Subordinate Judge. The arguments of the learned Vakil for the appellant are mainly, if not entirely, based on the recent decision of the Judicial Committee in the case of *Satya Narain Singh* v. *Satya Niranjan Chakravarty* (1). Now, in that case the question turned upon the construction of a grant of a permanent ghatwalli tenure made to the predecessor in title of the appellant by Capt. Brown in 1776, and the only point of law established in that case is that the nature of the estate which was the subject-matter of the grant rested upon the true construction of the grant and "not upon the notions entertained about them in later generations". Their Lordships of the Judicial Committee construed the grant and referred to "the most significant clause in the grant": "when called by the Huzur you should be escorted by a body of archers and Barkandazes 307 in number, of whom the Sirdars will be 7 and archers and Barkandazes will be 300, and should appear before the Huzur". Referring to this clause, their Lordships said as follows:—

"Their Lordships are further unable to refer the obligation to furnish a force of 307 men to any ordinary police administration of a Bengal Zemindari. The force is precise and it is large: it is military rather than civil; it does not vary according to the needs of the moment, but is fixed at a standing number at all times, and attendance on the Huzur with the whole force on demand is clearly beyond the scope of mere constabulary duties. Effect must be given to these very special and express words, and although no forfeiture is stated in case of non compliance

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(1) 1924 P.C. 5=3 Pat. 183=51 I.A. 37=28 C.W.N. 351=34 M.L.T. 27=5 P.L.T. 171 (P.C.).

with them, it is only possible to do so regarding them as descriptive of an obligatory service tenure, whether of the ordinary ghatwalli type or not, and as the condition on which the ghatwal holds the lands". In another place in their judgment, their Lordships made the following observations :—"The tenure-holder has to raise and maintain the force, not merely to pay for it. Whatever may be the other incidents, it is clear that these grants impose on him the duty of providing a specific armed force and of attending with it upon the competent Government Officers whenever this service is required of him. What can this be but a service tenure?" And in summing up their conclusions with regard to the construction and effect of the patta of 1776 and the confirmatory sanad of 1794, they said as follows :—

"(3) The express obligation imposed on the grantees as an integral part of the grant, to support a specified number of Barkandazes, and with them to attend the Huzur when required, shows that the tenure is a service tenure and is ghatwalli in its nature.

"(4) A tenure so granted is inalienable and indivisible".

I will now examine the grant in favour of the predecessor in-title of the plaintiff to see whether the tenure at its inception was a service tenure and therefore inalienable. The grant was made by Mr. Chapman, the Agent of the East India Company to Tekait Paran Singh, described as "the malik and mustajir of Gadi Ghoranji" on the 8th November, 1780. The document which has been produced by the plaintiff is addressed to "Mutsaddis of affairs of the present and future Chaudhuris and Kanoongoes of the District Kharagdiha," but in the margin occur these words in English, in the handwriting of Mr. Chapman, "Patta granted to Tikait Paran Singh, ghatwal of Ghoranji for the year 1188 Fasli, Jama Sika, Rs. 435-15-0". We may then accept Ex. 2, which is the document produced by the plaintiff, as the patta granted to Tekait Paran Singh, though it was not expressly addressed to him. The opening words of the documents are as follows :—"Under orders of the Bengal Council, this Sanad is granted (letting out) Gadi Ghoranji appertaining to the said district, in Istimrari Mokarrari to Tikait Paran Singh, Malik and Mustajir, of the said Gadi (with effect from) 1188 Fasli fixing Rs. 435-15 Sahwat (coins of) the present currency as the annual consolidated jama". Though the grant is of Gadi Ghoranji, there is express exception of "Chakran Jagirs". Most of the clauses (and they are not many) impose duties which are ordinarily discharged by the zemindars ; but then occurs this clause upon which reliance is placed by the plaintiff-appellant." Also, besides paying Government Revenue, he shall appoint Barkandazes and Digwars with one Sirdar as Chakars of Chakran lands, in order to guard the roads of the villages appertaining to the said Gadi, and see that the same are well guarded. Also if any murder, riot, theft, or highway robbery, etc., take place in their jurisdiction, they shall be treated, as offenders against Government and be dismissed from their posts. Whenever the said Chakars shall be called for by the authorities, the Sirdars with his subordinates shall attend in person. If any one himself takes any ill-advised step or gives evil advice to others, in consequence of which the work of Government suffers, he shall be removed from his situation after enquiry and judgment, and he shall not be allowed to enter the said Gadi again".

In my opinion, there is all the difference in the world between the duties imposed on Paran Singh and those imposed on the grantee in the case to which I have referred. Here his sole duty consists in appointing Barkandazes and Digwars, and, it may be, paying for them, though I am not sure that the exclusion of the Chakran lands from the grant did not imply that these Barkandazes and Digwars were remunerated by grant of Chakran lands expressly made to them by the Government, and not by any wages paid by Paran Singh to them. These Chakran lands, as the document shows, were situate within the ambit of Gadi Ghoranji, and it may well be that they were settled by the former Maliks and Mustajirs of the gadi with Barkandazes and Digwars on conditions of service. Now the earlier history of the Gadi shows that it was one of the 84 divisions called Gadis of Kharagdiha which originally formed part of the zemindari of Siwar Muhammadabad, the property of Maharajah Mode Narain Deo. The Ghatwals recognized the Maharaja as the chief through whom they paid their small

tribute to the ruler of the country, and they considered themselves as independent of his authority. It was recognized by the East India Company that the Ghatwals were a turbulent set of men worth winning by methods of conciliation, because of their influence in their country and their solidarity among themselves, and it was in pursuance of this policy, that, ignoring Maharaja Mode Narayan, the East India Company entered into direct settlement with the Ghatwals of Kharagdiha. Now, I am not unmindful of what was said by the Judicial Committee in the case to which I have referred, namely, that where the instrument contains words of grant and purports to make a grant on behalf of and in the name of the East India Company, it must be so interpreted, and that this construction cannot be defeated merely because there may be ground for thinking that the grantee was already the holder of the lands under earlier grants. The tenure, in the present case, is undoubtedly a Government tenure, but the question remains, is it a service tenure? I was referring to the earlier history of the gadi to show that, prior to the date of the grant, the Tekait, referredto in the document as "the milk and mustajir of Gadi Ghoranji", was undoubtedly in the possession of a zemindar, and it is not unreasonable to assume that he, or his predecessors-in-title made grants of lands to various persons on condition of guarding the roads of the villages and rendering other services usually rendered by village police. In entering into the settlement with the Tekait of Ghoranji the Government was careful to exclude the Chakran lands from the grant, and it would appear as if the Government took it out of the power of the Tekait to resume these Chakran lands and to put an end to the services rendered by the Digwars. If I am right in this view, then the estates known as Gadi Ghoranji, were not even subjected to a pecuniary charge, and the only duty which was cast on the Tekait under the patta was to appoint these police officers. I will assume, however, that the Tekait was required to pay for the services of these police officers, and that the Gadi Ghoranji was subjected to a pecuniary charge for the wages payable to these police officers. Even then, there were no services to be rendered by the Tekait so that the personality or the appointment of the holder of the gadi would be of no importance. In the case before the Judicial Committee, the grantee was required to go round the villages escorted by archers and Barkandazes and protect the villages. In the case before us, the duty is cast, not on the grantee, but on the Barkandazes and the Digwars to guard the roads of the villages. In the case before the Judicial Committee, the grantee was required whenever called upon to appear before the Huzur with a force of 307 men. In the case before us, no duty is cast upon the grantee to appear before the Ruling Authority, but a duty is cast upon the Chakors to attend the authorities whenever required by them to do so. In short, there are no services of a personal nature to be rendered by Tekait Paras Singh under the Sanad of the 8th November, 1780. How can it then be suggested that the tenure was a service tenure and was ghatwalli in its nature?

I will however assume that, though there were no services to be rendered by the Tekait, the fact that the grant imposed on him the duty of providing the village police was sufficient to impress the tenure with a ghatwalli character. It is conceded in the judgment of the Judicial Committee that such a tenure may be alienable by custom. It is also conceded that the incident of inalienability ceases to attach to the tenure if the Government releases or abolishes the services in some effective and lawful manner. I will first deal with the question of custom. My difficulty in dealing with this point is that the question was not discussed in the judgment of the Subordinate Judge. But the issue was clearly raised in the third paragraph of the written statement, and, as evidence of an unimpeachable character is in the record, I am clearly of opinion that I should express my views on this point. In the case of *Kali Pershad* v. *Anund Ray* (2), the Judicial Committee pointed out that ghatwalli tenures are generally inalienable, but that evidence may be given to show that in a certain district they are by local custom subject to special incidents in this regard. Such evidence was forthcoming in that case and was to the effect that many transfers had taken place in Kharakpur without being questioned or questionable, provided that the Zamindar of Kharakpur

(2) (1888) 15 Cal. 471=15 I.A. 18=5 Sar. 121 (P.C.).

expressly assented to and accepted the transferee as his ghatwal. In this case we are dealing, not with a Kharakpur ghatwali, but with Kharagdiha ghatwali, and we have conclusive evidence that numerous transfers have taken place in Kharagdiha without being questioned either by the holders of the gadis or by the Government. Ex. DD is the letter addressed by Capt. Wilkinson to the Government on the 3rd October, 1834 on the serious situation created in Kharagdiha, by reason of the chronic state of indebtedness of the Kharagdiha Ghatwalis. Capt. Wilkinson pointed out that Kharagdiha formerly consisted of 84 divisions designated gadis of which there were 51 in the agency, the rest having been transferred to the other Zillas. Dealing with 28 of the gadis which were permanently settled with the ghatwals, he said as folllows:—"One of the gadis Lataki was sold in auction, and the heirs of the old proprietor subsist on charity collected from relations. One Kagali, was sold privately, and the family of the proprietor are in the same condition as the Lataki family. Of eight gadis, namely, Chakmanjo, Khurchutta, Daopur, Doetan, Domchanch, Ghoranji, Jurria, Beria portions have been sold in different times by auction in satisfaction of decrees and by private sale. The portions which remain in the names of the ghatwals or zemindars are pledged to Mahajans, and the Zemindars or ghatwals are in the greatest distress. The produce of the portion pledged will not cover the interest accruing on the last bonds executed. Eighteen gadis and the names are given "are still in the possession of the heirs of the original ghatwals. They are all much involved in debt for the payment of which nearly the whole of their lands have been pledged to Mahajans and their condition is little better than those mentioned above." After pointing out that, if the Mahajans were allowed to recover their debts under Reg. 15 of 1793, 1 of 1798 or 17 of 1806, they must become proprietors in the course of three or four years of the whole landed property of Kharagdiha, he asked for special permission to be allowed "to investigate the accounts with the parties without any attention to documents which have been intermediately executed." He suggested that there should be no appeal from his decision to the Sudder Dewani Adalat. Mr. Sifton points out in his final report on the Survey and Settlement operations in the district of Hazaribagh that the proposals of Captain Wilkinson received the immediate approval of the Government, and an order was passed under section 5 of Reg. 13 of 1833, declaring that no appeal against the agent's order in these matters should lie to the Sudder Dewani Adalat. Finally the Chota Nagpur Encumbered Estates Act was passed in 1876, extending the protection of the State to all Encumbered Estates in Chota Nagpur. Mr. Sifton points out that there are at present only 12 gadis which are still the property of the original Ghatwali families and 12 others in which the original families still retain a portion of their property.

Two questions fall to be considered first, what is the effect of the numerous transactions which have taken place as a result of which the estates or portions of the estates belonging to the Kharagdiha ghatwals have passed into the hands of strangers? Secondly, what is the effect of the legislation, and particularly of the Encumbered Estates Act by which the protection of the state has been given to the encumbered proprietors of Chota Nagpur, including the Kharagdiha ghatwals? To take the first question, it is remarkable that there was no effective protest by the Government against the power of alienation exercised by the ghatwals. It is not that the Government did not appreciate the fact that it was necessary to maintain the ghatwals in the possession of their estates. Capt. Wilkinson, in his letter to the Government, stated the position in these words:—"The consequence of the Tekait's being deprived of their lands would, I am convinced, be disturbances of a nature something similar to those in Nagpur and Birbhum for the Tekaits, although ignorant, have great influence over the inhabitants of the country who are chiefly men of their own and other low castes impressed with an idea that they have been cheated out of their lands by the Mahajans assisted by their own Karpardazes who have not unfrequently been near relations of the Mahajans". The Government took effective means for the protection of the Tekaits, but it never struck any one to raise the question whether these tenures were at all alienable. In my opinion, the evidence establishes that there is a well-recognised custom in

Kharagdiha under which these tenures have become alienable.

The other question is equally important. If these gadies were originally inalienable, the ghatwals did not stand in need of any state protection. The Chota Nagpur Encumbered Estates Act of 1876 was passed, as the preamble shows, "to provide for the relief of holders of land in Chota Nagpur who may be in debt, and whose immoveable property may be subject to mortgages, charges and liens". Now this Act is the final effort on the part of the Government in the process of giving relief to "the holders of land in Chota Nagpur" which began with the action taken on the letter of Captain Wilkinson in 1834. It is not necessary to go through the provisions of the Act, it is sufficient to point out that powers of a very sweeping kind are given to the executive officers to protect the encumbered holders of land in Chota Nagpur against the claims of creditors. Now there is no doubt that the ghatwals of Kharagdiha come within the scope of of the statute, and that the Act has been applied in their favour again and again. Now, if these estates, were originally inalienable, how is it that the Legislature proceeds to devise means for the protection of those estates against the claims of the creditors? I regard the statute of 1876 as a legislative interpretation of the sanads under which the ghatwals of Kharagdiha held lands.

The last question is whether the Government has released or abolished the services renderable by the ghatwals in some effective and lawful manner. As I have pointed out, the only obligation imposed on the Tekait of Ghoranji under the Sanad of the 8th November, 1780, was to appoint the Barkandazes and the Digwars, and, it may be, to pay for their services. It will be found from Mr. Sifton's Final Report on the Survey and Settlement Operations in the District of Hazaribagh that the policing of the district was kept up by the ghatwals until 1834. In 1834, Government began to establish police stations, and in 1862, Government took over the entire management of the police under Act V of 1861 and abolished the police powers of the zemindars. The Government then took up the question of the proper reorganisation of the rural police or Digwars, and in 1877 Mr. Davis, the Superintendent of Police, presented a scheme for re-organisation of the Digwari system throughout the district by means of Digwars paid by cash wages. He found that 938 Digwars were actually being maintained by the zemindars, his scheme reduced the number of Digwars to 450 to be distributed over 109 road posts for patrol duty, and he calculated the cost of the establishment to be Rs. 2,220 per month. As the zemindars had alienated portions of their estates to Digwars who would now be relieved of their duties by the substitution of paid road patrols, it was decided that the zemindars could not be responsible for the whole of this cost, but that it should be realised between the zemindars and the Digwars jagirdars who retained their service lands without being required to perform any services. In the following year Act VIII (B.C.) of 1878 was passed empowering the Deputy Commissioner to fix the number of patrols necessary to protect the different roads and passes, and to realise their costs from the zemindars and under tenure-holders. Subsequent Acts dealing with the Rural Police of Chota Nagpur are Act V (B.C.) of 1887 and Act I of 1914 (Behar and Orissa). It is pointed out by Mr. Sifton that the Tekaits of Kharagdiha are required to contribute altogether Rs. 5,280 for this purpose.

Now what is the effect of these subsequent events on the character of the tenure in the hands of the Tekait of Ghoranji? Clearly the Government has released the services in an effective and lawful manner if the obligation to appoint Barkandazes and Digwars and to pay their wages could be called a service, and, in lieu thereof, has subjected his estate to a pecuniary charge. It was insisted by the learned Vakil for the appellant that the assessment by the Government of the ghatwals under Act VIII of 1878 is a continuation of their services in another form. But the change in form in my opinion is vital to the enquiry, for it is obvious that the personality or the appointment of the holder is no longer of any importance. Payment of rent or revenue is a form of service, but a tenure where no other service is imposed than the payment of rent or revenue cannot be called a service tenure. In my opinion, if the tenure in question was ever a service tenure, the Government released or abolished the services by Act VIII of 1878, and it can no longer be regarded as a service tenure. I hold that the plaintiff is not entitled to succeed in

the action on the ground that the tenure was inalienable.

The plaintiff's suit must also fail on another ground namely that he omitted to ask for a consequential relief although he was able to seek that relief in this action. The plaintiff's suit is a suit for declaration of title. No objection can be taken to the scope of the suit if as the plaintiff asserts, he is still in possession of the disputed properties. The object of the suit is in substance to obtain a declaration that the conveyance of the disputed properties by his father, Tekait Hemraj Singh to Nawab Ali Khan, represented in this action by the defendants, so far back as the 14th December, 1856, did not operate to confer any title on Nawab Ali Khan. Hemraj Singh died in 1857 and was succeeded in the Gadi by his son, the present plaintiff who however has died during the pendency of the appeal in this Court. It appears that the Court of Wards took possession of Gadi Ghoranji on behalf of the plaintiff and refused to recognise Nawab Ali Khan as the purchaser of the villages. Nawab Ali Khan thereupon instituted a suit for the purpose of having the deed of sale executed by Hemraj Singh established as against his son. It was open to the Court of Wards, which was then acting as the guardian of the present plaintiff, to take the plea that the tenure being ghatwalli, was inalienable. But the only defence that was put forward was that no such kabala had been executed by Hemraj Singh. The Calcutta High Court found in favour of the kabala and pronounced judgment in favour of Nawab Ali Khan (see Exhibit K-9, Part 3, page 34). Nawab Ali Khan then applied to have his name registered in the Government books as the proprietor of the purchased villages. The application was rejected on the 18th April, 1868 by the Deputy Commissioner on the ground that the gadi was a service tenure and was inalienable. The order was maintained on appeal by the Comissioner on the 30th March, 1869. When the Land Registration Act came into operation, the plaintiff applied to have his name registered in the Land Registration Department in respect of all the villages comprised in the gadi. Newab Ali Khan objected. The objection was allowed, and the name of Nawab Ali Khan was recorded in respect of the villages which were the subject-matter of the conveyance. In dealing with this point, the Deputy Collector said as follows :—

"The Government has now decided by their letter No. 3002, dated the 5th December, 1878, that the names of *bona fide* occupants of ghatwali tenures are to be registered, but it will not affect the right of Government. There is no doubt that the applicant is in possession for a long time by right of purchase. I would therefore on the authority of the Government order quoted above register the applicant's name as a joint sharer". In the record of rights, finally published on the 23rd February 1913, the names of the defendants were recorded as proprietors of the disputed villages. The Subordinate Judge on a consideration of all the evidence, came to the conclusion that the plaintiff was not in possession of the disputed villages and that the suit was barred by the provisions of section 42 of the Specific Relief Act.

Before dealing with the point, it is as well to dispose of an objection taken by the Stamp Reporter. He took the view that plaintiff could not avoid paying the proper Court-fee as in a suit for declaration of title and for possession by casting his reliefs in a declaratory form. With this view, I do not agree. The question of Court-fee must be decided on the plaint; and though it is open to the Court to say that the plaintiff has really asked for a consequential relief though he has tried to conceal it by casting the reliefs in a particular form it is not open to the Court to say that the plaintiff should have asked for a consequential relief and should have paid the proper fee as in such a suit. Here the plaintiff insists that is not necessary for him to ask for a consequential relief. Although he takes a risk in so insisting in that he is liable to have his suit dismissed under section 42 of the Specific Relief Act if the Court ultimately comes to the conclusion that it was open to him to ask for a consequential relief, he is clearly entitled to have the case made by him in the plaint tried by the Courts. I hold that the plaintiff cannot be called upon to pay the fee as in a suit for a declaration of title and consequential relief.

Coming now to the merits, there is no doubt whatever that the plaintiff is not in possession of the disputed properties, and that the Court will not make a declaration in his favour, since the plaintiff, being able

to seek further relief than a mere declacation of title omitted to do so. The learned Vakil for the appellant accepts the finding of fact of the Court below so far as the finding can be confined to the tenanted portions of the villages, but he insists that so far as the jungle lands and minerals are concerned, they cannot be in the actual possession of the defendants, and must be deemed to be in his possession assuming as this argument must assume-that he has a good and valid title to the villages. The argument is founded upon the well known principle that a person who has got possession by wrong cannot have recourse to the doctrine of constructive possession in his favour. Now possession, in the sense in which that term is used in jurisprudence, must be accompanied by an intention to possess, an *animus possindendi*. Now it cannot be said of wrong-doer that there is any intention to possess that of which he has not a definite physical control. But of that of which he has a definite physical control, he is clearly in possession, provided the *animus possidendi* is established. I think this is at the bottom of the rule which lays down that a wrong-doer cannot have recourse to the doctrine of constructive possession. But let us go a step further. Supposing a person without title acquires possession of a part of the land and then proceeds to mark out the area of the entire land which he intends to possess. Clearly he has shown an intention to possess the entire area, and he will be deemed to be in possession of the entire area, though he has a definite physical control only over a portion. I think that it is more correct to say that, in the absence of title, the law will raise from definite physical control of part of land a presumption of possession of that, neither more nor less, which the possessor has shown a clear and unambiguous intention to possess.

But here the defendants were in no sense wrong-doers. They were in by a document which purported to convey whatever title the vendor had in the villages conveyed. There was no dispute as to the boundaries of the villages, and the position is the same as if the defendants had marked out the entire area conveyed to them. It may be that the conveyance did not confer any title on them but they were not aware of any defect in their title and there was clearly an intention to possess the entire area conveyed to them in the right of the vendor. In my opinion, the defendants were just as much in possession of the jungles and the minerals as of the tenanted portions of the villages. I agree with the Subordinate Judge that the suit is barred by the provision of section 42 of the Specific Relief Act.

The appeal must be dismissed with costs.

Ross, J. :—I agree.

Appeal dismissed.

** 1925 Patna 216.

JWALA PRASAD, A.C.J. AND MACPHERSON, J.

Ram Rachhya Singh and others—Defendants-Appellants

v.

Kamakhya Narain Singh—Plaintiff-Respondent.

F. A. No. 238 of 1921, decided on the 6th August, 1924, from the decision of the Sub-Judge, Hazaribagh, dated 10th June, 1921.

• (a) *Adverse possession—Landlord and tenant—Continuation of relationship of landlord and tenant by admission of parties cannot affect claims openly set up and not withdrawn by the tenant and in conflict with the continuation of any incidents of the original tenancy.*

The relationship of landlord and tenant might be continued by the admission of the parties. But when there are any claims openly asserted and not withdrawn by the tenant who is suffered to continue in possession, the admission of the parties cannot create, preserve or revive undisputed, conditions of the continuous right of the relationship of the landlord and the tenant which conflict with claims asserted by the tenant such as are referred to above. [P. 228, C. 1.]

(b) *Landlord and tenant—Open assertion by a tenant to the knowledge of the landlords of a right inconsistent with the right claimed by the landlord to treat the tenant as a tenant at will or from year to year would enable the tenant to resist the landlord's claim after limitation—Adverse possession.*

Authorties in India show that a tenant in India is not precluded by an admission of tenancy, from showing that the nature of tenancy asserted by him to the knowledge of the landlord has been for the period prescribed by the Limitation Act *pro tanto* adverse to the right to eject at will or on notice given. The question then is not what was the right which actually existed at the beginning of the tenancy but what was the right which he has openly enjoyed to the knowledge of the owner or his representative for the time being. A manifest assertion by the tenant to the knowledge of the person representing the landlord's interest of a right inconsistent with that claimed by the landlord to treat him as a tenant-at-will or from

year to year, would be a disclaimer of the landlord's title. (*Vivian* v. *Mote*) 16 Ch. D. 730, *Ref. to.* [P. 228, C. 1.]

* (c) *Limitation Act, Art. 144—Art. 144 and not Art. 139 governs suit by landlord against* Mukarraridars *claiming permanent interest while lease granted only life interest—Limitation Act, Art. 139.*

The *Mukarrari Istimari* granted to the original Mukarraridars conveyed only a life-interest. But it was claimed by their representatives that the interest which the *mukarrari Istimrari* lease conveyed was of a permanent character. Such interest was expressly asserted in the sale-deed executed by the *mukarraridars* at the time. The defendants expressly claimed throughout to hold under the sale-deed as permanent *mukarraridars*.

Held that the suit was not governed by Art. 139, but by Art. 144, as the defendants had made a definite assertion of an adverse right more than twelve years before the suit. [P. 228, C. 2.]

(d) *Transfer of Property Act, S. 107—Scope.*

A registered instrument is necessary under S. 107 for creating a lease for any term exceeding one year or reserving a yearly rent. [P. 224, C. 1.]

** (e) *Transfer of Property Act, S. 116—Applies only where the lease is for a fixed term and not where it is for life—A tenancy need not necessarily be the result of holding over.*

S. 116 does not apply unless there is already a lease and that lease has determined. Under that section only the original lessee is benefited. Also that section applies only to a lease for a fixed term and not to a lease for life. The representatives or assigns of the tenants-for-life will not become tenants from year to year without the formalities of S. 107. In other words, they can become tenants from year to year, only by means of a registered instrument. A verbal contract is enough to make them tenants-at-will or for a year. Mere receipt of rent not inconsistent with any adverse title which the defendant may set up, cannot create a tenancy or a tenancy for a year, though receipt of the rent from persons in posession may under certain circumstances create a valid lease for a year. [P. 224, C. 1.]

(f) *Transfer of Property Act, S. 107—Tenancy may be created impliedly by acts of parties without registered instrument when the term does not exceed one year—Landlord and tenant.*

Acts indicative of establishing the relationship of landlord and tenant can create tenancy. These acts may be expressed, implied or gathered from conduct or circumstances of the parties. A person in wrongful possession or a trespasser may be altered into tenant. He may become a tenant-at-will or a tenant for a term. When the tenancy is to be for a term exceeding one year, certain formalities are necessary under S. 107. [P. 224, C. 1.]

(g) *Land-tenures — Hazaribagh — Istimrari Mukarrari in patta does not necessarily convey estate of inheritance.*

The phrase "Istimrari mukarrari" in a Patta in District Hazaribag does not *per se* convey an estate of inheritance. But the Court is competent to see whether the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties show that the intention was to make the grant hereditary. [P. 226, C. 1.]

(h) *Land tenure*—Marfatdari *receipt—Landlord and tenant.*

Marfatdari receipts cannot convey *Raiyati* title to a *Marfatdar.*

* (i) *Adverse possession—Adverse posession of a limited interest is recognised—When such adverse possession is claimed question of payment of rent is immaterial.*

The receipt of rent does not necessarily show that the interest of a permanent tenure in the tenant was recognised by the landlord. Nor does it show that the position of a yearly tenant was accepted by the tenant. Therefore, payment or non-payment of rent is immaterial when defendant sets up plea of adverse title to limited interest or, pleads tenancy and in the alternative possession of a limited interest. For the defendant in a suit for possession can set up a plea of adverse title to a limited interest such as an occupancy right or perpetual tenure. [P. 221, C. 1.]

** (j) *Adverse possession—Possession by tenant's assign is adverse from date of expiration of lease—Landlord and tenant.*

When a lease expires, the tenant's assign has no right to the possession of the property and if he is in possession the possession is wrongful. In the absence of evidence from which a fresh tenancy can be inferred time begins to run against the landlord from the expiration of the lease.

Manohar Lal and *Kailaspati*—for the Appellants.

Sushil Madhab Mullick—for the Respondent.

Jwala Prasad, A.C.J.;—This appeal is directed against the decision of the Subordinate Judge of Hazaribagh, dated the 10th June, 1921, decreeing the plaintiff's suit for resumption, and *khas* possession with mesne profits of two *mukarrari* villages named Jobda and Jobdi appertaining to the Ramgarh estate of which the plaintiff is the 16 annas proprietor. The defendants Nos. 11 to 14 did not appear in the Court below. They are not parties to this appeal.

The villages were leased out in *mukarrari istimrari* to two persons Syed Muzaffar Hussain and Syed Mohammad Hussain, by means of a registered *patta* bearing date Pous Sudi 14th 1922 Sambat (31st December 1865), the *kabuliyat* whereof has been produced by the plaintiff and marked Exhibit 1.

On 17th September, 1875 (Asin Badi 2nd 1931 (Sambat), Syed Mohammad Hussain, one of the lessees, executed an *ikrarnama* (Ex. C), stating that he had no

interest in the lease and that Syed Muzaffar Hussain was the sole lessee and had been exclusively in possession of the *mukarrari* by payment of *nazrana*, other expenses and rents, and that his (Syed Hussain's) name was mentioned in the lease in accordance with the prevailing custom in the Ramgarh estate to make *mukarrari* settlement in the name of two persons.

On 1st August, 1879 (29th Sawan 1936) Syed Muzaffar Hussain executed a deed of absolute sale (Ex. B) in favour of Babu Sabay Singh, ancestor of the defendants, transferring his entire interest in the disputed villages as well as in other villages for a consideration of Rs. 1,861.

The original lessees are dead. The exact date of their death is not known. The plaintiff's witness Sheo Sahay Lal simply states that they "died more than 12 years ago." The defendants stated in their written statement filed on the 28th August, 1920, that they died 25 to 30 years ago. Such is also the statement of their witness No. 1 Rambhuwan Singh. The Subordinate Judge has found that they died about 30 years ago, that is, in 1891-92 (1947-48). This is not disputed by the plaintiff.

The plaintiff's case is the simple one, that upon the death of original lessees his right to re-enter accrued, that the defendants as assigns of the lessees "continued in possession with the assent of the landlord as tenants from year to year notwithstanding the termination of the tenancy on the death of the said lessees," but that at the time of the preparation of the record-of-rights they falsely asserted for the first time that they were entitled to continue in possession as *mukarrari istimraidars* and that they were recorded as such in the record-of-rights. The plaintiff treating the defendants as tenants from year to year served them with notice to quit. The first notice (Ex. A) is dated the first August, 1907 (8th Sawan 1964 Sambat) and calls upon the defendants to quit at the expiration of that year, which expired on the 15th Chaitra 1964 Sambat (corresponding to the 1st April, 1908). In spite of this notice the defendants continued in possession and the last notice (Exs. 2 to 4), dated the 20th August, 1919, was served on the 10th September, 1919 (plaintiff's witness No. 2 Rama Prasad), and called on them to quit by the end of the Sambat year, which expired on the 15th Chaitra 1977 (20th March, 1920). The suit was instituted on the 1st April, 1920.

The defendants assert that the original lessees Syed Muzaffar Hussain and Syed Mohammad Hussain acquired permanent *mukarrari* under the *patta* (Ex. 1) of 31st December, 1865, that the defendants purchased this permanent *mukarrari* interest by the *kobala* (Ex. B) in 1879 and since then have been in possession in virtue thereof and that they are in adverse possession of the same and are not year to year tenants with the permission of the landlord after the death of the original lessees. They also plead limitation.

Upon the pleadings of the parties various issues were raised in the Court below. We are concerned only with four of them, namely, Nos. 2, 3, 4 and 5 of the Court below.

"Is the suit barred by limitation?"—(Issue No. 2). "What is the meaning of the term *mukarrari istimrari*? Does it mean life-grant or lease in perpetuity?"—(Issue No. 3).

"Have the defendants been tenants from year to year with the assent of the landlord after the death of the original lessee?"—(Issue No. 4).

"Has the defendant obtained a right to hold the mauzain suit by prescription and adverse possession"—(Issue No. 5.)

Issue No. 3.—As to whether the *mukarrari istimrari* grant in Exhibit (1) was a perpetual grant or whether it enured for the life-time only of the grantees, the question seems to have been concluded by the decision in the case of *Ram Narayan Singh* v. *Chota Nagpur Banking Association* (1). It appears that about the time when the present grant was made by the registered *patta* of the 31st December, 1865 (*kabuliyat*, Ex. 1), Maharaja Ramnath Singh granted a large number of villages in the years 1864-65 in *mukarrari istimrari* lease to different grantees. In course of time when the original grantees began to die off, a question arose between the ancestor of the plaintiff, the present owner of the Ramgarh estate, and the heirs or assigns of the original *mukarraridars* as to the nature of the grant. The plaintiff's ancestors alleged that the grants were merely life tenures and were resumable after the death of the original grantees, whereas the heirs or assigns of the grantees alleged that the grants were permanent, hereditable,

(1) (1915) 43 Cal. 332=36 I.C. 321.

and transferable grants and the plaintiff had no right of resumption. Some test cases were instituted and the controversy between the parties was finally set at rest by the decision of the Calcutta High Court in the case referred to above, wherein it was held that grants in the terms in which the grant now in controversy is couched did not create an estate of inheritance and were not permanent and heritable, but were merely life tenures and that the plaintiff's ancestor had a right of resumption. Thereafter a large number of suits was instituted by the Ramgarh estate against the heirs or assigns of the original *mukarraridars* for resumption of the grants and several of them have come to this Court in appeal. The present case is one of those resumption suits.

The terms of the lease are set out in the *kabuliyat* (Ex. 1). The lessees are two in number, Syed Mohammad Hussain and Syed Muzaffar Hussain. The document states that the lessees have obtained *mukarrari istimrari* of mauzas Jobda and Jobdi in Pargana Dantar (District Hazaribagh), exclusive of *jagir* and *brit* lands, coal mines, sub-soil rights, at an annual *jama* of Rs. 344. The lessees then expressed their readiness to cultivate and improve the village, to keep the tenants contended and to construct *ahars* and so forth. The rent is payable in *kists* and provision is made for certain small *salamis*. Default in payment of rent is to involve cancellation of *mukarrari*. Losses from drought and so forth are to fall on the lessees who undertake not to do anything injuriously affecting the boundaries. Power to transfer is withheld declaring that any transfer of the interest created by the deed would be "null and void". The cutting down of fruit-bearing and income-yielding trees is forbidden, and the obligation to replace fallen trees is imposed on the lessees. These terms are exactly the same as those dealt with in the case of *Ram Narayan Singh* v. *Chota Nagpur Banking Association* (1) and in fact a part of one and the same scheme of Ramgarh estate administration. I have, therefore, borrowed the description of the terms given in the judgment of his Lordship the Chief Justice Sir Lawrence Jenkins at p. 300 of the report. Upon a review of the authorities, and on the basis of the decision of their Lordships of the Judicial Committee in the case of *Toolshi Pershad Singh* v. *Ram Narayan Singh* (2) which was followed in *Narsingh Dyal Sahu* v. *Ram Narayan Singh* (3) his Lordship held that "it must be taken as settled that 'the phrase *istimrari mukarrari*' in a *patta* in the District of Hazaribagh do not *per se* convey an estate of inheritance, but that it is open to us to see whether (*a*) the other terms of the instrument, (*b*) the circumstances under which it was made, or (*c*) the subsequent conduct of the parties show the intention with sufficient certainty to enable us to pronounce that the grant was hereditary." As pointed out in that case, notably the provisions as to trees and restraint on transfer do not point to a grant in perpetuity, the leases were granted by the Raj not by way of bounty but as a matter of bargain and, with a view to give continuity to grantees, the grant was in favour of two persons so that the terms of the lease may be prolonged to two lives.

In the case of *Agin Bindh Upadhya* v. *Mohan Bikram Shah* (4) it was pointed out that the words "*istimrari mukarrari*" are of Arbic origin and literally mean continuous, running and fixed. Their dictionary meaning is of little use as they might mean continuous or permanent during the life-time of the grantee or permanent as regards hereditary descent. Therefore the expression "*mukarrari istimrari*" in itself does not necessarily convey an estate of inheritance : *vide* also *Beni Pershad Koeri* v. *Dudhnath Roy* (5). There are no words in the deed expressly conferring any right of inheritance : not even such expressions as "*naslan bad naslan*," or "*farzand ba farzandan*" indicative of the right of inheritance. There is no evidence of any circumstance under which the deed was granted or any subsequent conduct on the part of the parties indicative of the grant being hereditary. The lessor Raja Ramnath Singh died soon after the execution of the deed in 1866 as pointed out by Woodroffe, J., in the aforesaid case of *Ram Narayan Singh* v. *Chota Nagpur Banking Association* (1).

The Court below is, therefore, right in holding that the *mukarrari istimrari* deed

(2) (1885) 12 Cal. 117=12 I.A. 205=4 Sar. 646 (P.C.).
(3) (1903) 30 Cal. 883.
(4) (1902) 30 Cal. 20=7 C.W.N. 314.
(5) (1899) 27 Cal. 156=26 I.A. 216=4 C.W.N. 274=7 Sar. 580 (P.C.).

in question did not convey a grant of permanent and heritable nature but a life tenure only upon the grantee. The sale-deed (Exhibit B), dated the 1st August, 1879, executed by Syed Muzaffar Hussain cannot confer a higher title upon the defendants' ancestor Sahay Singh, although it recites that the vendor Syed Muzaffar Hussain had held the villages in perpetual *mukarrari istimrari* and purports to convey a permanent *mukarrari* interest to the transferee Sahay Singh. The vendor could not give a larger interest in the mauzas to the vendee than he himself had : *vide* *Beni Pershad Koeri* v. *Dudhnath Roy* (5).

The survey record-of-rights prepared in 1914 describing the interest held by the defendants as *mukarraridars* is entirely based upon the sale-deed, dated the 1st August, 1879, executed by Syed Muzaffar Hussain in favour of Sahay Singh. This is of no consequence and may be ignored. The lessor's right to re-enter, therefore, accrued upon the death of the survivor of the two lessees.

The tenure held by Syed Muzaffar Hussain and Syed Mohammad Hussain came to an end and so also the interest conveyed by them to Sahay Singh also came to an end upon the death of the original lessees Syed Muzaffar Hussain and Syed Mohammad Hussain, which occurred in 1891-92.

In fact, the sale by Syed Muzaffar Hussain to Sahay Singh in 1879 was against the terms of the grant which expressly says that the lessees shall "have no right at all to transfer the said mauzas" and declares such a transfer to be " null and void."

Sahay Singh, however, continued to be in possession of the property. He died in 1322 Fasli (1914-15) (D. W. 1).

The plaintiff's case is that although his right to re-enter accrued upon the death of the lessees the defendants purchasers continued in possession with the assent of the landlord as tenants from year to year.

[His Lordship, holding in the course of his discussion on the evidence, that no *marfatdari* receipts were granted by the lessor to the defendants as argued on the plaintiff's behalf, proceeded.]

Assuming for the sake of argument that *marfatdari* receipts were granted, that will not in itself constitute any relationship of landlord and tenant between the plaintiff and the defendants. In the case of *Khoodeeram Chatterjee* v. *Rookhinee Boistobee* (6) it was held that *marfatdari* receipts do not confer any raiyati title on a *marfatdar*. In that case the receipts or *dakhīlas* showed the name of Nabokristo as the raiyat and Rookhinee's name as merely *marfatwar* (*marfatdar*). It was held that such payment of rent did not confer any right on Rookhinee in the property. This case was followed in *Mullick Abdul Guni* v *Nund Lal* (7) and *Debnarain Dutt* v. *Baidya Nath* (8). It was there held that the receipt of rent by the landlord from a transferee of a non-transferable holding not on his own account but on account of the transferor is not a recognition of the transfer and that the transferee may acquire the right to hold the land as an occupancy raiyat by possession as a raiyat for a period of 12 years and by assertion of his title as such. It was further pointed out that the receipts describing the transferee as only *sarbarakar*, retaining the name of the vendor under the head of the tenant's name, would go to show that the landlord did not by these receipts mean to recognize the defendants as tenants : *Ram Taruk Ghosal* v. *Radha Bullab Sircar* (9) and *Gaur Lal Sirkar* v. *Rameshwar Bhunuk* (10). The transfer was therefore held not to have been recognized and the defendant was held liable to be ejected.

Again in another case of the present plaintiff where in similar circumstances the heirs of the grantees were in possession after the expiry of a similar *mukarrari istimrari* lease, this Court (Das and Ross, JJ.) in *Hari Gir* v. *Kamakhya Narain Singh* (11) very recently pointed out that such *marfatdari* receipts do not prove any tenancy. In that case as in the present case the defendants wanted receipts in their own name but the landlord refused to grant receipts other than *marfatdari* receipts. Their Lordships held that although the Plaintiff was willing to accept rent from the Defendants he was not willing to recognize their status as tenants. I have already said that there is no evidence of any rent having been paid by the defendants to the plaintiff or

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(6) (1871) 15 W.R. 197.
(7) (1902) 30 Cal. 15=7 C.W.N. 152.
(8) (1909) 14 C.W.N. 68=2 I.C. 148.
(9) (1871) 15 W.R. 97.
(10) (1870) 6 B.L.R. App. 92.
(11) 1924 Patna. 572=3 Patna. 534=1924 Pat. H.C.C. 158.

his predecessor-in-interest. Shiv Sahay Lal expressly admitted this.

Mere receipt of rent would also not have been sufficient to make the defendants tenants from year to year. The plaintiff's case is that the defendants were tenants from year to year. The Defendants' case is that they are perpetual tenure-holders. Therefore upon the case of both sides rent is payable to the landlord. Mere payment of rent will not establish the case of either party. In order to make defendants yearly tenants the rent must have been paid and received upon the understanding that they were so. It is well recognized that a defendant can set up a plea of adverse title to a limited interest, such as an occupancy right or a perpetual tenure: *Ramchurn Raha Bukshee* v. *Mungul Sircar* (12), *Watson & Company* v. *Rani Shurut Sundari Debe* (13), *Dinomoney Dabea* v. *Doorgapersad Mozoomdar* (14), *Maidin Saiba* v. *Nagapa* (15), *Madhava* v. *Narayana* (16), *Chandri* v. *Daji Bhau* (17), *Thakore Fatesingji Dipsangji* v. *Bamanji Ardeshir Dalal* (18), *Bagdu Majhi* v. *Durga Prosad Singha* (19) and *Sujjad Ahamad Chowdhury* v. *Ganga Charan Ghose* (20). A defendant can also plead tenancy and in the alternative possession of a limited interest: *Icharan Singh* v. *Nilmoney Bahidar* (21), and *Ishan Chander Mitter* v. *Raja Ramranjan Chakarbutty* (22). In such cases payment or non-payment of rent is immaterial: *vide Sankaran* v. *Periasami* (23) and *Thakore Fatesingji Dipsangji* v. *Bamanji Ardeshir Dalal* (18). The receipt of rent will not necessarily indicate that the landlord recognized the interest of a permanent tenure in the tenant nor will it show that the tenant accepted the position of a yearly tenant. The question, however, does not arise in the present case as there is no proof of payment of rent.

It has however been contended that upon the defendants' admission that a rent decree was realized from them by Narsingh Dayal Sahu when mortgagee of the villages in question and that Narsingh Dayal Sahu sued them for rent and obtained rent decrees which were duly paid off, the Defendants must be held to have been in possession as yearly tenants. [After referring to the evidence His Lordship proceeded:—]

In the first place the payment of the rent decrees is not inconsistent with their plea of being permanent tenure-holders liable to pay rent under the sale-deed (Ex. B.) If they had not satisfied the rent decree the tenure would have been sold up and whatever right they claimed or had would have been extinguished. The payment of rent decrees was therefore to preserve the right which they claimed. The payment to a mortgagee does not create any recognition by the mortgagor of the interest of the defendants [Woodroffe, J., in *Ram Narayan Singh* v. *Chota Nagpur Banking Association* (1)]. The mortgage-deed now filed shows that the mortgagee was to remain in possession for six years, that is, from 1948 to 1954 Sambat (1891-92 to 1897-98), and the entire mortgage-debt was to be satisfied within that period from the usufruct of the villages mortgaged including the villages in question, and the mortgaged property was to be released to the plaintiff on the expiry of the period. Thus the *zarbharnadar* mortgagee remained in possession from 1948 to 1954 Sambat.

The defendants asserted in their written statement that they did not pay any rent to the plaintiff after the expiry of the *bharna* deed. This statement has not been challenged in evidence by the plaintiff while the defendant No. 1 in his evidence states that after the mortgage was satisfied and the proprietary interest in the property came into possession of the Plaintiff, no rent was ever paid. This is consistent with the case of both parties, namely, that in the year 1960 Sambat or 1961 Sambat the plaintiff refused to grant receipts in the names of the defendants and was only willing to grant *marfatdari* receipts retaining the names of the original tenants. The defendants, therefore, remained in possession of the property by the laches of the Plaintiff. They were not tenants at all. The defendants' possession was not rightful. No doubt, by the acts of the parties a tenancy from year to year might

(12) (1871) 16 W.R. 232.
(13) (1867) 7 W.R. 395.
(14) (1873) 12 B.L.R. 274=21 W.R. 70.
(15) (1882) 7 Bom. 96.
(16) (1885) 9 Mad. 244.
(17) (1900) 24 Bom. 504=2 Bom. L.R. 491.
(18) (1903) 27 Bom. 515=5 Bom. L.R. 274.
(19) (1904) 9 C.W.N. 292.
(20) (1905) 9 C.W.N. 460=1 C.L.J. 116.
(21) (1908) 35 Cal. 470=7 C.L.J. 499=12 C.W.N. 636.
(22) (1905) 2 C.L.J. 125.
(23) (1890) 13 Mad. 467.

have been created but no such acts has been proved in the present case.

Therefore as held in the case of *Hari Gir* v. *Kumar Kamakhya Narain Singh* (11) the right to eject the defendants commenced from the death of the original lessees, and the period of limitation for a suit to eject the defendants commenced from that time. The plaintiff's suit is, therefore, barred by limitation.

The defendants relied upon the case of *Krishnaji Ramchandra* v. *Antaji Pandurag* (24). In that case the land in dispute was leased to Ramchandra for life, who died in 1871 and after his death his heirs the defendants continued in possession without obtaining a fresh lease or paying any rent to the landlord. In 1888 the landlord sued to eject the defendants. The defence was that the suit was barred by limitation. Telang, J., held that the suit was not barred upon the ground that after Ramchandra's death the defendants though not in possession as tenants were not trespassers and that their possession was permissive and not adverse until they expressly set up a title of ownership in the property. As shown in the case of *Hari Gir* v. *Kumar Kamakhya Narain Singh* (11) that case was entirely based upon *Hellier* v. *Sillcox* (25) which is an authority for the proposition that an action for use and occupation would lie against a person who is in the possession of demised land after the death of a tenant with the permission of the landlord and it is not an authority for the proposition that a person in possession could not plead lapse of time if an action for ejectment was brought after the expiry of the period of limitation. This case was dissented from in *Kantheppa Reddi* v. *Sheshappa* (26) and overruled in *Chandri* v. *Daji Bhau* (17), where it was held that the possession of a tenant holding over is wrongful and if there is no evidence from which a fresh tenancy can be inferred, time begins to run against the landlord when the period fixed by the lease expires. In that case there was a lease for a year; at the end of the year possession was not given up nor was any rent paid. A suit was brought more than twelve years after the expiry of the lease. It was held that the suit was barred. The aforesaid case was also dissented from in *Vadapalli Narasinham* v *Dronamraju Seetharamamurthy* (27).

The next case relied upon is the decision in *Lalji Sahu* v. *Shamlal* (28) (Sharfuddin and Roe, JJ.). That was a case of Ramgarh estate and the *patta* granted was an *istimrari mukarrari* lease similar to Exhibit 1. The *mukarraridar* executed a *zarbharna* deed which was purchased by the plaintiff in execution of his mortgage decree against the *mukarraridar* in 1906. He brought a suit for rent for the years 1963, 1964 and 1965 against the tenants of the villages. Notice to quit was served by the Maharaja upon the *zarbharnadar* in 1907, directing him to vacate the property before the close of 1964 Sambat, that is, by the 1st of April 1908. On the authority of *Beni Pershad Keori* v. *Dudhnath Roy* (5) it was held that the *mukarrari* grant became void upon the death of the *mukarraridar*, so also the *zarbharna* and the plaintiff's purchase. The question was whether the plaintiff was entitled to recover rent for the years in suit, the defence contention being that the Plaintiff was a mere trespasser after the death of the *mukarraridar* and he had no title to receive any rent. The plea of the tenants defendants was overruled upon the ground that the plaintiff could maintain the suit so long as the notice to quit had not been served upon the *zarbharnadar*. That notice being served in 1907 after the expiry of Sambat year 1964 it was held that the plaintiff was-entitled to recover rent for the year 1963-64, and not for 1965, for before that he was not a trespasser but was a tenant by sufferance liable to be ousted at a moment's notice. That ruling does not seem to apply to the present case, for in the present case the question is not whether the defendants being in possession could realize rent from the tenants of the village, but as to whether the right to eject them by the superior landlord arose from the date of death of the original *mukarraridars*, and whether time should commence from the death of the *mukarraridars*. Further, in that case it was found that the *zarbharnadar* did not assert any adverse title.

The next case relied upon is *Ram Chandra Singh* v. *Bhikhambar Singh* (29).

(24) (1893) 18 Bom. 256.
(25) (1850) 19 L.J. Q B. (N.S.) 295.
(26) (1897) 22 Bom. 893.
(27) (1907) 31 Mad. 163=3 M.L.T. 256=18 M. L.J. 26.
(28) (1916) 32 I.C. 827.
(29) (1910) 37 Cal. 674=6 I.C. 339.

Raja Madan Mohan Sinha was the holder of the impartible zamindari of pargannah Jeypore. Raja Kasi Nath Sinha was the eldest son, the plaintiff's father, and Hakim Gopal Sinha was the second son, the defendant's father. Raja Madan Mohan Sinha made a *khorposh* grant to the defendant's father which was terminable upon the death either of the grantor or grantee. The grantor-Raja Madan Sinha died in 1858. The grantee, the defendant's father, died in 1877. Raja Kasi Nath who had succeeded Raja Madan Mohan Sinha died in 1885. Although the grant terminated in 1858 when the grantor died or 1877 when the grantee died, it was allowed to continue in the defendant's possession. In that case there was sufficient evidence in certain letters A, B and C to show that in spite of termination of the grant the plaintiff's father and afterwards the plaintiff consented to continue the grant in the defendant as yearly tenancy. This was found as a fact and upon that finding it was held that there was no adverse posssession on the part of the defendant sufficient to bar the plaintiff's suit under section 139 of the Limitation Act. It was pointed out that a tenancy by sufferance would not by itself make the possession of the holder rightful so as to prevent limitation from running but at the same time if the landlord or the person entitled to redeem the tenancy does anything to indicate his assent to the continuance of the tenancy, that would in itself be sufficient to convert the tenancy by sufferance into a tenancy from year to year. Therefore it is to be found in the circumstances of each case whether there was a yearly tenancy created by the act of the landlord and the tenant.

The next case relied upon is that of *Maharani Beni Pershad Koeri* v. *Dudhnath Roy* (5). In that case Maharaja Jai Prakash Singh of Dumraon had made a maintenance grant to Lal Parmeswar Singh resumable on the death of the grantee. In 1857 he surrendered the grant to Maharaja Maheswar Baksh Singh and shortly afterwards died. Before this Lal Parmeswar Baksh Singh had executed a *mukarrari istimrari patta* in favour of Ram Golam Raut. Maharaja Maheswar Singh abdicated in 1868 and died in 1871 and was succeeded by his son Maharaja Radha Prasad Singh. The *patta* to Ram Golam Raut came to an end upon the surrender and subsequent death of Lal Parmeswar Baksh Singh. Maharaja Radha Prasad Singh might have resumed the mauza or have made a fresh grant either in the terms of the *patta* or otherwise or have allowed Ram Golam Raut to remain in possession on paying the rent, and as a matter of fact Ram Golam Raut was allowed to continue in possession on payment of the rent mentioned in the *patta*. In 1879 Ram Golam Raut instituted a suit for rent against the tenants of the mauza alleging that he had held the village in perpetual *istimarari mukarrari*. The Maharaja presented a petition of objection in which he stated that Ram Golam Raut had no *mukarrari* interest but held only a service grant terminable at the pleasure of the proprietor. The Maharaja was made a defendant. The result is not known, but on 25th May, 1885, the Maharaja brought a suit against Ram Golam Raut for recovery of arrears of rent. Later the Maharaja brought a suit for declaration of his title to *khas* possession of the mauza after the death of Ram Golam Raut. Ram Golam Raut died in 1893 and the plaint was amended and the prayer for possession was added. Although the *patta* had become void and spent, yet a life-tenancy of the defendant was admitted. Under the circumstances it was held that he was a tenant for life, and not a tenant at will, who could be ejected during his life-time and that therefore no limitation applied to the case. The suit for a declaration was converted into a suit for possession such as might be brought just after the death of the life tenant.

In the present case the tenants for life were the original *mukarraridars* and the defendants were not recognized as tenants at all. The limitation in the present case would therefore run from the death of the original grantees, and was never interrupted by any act of the landlord making the defendants yearly tenants.

After the death of the original *mukarraidars* what was the position of the defendants? It is now concluded by the authorities that their possession was wrongful. A fresh act had to be done in order to make them tenants. The original *mukarrari* had become extinct. Their saledeed had become void. They were not the original grantees. There was no privity between them and the landlord. A tenancy can be created by acts indicative of estab-

lishing the relationship of landlord and tenant. This may be express, implied or gathered from conduct or circumstances of the parties. A trespasser or a person in wrongful possession may be converted into a tenant. He may become a tenant-at will or a tenant for a term. To create a valid tenancy for a period exceeding one year certain formalities must be observed. Under section 107 of the Transfer of Property Act a lease for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument. Section 116 deals with the effect of holding over by a lessee and with the creation of a tenancy by implication. There must already be a lease and it must have been determined. There was no lease in the present case in favour of the defendants. There was a lease of the property in favour of the original *mukarraridars*, lasting till their death. It became an extinct document after their death. The rights created there were not transferable nor heritable, so that the extinct document was also incapable of being continued. The defendants therefore needed a fresh contract, express or implied between themselves and the landlord in order to have a tenancy of the property in question. They could not hold over under the extinct lease granted to the original *mukarridars*. Their mere holding over by assent of the landlord to the continuance of their possession or by the landland accepting rent from them would not make them tenants from year to year or yearly tenants. That kind of tenancy under section 116 of the Transfer of Property Act is only created by law in favour of the original lessee. Therefore section 116 applies only to the case of a lease fixed for a term of years and not to a lease for life. The representatives or assigns of the transferees of a tenant for life will not become tenants from year to year, without the formalities of section 107 of the Transfer of Property Act, that is, they can become tenants from year to year only by means of a registered document. They may of course become tenants-at-will or for a year without any registered document, that is, by a verbal contract. Receipt of the rent from persons in possession may under certain circumstances create a verbal lease for a year, but a mere receipt of rent not inconsistent with the plea of the defendant, that is, when the defendant sets up an adverse title of a higher kind, cannot create a tenant at all or a tenant for a year. In this view I do not agree with the decision of Das and Bucknill, JJ., in the case of *Ram Lochan Vaid* v. *Kamakhya Narain Singh* (30), for there was no tenancy which could be continued after the death of the original *mukarraridars* by mere receipt of rent from the Defendant. This view is supported by the case of *Vedapalli Narasimham* v. *Dronamraju Seetharamamurthy* (27) where it was held that the representatives of a tenant on sufferance are mere trespassers and the lessor cannot by his assent alone convert such representatives into tenants without their concurrence and such a representative who enters on possession at the death of the original lessee is not a tenant within the meaning of Article 139 and a suit for possession against him will lie under section 144. This was the view also expressed in the decision of *Ramakristna* v. *Ranga* (31). In *Luvuma Mana Patil* v. *Moroba Ramkrishna* (32) it was held that possession under an invalid deed or under an expired lease or under a void lease for 12 years was a sufficient answer to claim to eject.

Now what is the claim set up by the Defendants in the present case? They assert a title by adverse possession.

[His Lordship examined the evidence on the point and proceeded]:—

I differ from the view of the learned Subordinate Judge and hold that the Defendants asserted a permanent *mukarrari* interest and had been in possession to the knowledge of the Plaintiff and have thus acquired indefeasible title as *mukarraridars*. The learned Subordinate Judge has overlooked the most important fact in this case that the Plaintiff admits the Defendants' possession as transferees in the plaint as well as in the evidence. Shiv Sahay Lal, Plaintiff's witness No. 1, has deposed that since the death of *mukarraridars* more than 12 years ago "their assigns were allowed to remain in possession of the village as yearly tenants" and so the plaint also states (para. 3). Thus the Plaintiff knew that the Defendants were holding under a sale deed which described the interest conveyed to them as perpetual *istimrari mukarrari*. The

(30) 1923 Patna, 201=4 P.L.T. 123=1923 Pat. H.C.C. 54.
(31) (1884) 7 Mad. 424.
(32) (1896) 21 Bom. 502.

defendants were not holding in any other capacity. The plaintiff and his predecessors knew fully that the heirs and assigns of the *mukarraridars* were claiming permanent interest, whereas the plaintiff and his predecessors were claiming that the original *mukarraridars* had only life interest and their heirs and assigns were merely trespassers. The previous history is well known and fully set forth in the judgment of Woodroffe, J., in *Ram Narayana Singh* v. *Chota Nagpur Banking Association* (1), Shiv Sahay Lal indicates this in his evidence. He admits that the Raja had brought suits for resumption against the heirs and assigns of *mukarraridars* holding under leases similar to that in the present case. He says the Raja was unsuccessful in the resumption suit against Amir Khan which was in 1934 35 Sambat (1877); that he got a decree for resumption in the suit against Narsingh Dayal Sahu in 1903. He says that during the interval no resumption suit was brought because it was apprehended that the Raja would not succeed. This evidently means that all the heirs and assigns of the *mukarraridars* were claiming to hold the villages as permanent *mukarraridars*. In 1958 Sambat (1902) the Raja's suit against Girdhari Singh was decreed and that against the Chota Nagpur Banking Association in 1915. This last-mentioned case is *Ram Narayan Singh* v. *Chota Nagpur Banking Association* (1). The suit was instituted in 1910. The cases referred to by Shiv Sahay Lal are given in detail in the judgment of Woodroffe, J., in the aforesaid case of *Ram Narayan Singh* v. *Chota Nagpur Banking Association* (1). The history of the litigation in connection with a large number of leases including the present one granted by Raja Ramnath Singh between the years 1864 and 1866 and the fluctuating state of the law as to the meaning of *mukarrari istimrari* from that time up to 1915 will clearly show that the claim of the heirs and assigns of *mukarraridars*, including those in the present case that they had acquired under the *pattas* permanent *mukarrari* lease heritable and transferable, had acquired notoriety of such a character that it is not possible to conceive that the defendants held possession of the villages except under a claim by adverse possession claiming interest of a limited nature, namely, perpetual *mukarrari*. There have been a number of cases and the history of the litigation between the Ramgarh estate and the heirs and assigns of *mukarraridars* has become notorious, so much so that it is not now thought necessary to repeat in each case. It has, however, been sufficiently indicated in the evidence of Sheo Sahay Lal, which can be elucidated and made comprehensive by referring to the detailed account given by Woodroffe, J. He says that between the 26th November, 1864 and the 22nd of September, 1866, Raja Ramnath granted 644 *istimrari* leases, thus letting out a large portion of his zemindari in *mukarrari istimrari*. The Sadar Dewani Adalt previous to that had held that an *istimrari mukarrari* lease did not import heritable interest unless there were express words of inheritance, such as, "*naslan bad naslan*" (generation after generation). Shortly after the first lease was granted it was held in the case of *Munranjun Singh* v. *Raja Leelanund Singh* (33) that the *mukarrari istimrari* interest there dealt with was hereditary. Raja Ramnath Singh died in 1866, and shortly after his posthumous son also died, and litigation then broke out between his widow Srimati Hira Kueri and Ram Narain Singh, who belonged to a junior line of Tej Singh, the common ancestor. During this period in 1869 the High Court held in the case of Mt. *Lakhu Kowar* v. *Huree Krishna* (34) that a *mukarrari istimrari* grant there constituted a perpetual and heritable interest. In 1871 a suit for resumption of one of the *mukarraris* was brought by Srimati Prem Kueri, mother of Raja Ramnath Singh. It was dismissed in March 1872 on the ground that the words *mukarrari istimrari* in the *patta* conveyed heritable interest. In 1873 after the death of Srimati Hira Kueri the Court of Wards made over the estate to Ram Narain Singh. In 1875 Ram Narain Singh brought a suit for resumption against the *mukarraridar* named Amir Khan. This was dismissed on the ground that the words *mukarrari istimrari* gave a heritable interest to the grantee. The decision was upheld by the High Court in 1877 when it was held that the words by themselves purported to give a perpetual and heritable tenure. This

(33) (1865) 3 W.R. 84 = I.A. Sup. 181 = 13 B.L.R. 124 (F.B.)
(34) (1869) 12 L.R. 3 = 3 B.L.R. A.C. 226.

case is referred to by the witness Shiv Sahay Lal. Previous to the decision in this case the Judicial Committee disposed of the appeal of *Manoranjan Singh* v. *Raja Leelanand Singh* (33) and held that whilst it was doubtful whether the words *mukarrari istimrari* meant permanent during the life of the persons to whom they were granted or permanent as regards hereditary interest, yet that coupling these words with the usage proved in that case the tenures were, as the High Court held, hereditary. This decision was followed by the High Court in *Sheo Pershad* v. *Kally Dass Singh* (35). On appeal the Privy Council held that "*mukarrari*" does not necessarily import perpetuity though it might do so. [*Bilasmoni* v. *Sheo Pershad* (36)] In 1885 the Judicial Committee reviewed all the preceding decisions and held that the words *mukarrari istimrari* in a *patta* granting land do not themselves denote that the estate granted is an estate of inheritance. It was, however, also observed that it could not be said that such an estate could not be granted unless the words "*ba farzandan*" or "*naslan bad naslan*" or similar terms were used. There may be other terms, circumstances and conduct of the parties showing intention with sufficient certainty that the grant was to be perpetual: *Toolshi Pershad Singh* v. *Raja Ram Narayan Singh* (2), This was followed in the case of *Agin Bindh Upadhya* v. *Mohan Bikram Shah* (4). In 1899 in the case of *Maharani Beni Pershad Koeri* v, *Dudhnath Roy* (5) the decision in *Toolshi Pershad Singh* v. *Rajah Ram Narayan Singh* (2) was followed. These three last decisions, that is, of *Agin Bindh* (4), *Maharani Beni Pershad Koeri* (5) and *Toolshi Pershad* (2) are not concerned with the Ramgarh estate, for Raja Ramnath Singh having lost Amir Khan's case in 1877 did not pursue his claim further by litigation, except in 1884 where a suit which was instituted was withdrawn alleging that the case could not be taken as a test case to the Privy Council. Raja Ramnath Singh died in 1899 and was succeeded by Raja Ram Narain Singh. He being encouraged by the decision of the Judicial Committee in *Toolshi Pershad Singh's* case (2) asserted again by litigation his claim to resume the lands covered by these leases on the death of the grantees and he was successful. In the case of *Girdhari Singh* v. *Maharaj Ram Narain Singh* decided by Henderson and Geidt, JJ., in 1902 and in the case of *Narsingh Dyal Sahu* v. *Ram Narayan Singh* (3) it was held that the lease couched in the same terms as those in the present suit granted by Maharaja Ramnath Siugh did not convey perpetual hereditary grant. Sheo Sahay Singh says:

> "The Raja was unsuccessful in his resumption suit against Amir Khan which was in 1934 or 1935 (1877). Then the Raja got decree from the High Court in 1903 A.D. in his resumption suit against Narsingh Dyal Sahu and others. During the interval no resumption suit was brought because it was apprehended that the Raja would not succeed."

In this state of litigation when the Raja was even from 1877 asserting his right to resume after the death of the original grantee and the heirs and assigns of the *mukarraridars* were, on the other hand, asserting that the grant was of a permanent character, it is impossible to conceive that the Raja would recognize the heirs and assigns as tenants or that the latter would agree to have the status of merely yearly tenants. It was well known and it is tacitly admited by Shiv Sahay Lal in the words quoted above that the heirs and assigns were setting up a claim of permanent *mukarrari* in the leased villages. Again, it is pointed out by Woodroffe, J., that after *Amir Khan's* case (37) in 1877 the deeds of transfer by the *mukarraridars* referred to the permanency of the grant. Thus it is that the deed of sale (Ex. B) of 1879 in the present case in favour of Sahay Singh, the ancestor of the defendants, refers to the permanency of the grant. This shows that in the circumstances of the general litigation the *mukarraridars* and heirs and assigns were setting up permanent interest and not anything less than that, and they would not consent to be yearly tenants. They therefore insisted upon having receipts in their names, thinking that such receipts would confer upon them the permanent *mukarrari* interest, whereas the landlord was loath to recognize the transfer and was willing to grant the defendants only *marfatdari* receipts, thus keeping intact his

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(35 (1879) 5 Cal. 543=5 C.L R. 138.
(36) (1882) 8 Cal. 664=9 I.A. 33=11 C.L.R. 215=4 Sar. 325 (P.C.).

(37) S.A. No. 533 of 1876, decided on 4th September 1877 (Cal.).

right under the original *mukarrari istimrari* which he contended did not confer a permanent and heritable interest. Now, when the Privy Council decided that the words "*istimrari mukarrari*" do not by themselves convey a permanent interest, but those words coupled with circumstances and conduct and usage might establish a clear intention of a permanent interest being created, the Chota Nagpur Banking Association set up a case of usage and conduct in support of its claim that permanent interest was acquired under the *istimrari mukarrari* deed. This plea was, however, overruled upon the finding that there was no evidence of any circumstances or conduct or usage as set up by the defendant. It is however clear that both the parties were trying to assert rights against each other, the Rajah claiming to re-enter after the death of the lessees and the heirs and assigns of the *mukarraridars* claiming the right of holding as permanent *mukarraridars*, shaping their respective cases in the light of the decisions of Courts that were from time to time given. In the case of the *Chota Nagpur Banking Association* (1) it was further held that the grant of receipts by the Raja's mortgagee Jadunath Mukherjee did not constitute any recognition of tenancy, for the Raja was not concerned with the acts of the mortgagee or the *mukarraridars* and the Raja could not be said to have recognized the alleged heirs or their tenants unless he was aware of the fact and the holding over was with his express consent. In that case, as in the present case, therefore, the realization of rent decrees by mortgagee Narsingh Dayal Sahu between the years 1954 to 1958 Sambat did not constitute any recognition of tenancy by the Raja. There, as in this case, there has not been proved any express consent by the Rajah of the holding over as tenants by the defendants. As in that case, so in the present case, it has not been shown nor is it likely that the lessor who has persistently refused to recognize any heirs of the *mukarraridars* had given express consent to their holding over. The suits referred to in the case of *Ram Narayan Singh* v. *Chota Nagpur Banking Association* (1) were brought within twelve years of the death of the original *mukarraridars*. This is admitted by witness Shiv Sahay Lal and the cases themselves show this, and therefore those suits were not barred. It was pointed out by Woodroffe, J., that if the heirs and assigns became tenants by recognition, which was not proved, notice was necessary. The Raja's claim is obviously time-barred, but in order to bring his case within limitation, what the tenants had set up in the previous cases of recognition to defeat the Raja's claim to eject them without notice is now pleaded by the Raja in order to create a yearly tenancy and to bring the suit, after determination of the same by notice, under section 111 (*h*) of the Transfer of Property Act read with article 139 of the Limitation Act. As already shewn, no recognition by receipt of rent has been established and this was not the plaintiff's claim. The notices (Exs. A, B, C, D, E and F) show that they were treated as yearly tenants upon the ground that they were allowed to hold over. Such is the case in the plaint and in the evidence. The case set up is obviously due to the notion that mere assent to hold over will be sufficient to create a yearly tenancy under section 116 of the Transfer of Property Act and the principles underlying that section. It has been shown already that a mere assent in such a case is not sufficient to create a tenancy, still less a tenancy from year to year so as to prevent the defendants from taking advantage of the limitation running against the lessor from the death of the original lessees.

Reading the evidence in the light of the litigation disclosed in the evidence in the case, such as it is, and referred to above, and in the judgment of Woodroffe, J., referred to above, it is clear that the tenants claimed to hold adversely to the knowledge of the lessor the limited interest of a permanent *mukarrari* tenancy liable to pay rent to the landlord as is mentioned in the *mukarrari* deed which had become void. The payment of rent in these circumstances, as already shewn, even if proved and it has not been proved in the present case, will not preclude the defendants from pleading adverse possession as set up by them. The authorities in which it has been held that it is open to a person to plead tenancy and in the alternative possession of a limited interest have been cited above. Of course the nature and effect of possession must depend upon the nature and extent of the right asserted by the overt conduct or express

declaration of the person relying upon it; [*Ramchurn Laha Bukshee* v. *Mungul Sircar* (12), *Messrs. R. Watson & Coy.* v. *Rani Shurut Sundari Debee* (13), *Dinomoney Dabea* v. *Doorgapersad Mozoomdar* (14), *Maidin Saiba* v. *Nagapa* (15), *Luxuma Nana Patil* v. *Moroba Ramkrihna* (32) and *Thakore Fatesingji Dipsanji* v. *Bamanji Ardeshir Dalal* (18)]. In the last case it was observed:

"The effect of acquiescence in the defendants' assertion of title by allowing him to remain in possession and accepting rent would not debar the tenant from raising the plea of adverse possession.

"Authorities show that a tenant in India is not precluded by an admission of tenancy from showing that the nature of tenancy asserted by him to the knowledge of the landlord has been for the period prescribed by the Limitation Act *pro tanto* adverse to the right to eject either at will or on notice given. The question then is not what was the right which actually existed at the beginning of the tenancy but what was the right which he has openly enjoyed to the knowledge of the owner or his representative for the time being. A manifest assertion by the tenant to the knowledge of the person representing the landlord's interest of a right inconsistent with that claimed by the landlord to treat him as a tenant-at-will or from year to year would be a disclaimer of the landlord's title under the ruling in *Vivian* v. *Moat* (38)."

Relying upon the case of *Gopal Rao* v. *Mahadeo Rao* (39), it was observed that it is inconsistent with the decided cases to hold that a landlord merely by receiving rent from his tenant could preserve his right to other claims continuously denied by the tenant. The relationship of landlord and tenant might be continued by the admission of the parties, but such admission cannot create, preserve or revive undisputed conditions of its continuous rights in conflict with the claims openly asserted and not withdrawn by the tenant who is suffered to continue in possession. Their Lordships observe:

"In this case it seems impossible to close one's eyes to the fact that adverse interest was openly asserted and so far enjoyed as to give full notice of the nature of the tenancy claimed."

No doubt, in that case the lease which turned out to be invalid purported to create a permanent *mukarrari* interest, whereas in the present case the *mukarrari istimrari* granted to the original *mukarraridars* conveyed only a life interest; yet the defendants in the present case claimed that the interest conveyed by the *mukarrari istimrari* lease was of a permanent character and in the sale-deed taken by Sahay Singh such an interest is expressly asserted and the defendants expressly have been claiming throughout to hold under the sale-deed as permanent *mukarrari*. By reason of the litigation referred to above and the circumstances and evidence in the case that claim had become notorious and was well known to the plaintiff. Therefory the principle enunciated in the cases alreads referred to applies to the present case. Under these circumstances article 139 of the Limitation Act has no application, and as held by their Lordships of the Judicial Committee in the case of *Ramchunder Singh* v. *Madho Kumari* (40) the suit is governed by article 144 of the Limitation Act, the defendants having made a definite assertion of an adverse right more than 12 years prior to the suit. The defendants never claimed to hold on any terms other than as permanent *mukarraridars*.

I would, therefore, hold in disagreement with the view of the learned Subordinate Judge that the defendants had before the date of suit acquired a right to hold the mauzas in suit as permanent *mukarraridars* by prescription and adverse possession. I also hold that the defendants were not tenants from year to year and that the suit is barred by limitation.

The result is that Issue No. 3 is decided in favour of the plaintiff, and Issues Nos. 2, 4 and 5 against the plaintiff and in favour of the defendants.

The result is that the decree of the Court below is set aside and the suit is dismissed. The appeal is allowed with costs throughout.

Macpherson, J.:—I agree.

Appeal allowed.

(38) (1881) 16 Ch. D. 730=50 L.J. Ch. 331=44 L.T. 210=29 W.R. 504.
(39) (1895) 21 Bom. 394.
(40) (1885) 12 Cal. 484=12 I.A. 188=4 Sar. 666 (P.C.).

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JWALA PRASAD AND MACPHERSON, JJ.

Gopal Ojha and others—Plaintiffs-Appellants

v.

Ramadhar Singh and others—Defendants-Respondents.

Appeal from Original Decree No. 79 of 1920, decided on 17th June, 1924, from a decision of Additional Sub. Judge, Palamau, dated 28th January, 1920.

(a) *Civ. Pro, Code. O. 1, r. 3—All persons recorded as in possession of village are necessary parties to suit for declaration that entry in Survey Record is incorrect and for recovery of possession.*

When a suit is filed for declaration that an entry in Survey Record of Rights of a village is incorrect and for recovery of possession if the plaintiff is held to be out of possession all persons found on the record as in possession of the village and as claiming title adverse to the plaintiff are necessary parties. [P. 232, C. 2.]

(b) *Landlord and tenant—Joint lease—One of two joint lessees dying does not entitle landlord to re-enter as to half the property as the right of re-entry in such case does not arise until death of both lessess—Co-sharers.*

In the case of joint tenancy of two persons where one of the lessees dies, the lessor does not get a right of re-entry as to half the property demised because the lease does not come to an end until the death of the survivor of the two lessees and hence the landlord's right of re-entry does not come into being until the death of both the lessees. [P. 236, C. 2.]

(c) *Co-sharers—Partition ends nature of tenure and survivership does not apply thereafter.*

Partition puts an end to the incidents of a joint tenancy. When the interest of a joint tenant is severed by partition, on his death, succession to his interests will not be by survivorship but the separated tenant's heirs would inherit his interest in the tenancy. [P. 236, C. 1]

(d) *Evidence Act, S, 92—Evidence of conduct of parties is inadmissible to contradict an unambiguous grant.*

Where the conditions in a grant are clear and unambiguous evidence of the conduct of the parties leading to a different inference is inadmissible.

(e) *Contract Act, S. 62—No novation takes place without the substitution of a fresh contract for the original one.*

When a contract is novated there is a fresh contract coming into existence directly or by implication in place of the original contract. Hence the fact of the holders of a perpetual and heritable grant, partitioning subsequent to the grant, the subject-matter of the grant without reference to the grantor, so as to entitle the respective heirs to the specific properties, does not invite the operation of the principle of novation. [P. 236, C. 1.]

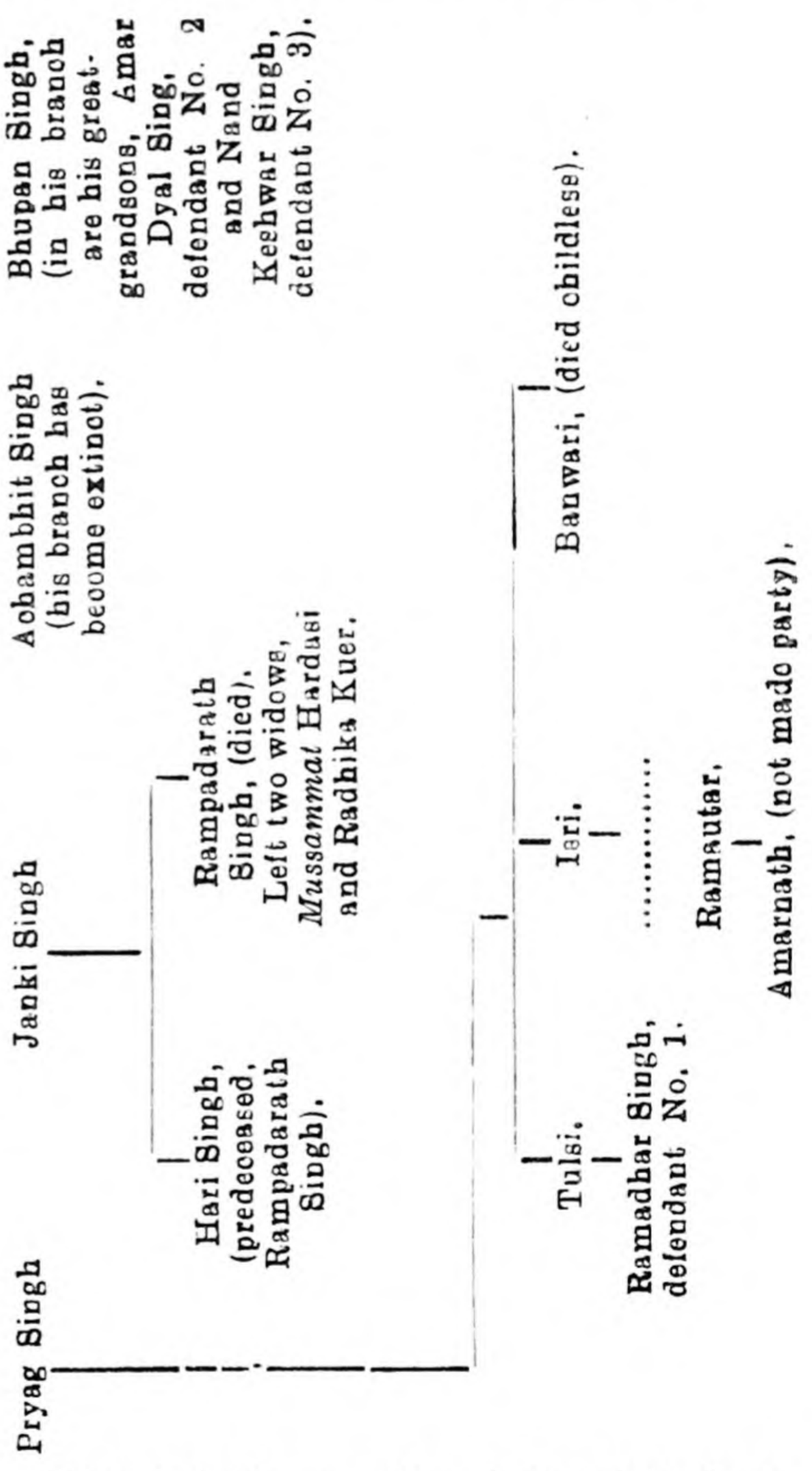
(f) *Deed—Construction—Lease in terms perpetual, with fixed rent, heritable, and in default of payment of rent of three kists becoming void, was held unresumable.*

The terms of grant of lands to two brothers made the grant a perpetual one. The grantees and their descendants were to pay a fixed rent and enjoy the lands from generation to generation. The grantor's descendants were to collect the fixed rent generation after generation and when there was default in payment of the fixed rent for three kists the fixed lease was to be void. *Held*, that the grant was not resumable and that it was permanent in its duration with a fixed rental, capable of descending to heirs in male and female lines and of being held from generation to generation. That is, in short, the grant was an absolute, perpetual, heritable and transferable grant.

C. C. Das and *L. K. Jha*—for the Appellants.

S. M. Mullick and *S. Saran*—for the Respondents.

Jwala Prasad, J.:—This appeal arises out of a claim for resumption. The plaintiffs are the appellants. The following genealogy culled from the evidence of Ramadhar Singh, defendant No. 1, which is not challenged, may be useful and is accordingly set out in the beginning.



Thus defendants Nos. 1, 2 and 3 have been recorded in the Record-of-Rights prepared at the last Survey in 1917 as being in possession of the properties as *mukarraridars*, 8 annas in the name of defendant No. 1 and 8 annas in the names of defendants Nos. 2 and 3. The tenure has been recorded as *mukarari istamrari* not resumable. The aforesaid entry is the result of a decision arrived at by the Assistant Settlement Officer, dated the 6th March, 1917 (Ex. 5) in a hotly con-

tested dispute between the parties. The decision was upheld on objection under section 83 of the Bengal Tenancy Act by the Assistant Settlement Officer in charge by his decision (Ex. 6), dated the 17th of June, 1917.

The defendant No. 4 Babu Chain Singh, is alleged in the plaint to be the son of Babu Sheosagar Singh by a daughter of Rampadarath Singh. Both the plaintiffs and the defendants Nos. 1 to 3 disputed the relationship of defendant No. 4 with Rampadarath Singh and the Court below has held that the relationship has not been established: that this defendant, who was made respondent in this appeal, entered appearance and filed a cross-objection challenging the decision of the learned Subordinate Judge so far as it affected him. He is, however, dead and in his place one Sahdeo Singh has been substituted at the instance of the appellants. Notice was served upon him, but he has not entered appearance nor has he contested this appeal.

Respondent No. 1 Babu Ramadhar Singh and respondent No. 3 Babu Nandkeshwar Singh are also dead and in their place their respective heirs and legal representatives have been brought on the record. Therefore, this appeal is contested principally by the legal representatives of respondents Nos. 1 and 3 and respondent No. 2. They have lodged a cross-objecaion with respect to the issues that have been decided by the Subordinate Judge against them.

Shortly speaking, the plaintiffs dispute the correctness of the entries in the Record-of-Rights referred to above and in fact they base their cause of action upon the decision of the Assistant Settlement Officer in charge, dated the 17th June, 1917. They say that they have been all along in *sir* possession of both the *mauzas* in dispute Manhu and Saharewa and that their possession has not at all been disturbed on account of their wrong entry in the Survey Record-of-Rights. They also assert that the tenure is resumable and was, as a matter of fact, resumed. Their case is that the villages in question, Manhu Saharewa and Majhigawan in *Pargana* Palamau, were held by their ancestors on the mother's side in *khairat*. The two *Mauzas* Manhu and Majhigawan were granted in *mukarrari* to two brothers Janki Singh and Pryag Singh shown in the above pedigree, by a deed, dated the 19th *Chaitra* 1234 *Fasli* (corresponding to 1st April 1827) at an annual *jama* of Rs. 71 and Rs. 21 respectively. Under the terms of that deed (a correct translation of which has now been made by the Superintendent of the Translation Department under our direction) the rent was to be paid in three instalments with a stipulation that in the event of default of payment of three *kists* the deed would become inoperative. The defendants did make default in payment of the three *kists* after the death of Janki Singh and Pryag Singh. The plaintiffs further assert that according to the custom prevalent in the District of Palamau the grant is liable to resumption after the direct male line of the last maleholder of village Manhu has become extinct. After the death of Janki Singh, his son Rampadarath Singh came into possession of that village, and after the death of Rampadarath Singh the ancesters of the plaintiffs wanted to enter upon and take *sir* possession of the village, but at the request of the widows of Rampadarath Singh namely, *Musammat* Haridasi Kuer and *Musammat* Radhika Kuer, the plaintiffs' ancestors allowed those ladies to remain in possession of the village during their lifetime as a sort of maintenance. During the survey operations *Musammat* Radhika Kuer in 1323 *Fasli* (corresponding to 1916) and defendants Nos. 1 to 3 Ramadhar Singh, Amardayal Singh and Nand Keshwar Singh contested the claim of the plaintiffs and the defendants were ultimately recorded by the Survey Officers in the *khewat* as being in possession and the tenure being not resumable. The plaintiffs also alleged that defendants Nos. 1 and 3 are distant *gotias* and are not heirs of Rampadarath and as such are not entitled to the property in question and that after the death of *Mussammat* Radhika Kuer the *mukarrari* is liable to be resumed by them.

As regards Sahorewa the plaintiffs claim that this village is unconnected with and not falling under the *mukarrari* grant, dated the 1st April, 1827 (Ex. 1) and as such it has been in possession of the plaintiffs but in the Record-of-Rights this village has been recorded as also *mukarrari istimrari* of the defendants Nos. 1 to 3 as part and parcel of village Manhu.

Upon these allegations the plaintiffs claimed the following reliefs :—

(*i*) It may be adjudicated and declared by the Court that on account of default made in the

payment of three instalments and also on account of the failure of the male line of Babu Janki Singh, *Mauza* Manhu has been in the *sir* possession of the plaintiffs, that the plaintiffs are in *sir* possession of *Mauza* Sahorswa also, that both the *Mauzas* Manhu and Sahorswa belong to them in their *khairatdari* interest, that the defendants in this suit neither have nor supposed to have acquired any interest in the *mukarrari* of the said *mauzas* and that the defendants are not entitled to get their names entered in the *khewat* as *mukarridars* in respect of *Mauzas* Manhu and Sahorswa.

(*ii*) If on account of any illegal action on the part of the Survey and Settlement Department, etc., the defendants be deemed to be in possession then in that case the Court may be pleased to put the plaintiffs in *sir* possession of *Mauzas* Manhu and Sahorswa, Tappa Nandiha, *Pargana* and District Palamau, boundaries, Survey Numbers and Thana Numbers whereof are given below, by removing the unlawful possession of the defendants.

(*iii*) All costs in Court with interest *pendente lite* and future interest may be awarded.

The defendants Nos. 1 to 3 filed one written statement and defendant No. 4 filed another. They resist the plaintiffs' claim on various grounds both in law and on facts. They plead limitation, *res judicata* and insufficiency of Court-fee as pleas in bar to the plaintiffs' claim.

As to their right under the deed of grant in question the defendants assert that two villages Manhu including Sahorswa and Mahjigawan were jointly granted to the two brothers, Janki Singh and Pryag Singh, in *mukarrari istimrari* descendible from generation to generation, that subsequent to the grant the two brothers arranged to hold the two villages separately, Janki having got Manhu including Sahorswa and Pryag having got Majhigawan, that under the deed in question the grant is not resumable on failure of heirs of the grantee, male or female that there was no *kist* mentioned in the deed and hence the plaintiffs have no right to resume the grant on failure to pay the instalments as alleged by the plaintiffs.

The defendants repudiate the plaintiffs' suggestion of there being any custom in the District of Palamau for the resumption of such *mukarrari* grants on failure of heirs and deny the correctness of the allegation that the possession of the widows of Rampadarath Singh namely, *Musammat* Hardasi and Radhika, after the death of their husband, was permissive and assert that the said ladies got possession of the villages as heiresses of Rampadarath Singh and on payment of rent. They also deny that there was any default in payment of any *kist* as alleged in the plaint and aver that the rents of 1323 and 1324 were deposited by the defendants in Court to the credit of the plaintiffs who refused to accept the same when tendered. The defendants further traverse the allegation of the plaintiffs as to their having got *sir* possession of the villages in question and of their having established their *bhandar* there and say that they are in possession of the villages as heirs of Rampadarath Singh after the death of his widows in *mukarrari istimrari* under the grant referred to above. These defendants deny as observed above, the relationship of Chain Singh with Rampadarath Singh and state that the said Chain Singh is a creature of the plaintiffs and his claim has been set up in this case by the plaintiffs to defeat the defendant's right. As regards Sahorswa the defendants say that it is a *tola*, and not a separate village, and has always been in possession of their predecessors-in-interest as part and parcel of Manhu under the grant in question.

We need not now refer in detail to the plea of defendant No. 4 as in the circumstances mentioned above he may be considered to have been deleted from the litigation.

Upon the pleadings of the parties the following issues were raised in the Court below:

(*i*) Have the plaintiffs any cause of action for the suit?

(*ii*) Is the Court-fee paid insufficient?

(*iii*) Is the suit barred by limitation?

(*iv*) Is the suit barred by *res judicata*?

(*v*) Is the *mukarrari* of *Mauza* Manho resumable for non-payment of rent for 3 *kists*, if so, can the *mokarrari* be resumed without giving an opportunity to the defendants to pay up the arrears of rent?

(*vi*) Is the *mukarrari* of *Mauza* Manho resumable on failure of heirs male of the grantees. If so, can it be resumed so long as the heirs male of Pryag Singh are in existence?

(*vii*) Did the plaintiffs make any life grant of the disputed *mokarrari* to Musammat Radhika Kuer or she was in possession in her own right as legal heir of her deceased husband Padarath Singh?

(*viii*) Did Mussammat Radhika pay up the *mukarrari* rent up to the year 1322 *Fasli* and have there been any deposits of rent for the years 1323 and 1324 *Fasli*?

(*ix*) Is there any custom in the *Parganah* of resumption on failure of heirs male in direct line

as alleged by the plaintiffs? If so does the custom apply to the grant in suit?

(*x*) Are the plaintiffs in *sir* possession so far as the defendants are concerned of Manhu and Tola Sahorswa as alleged?

(*xi*) Is defendant No. 4 the daughter's son of Padarath Singh, deceased? If so, has his right to succession over the properties of Padarath Singh become extinguished in consequence of his becoming a *sadhu* and have the defendants Nos. 1 to 3 become entitled to these properties?

(*xii*) Is the suit bad for defect and misjoinder of parties?

(*xiii*) To what relief, if any, are the plaintiffs entitled?

Issues Nos. 1 to 4 do not now arise and have been set at rest by the decision of the Court below.

The findings of the Court below upon Issues Nos. 3 and 4, namely, limitation and *res judicata* have not been challenged in this Court, and in fact, it appears that the view of the Court below is correct.

Issues Nos. 5 and 8 decided against the plaintiffs-appellants are also not pressed in appeal.

Issue No. 11 was decided against defendant No. 4 he being held not to be the son of daughter of Rampadarath Singh. There was, as observed above, a cross-objection by defendant No. 4 against the finding on this issue, but there has been no appearance on behalf of his heirs in this Court, and the plaintiffs and other defendants accept the finding of the Court below, the latter having denied the relationship set up by defendant No. 4. This issue consequently does not now need further consideration in this appeal.

The first parts of Issues Nos. 6 and 9 have been decided in favour of the plaintiffs. The Court below has held that the *mukarrari* tenure in question is resumable on failure of heirs male of the grantees under the terms of the grant as well as under the custom of resumption on failure of heirs male in direct line of the grantees set up by the plaintiffs as being prevalent and in vogue in *Pargana* Palamau. The defendants are aggrieved by the decision of he Subordinate Judge upon these points and have filed a cross-objection.

Issue No. 12 has also been decided in favour of the plaintiffs, the Court below having held that the absence of Amarnath from the record does not affect the maintainability of the suit. The defendants do not accept this view of the Court below and have, therefore, filed a cross-objection.

The second parts of Issues Nos. 6 and 9 and Issue No. 10 have been decided against the plaintiffs, the Court below having held that the *Mukarrari* of *Mauza* Manhu cannot be resumed so long as the heirs male of Pryag Singh are in existence and that the plaintiffs have never been in *sir* possession of Manhu or of *Tola* Sahorswa.

The result of the decision of the Subordinate Judge upon these issues against the plaintiffs have been that the plaintiffs' suit has been dismissed *in toto*.

The main questions, therefore, for consideration in this appeal are those involved in the aforesaid Issues Nos. 6, 7, 9, 10 and 12. To put it clearly the points are (1) whether the *Mukarrari* of *Mauza* Manhu is resumable *firstly* under the terms of the grant (Ex. 1), dated the 1st April, 1827, and *secondly* upon the custom of resumption pleaded by the plaintiffs, (2) if the tenure is resumable upon the happening of certain events so as to entitle the plaintiffs to resume the *Mukarrari* in question, (3) is Sahorswa a part or *tola* of *Mouza* Manhu, or is it a separate village unaffected by the grant in question, (4) is Amarnath, the great-grandson of Pryag Singh, a necessary party in the case and is the suit, therefore bad on account of his absence from the record.

The last point may be disposed of at once. The plaintiffs' action is virtually levelled against the entry in the Survey Record-of-Rights and they seek a declaration that the entry is incorrect. They expressly state that the persons entered in Record-of-Rights set up a false claim with respect to the *mauzas* in question against the plaintiffs' right. The Survey has recorded amongst others Amarnath as being in possession of the villages in question and as claiming *istimrari mukarrari* interest adverse to the plaintiffs. The plaintiffs further claim in the alternative recovery of possession in case they be deemed to have been out of possession. Now, the persons recorded as in possession of the villages in question and as claiming title adverse to the plaintiffs are necessary parties to the plaintiffs' action for a declaration of their title and for recovery of possession in the alternative. The Court below has held that

"The defendant No. 1 is the only person entitled to this *mukarrari* but as the Survey Records have entered the names of defendants Nos. 2 and 3 also they are necessary parties to this suit."

This reason stated by the learned Subordinate Judge applies with equal force to the case of Amarnath and, therefore, the Subordinate Judge is wrong in his view, for which he has given no reason, that "the absence of Amarnath from the records of this suit does not affect its tenability." Therefore, the objection of the defendants must prevail and the finding of the Court below on Issue No. 12 is set aside.

The next question is as to whether the tenure is resumable either under the terms of the grant or under the custom set up by the plaintiffs. The deed in question is said to be a *patta* granted by Nut Nath Jha the predecessor-in-interest of the plaintiffs, to Raj Kumar, Sri Pryag Singh and Babu Janki Singh, the ancestors of the defendants-respondents. It runs as follows :—

"*Swasti Sri Maharaj Pujit Sri Sri Minhaidar* Mauza *Kishunpur wogarah Paragana Palamau Zillah Ramgarh age Tappe Deogan maha* Mauza *Naudiha wo mahuari ke bari maha* Mauza *Manhu wo* Mauza *Majhigawan yeh dono gaon hamara khairati hai se ham Raj Kumar Babu Sri Pryag Singh wo Babu Sri Janki Singh ko* mukarrari *likh del mai am, mahua jalkar, bankar, tar, bagh, kath, koa, parjakur, chakur sayan mai jahat istamrari likh del take jama molguzarijat wo rupia sikha kaldar* mukarrari *biyanwe rupia wo Babu mazkur ke ali aulad pusht dar pusht likhla muafiq malguzari del karat sal basal jagah blog karat Ham wo hamar ali auladi likhla muafig malguzari pusht dar pusht del kari sal basal.*"

The English translation of the above is as follows :—

["Respected and worshipped by the Maharaj, (I am) the *mainhaldar* of *Mauza* Kishunpur, etc., Pargana *Palamau*, District Ramgarh. I hold in *khairati* (charity) *Mauza* Manhu and *Mauza* Majhigawan in the Barhi of (apnertaining to ?) *Mauzas* Naudiha and Mahuari in Tappa Deogan. I have granted it (in writing) (in) *mukarrari* to Rajkumar Babu Shri Prayag Singh and Babu Shri Janki Singh, including mango and mahua (trees), *alkar*, bankar, palm trees, orchards, catechu, cocoons, houses of tenants, the four boundaries ; (I have) granted (it) in writing as a perpetual (*istimrari*) grant by all means. The amount of rent in respect thereof is ninety two-rupees in *kalladar* coin.....fixed (amount) Rs. 92. The Babus, aforesaid, and their descendants (*al aulad*) generation after generation, should pay the rent written (above) year after year, (and) enjoy the lands. I and my descendants (*al aulad*) generation after generation, shall realise the rent written (above), year after year. Details of the rent :— For *Mauza* Manhu seventy-one rupees for *Mauza* Majhigawan Rs. 21. In the event of default (in the payment of) rent for three *kists* the *mukarrari* shall be void. Dated Sari, the 19th Chait 1234 *Fasli Sambat* 1884."]

In the translation the words "heirs and representatives" have been put down for the vernacular words "*al aulad*" and the words "generation after generation" for the words "*pusht dar pusht.*"

The grant of the two villages, Manhu and Majhigawan, has been made to the two brothers, Pryag Singh and Janki Singh. The grant is to be enjoyed by the grantees and their heirs and representatives (*al aulad*) generation after generation (*pusht dar pusht*). The grantor and his heirs and representatives (*al aulad*) have to receive the rent generation after generation (*pusht dar pusht*).

According to Fellon's Dictionary the word "*al*" in Arabic signifies the issue born to the daughters and "*aulad*" the issue of the son. The two words "*al aulad*" put together would mean the offspring or children or descendants both in the male and in the female line "*pusht dar pusht*" means through successive generations ; generation after generation ; *parampara*.

The word '*istimrari*' is derived from "*istimrar*" which means permanence, perpetuity, uninterrupted possession. In law it means a fixed rent not liable to alteration. "*Istimrardar*" is the holder of a lease in perpetuity. "*Istimrari*" is an adjective and means perpetual, continuative, never ceasing. "*Istimrari patta*" is a lease or form granted at a fixed rent and in perpetuity. In this view the Permanent Settlement of Lord Cornwallis is said to be *istimrari* and a piece of land is said to be settled *istimrari* when it is settled permanently.

Mukarrari, a fixed lease, quit rent, a fixed stipend. It connotes fixity of rent and also permanency.

The aforesaid words in the *kabuliyat* (*al aulad*) *pusht dar pusht*, *mukarrari* and *istimrari* indicate etymologically that the grant was perpetual, permanent in its duration and fixed in the rental descendible to heirs both in the male and female lines and was to be held generation after generation. Not the terms of the document but the entire context thereof shows that the grant conferred, upon the

grantees in unambiguous and clear terms, a permanent, perpetual and heritable grant. It was a grant unlimited in the way of succession or in duration. Therefore, so far as the terms of the grant are concerned the plaintiffs cannot ask us to put any limitation upon its enjoyment by the heirs of the grantees either in the male or female line or by their representatives. It was an absolute grant heritable and transferable. The plaintiff's right to resumption has not at all been reserved in the deed. Therefore, the contention of the plaintiff that the grant was resumable on failure of the male heirs in direct line of the grantees must fail upon the construction of the document.

The plaintiffs wanted to fortify their position by making the grant resumable upon custom said to have been in vogue in the part of the country where the lands in question are situate. The learned Subordinate Judge has held that no reliable evidence of any custom has been given in this case. Now, the clear and unambiguous terms of the documents conferring an absolute and irresumable right on the grantees can be abandoned or controlled only by clear evidence of custom ancient, invariable and unambiguous and so having acquired the force of law. The learned Counsel on behalf of the appellants has not attempted to support the custom set up by the plaintiffs by reference to any evidence on the record. Therefore, the view of the Court below is that there is no evidence offered or produced by the plaintiffs to show that there was a custom prevalent by which the words "*al aulad*" were understood to mean lineal male descendants. The learned Subordinate Judge has based his decision on the fact that "*al aulad*" and "*pusht dar pusht*" in the present case must have restricted meanings and application to male descendants only upon certain authorities relied upon by him. The first case referred to by him is *Perkash Lal* v. *Rameshwar Nath Singh* (1). That case related to a *khairat bishanprit* grant made to a Brahman by the Rajah of Kunda in Hazaribagh and special custom was pleaded whereby the words "*al aulad*" related only to male descendants, and the evidence in proof of the custom was accepted. The contention of the Advocate-General was that

> "although the words *al aulad*, etymologically considered, include both male and female descendants, yet according to the custom prevailing in the Kunda Raj at the time of the grant such *khairat* grants were resumable on the failure of lineal male descendants, and admittedly no such descendants exist. The evidence on custom is overwhelming."

This argument was accepted by the Court. Therefore, in order to apply the principle of that decision it must be established by evidence that by custom the words must not be understood in their etymological sense but in a restricted sense as meaning male descendants in the direct line only. Another distinguishing feature of that ruling is that the terms of the grant quoted in the judgment show that the words of inheritance employed were only "*al aulad*", and not "*pusht dar pusht*". Here, these additional words go to confirm that the grant was meant to be descendible both in the male and the female lines. Therefore, upon the findings of the Court that ruling has no application to the present case.

Mr. Das then relied upon the case of *Ram Narain Singh* v. *Chota Nagpur Banking Association* (2) in order to show that the view taken in the case of *Perkash Lal* v. *Rameshwar Nath Singh* (1) was approved of by the Privy Council. This is so but the view was confirmed with respect to the meaning of '*al aulad*' having been restricted by custom. The Privy Council decision refers to the case of a *putra putradik* grant by the Maharajah of Chota Nagpur and it was held upon evidence that the words "*putra putradik jagir*" as employed in the grants made by the Maharajah meant only an estate for life descendible to male heirs only, and resumable on the extinction of the male heir of the grantee in the direct line. This decision also, therefore, does not apply to the present case. The same remark applies to the decision in the case of *Lal Gajendra Nath Sahi Deo* v. *Lal Mathura Lal Nath Sahi Deo* (3) which refers to the estate of the same Maharajah in the Ranchi District.

The aforesaid cases referred to by Mr. Das do not at all relate to *Pargana* Palamau and will not apply to a custom set up in the present case. Therefore, the first part of Issues Nos. 6 and 9 must be decided in favour of the defendants and the

(1) (1904) 31 Cal. 561.

(2) (1916) 43 Cal. 352=36 I.C. 321.
(3) (1916) 1 P.L.J. 109=20 C.W.N. 876=35 I.C. 383.

view taken by the Court below must be set aside.

The plaintiff's case was that after the death of Rampadarath, son of Janki Singh, the *mukarrari* of *Mauza* Manhu came to an end and was resumable; but his widows, Hardasi and Radhika, were allowed to remain in possession with the leave and license of the plaintiffs and consequently they obtained life grants which terminated after the death of the survivor of them Musammat Radhika in 1916. This story of their permissive possession of the widows of Rampadarath seems to be a myth and has not been substantiated by reliable evidence on the record. It is impossible to conceive that the widows would have been allowed to remain in possession merely for the asking and without any deed having been executed in their favour. Receipts used to be granted to them: *Vide* Exhibits A-8, A-9, A-24 to A-46, a large number of receipts in A series. These receipts described the ladies as heirs and successors of Babu Rampadarath Singh, the deceased *mukarraridar*, for instance, *vide* Exhibit A-8, dated the 6th January, 1881, and Exhibit A-9, dated the 16th January, 1881. The Subordinate Judge rejects the story and we have no hesitation in accepting his finding. But the finding leads to an important inference and that is that the two females succeeded to the *mukarrari* as heiresses of their husband which conclusively established that the grant from its inception was heritable in the female line. The ladies remained in possession for 30 years. This instance of succession of females to the *mukarrari* successfully repudiates the suggestion that *al aulad* and *pusht dar pusht* in the document in question should have a restricted meaning.

The learned Subordinate Judge says that assuming that the grants were resumable on failure of heirs male of the grantees either under the deed or under the custom set up by the plaintiffs, there has, as a matter of fact, been no failure of heirs male so long as the male heirs of Prayag Singh, the joint grantee with Janki Singh is alive. The learned Subordinate Judge holds that the grant created a joint tenure in favour of the two brothers Prayag Singh and Janki Singh and the subsequent division of the *mauzas* between the two brothers, namely, Janki Singh, getting village Manhu and Prayag Singh getting village Majhigawan, does not affect the original terms of the grant and does not create a separate grant of *Mauza* Manhu to Janki Singh and Majhigawan to Prayag Singh, so that on the failure of male heirs of Janki Singh, Manhu should revert to the grantor. Mr. Das impugns this view of the Subordinate Judge and contends that there was no joint tenure created by the deed and Janki Singh snd Prayag Singh were not joint tenants but were merely tenants-in-common. A plain reading of the deed (Exhibit 1), dated the 1st April 1827, does not support the contention of Mr. Das. He says that Manhu was granted to Janki Singh, and Majhigawan to Prayag Singh. The words in the deed are "*Mauza* Manhu and *Mauza* Majhigawan," the two *mauzas* are granted to "Rajkumar Prayag Singh, and Babu Sri Janki Singh." The two *mauzas* were jointly granted to the two brothers jointly. The rent payable to the landlord is mentioned in the aggregate for the two villages, namely, Rs. 92, in the document. How this rent has been arrived at is stated at the foot of the document as Rs. 71 for *Mauza* Manhu and Rs. 21 for *Mauza* Majhigawan. Mr. Das contends that the specification of the two *mauzas* with respect to the rent separately at the foot of the document shows that the two villages were separately granted. I confess I have not been able to follow this argument. The question is not as to the apportionment of the rent over two villages, but the liability of the grantees for payment of the rent. What is there in the document to show that one of the brothers is liable to pay anything less than Rs. 92, or the separate rent of Rs. 71 for *Mauza* Manhu and Rs. 21 for *Mauza* Majhigawan? Both of them, according to the terms of the document are liable for the rent whether it be a consolidated rent for the two villages taken together, or separate rent for each of the villages. No inference for separate grants can be made from the specification of rent in the document with respect to each *mauza* separately. Had there been any separate grant, then Manhu having been mentioned first would have gone to Prayag Singh who is mentioned first in order of the grantees and Majhigawan having been mentioned second would have gone to Janki Singh who is mentioned second in order of the grantees, but this is not so. Therefore, the original grant cannot possibly be held, upon the construction of the deed,

to be a separate grant of Manhu to Janki Singh and Majhigawan to Prayag Singh. Mr. Das then says that had the grant been joint, then after the death of Janki Singh, the two brothers would have been joint tenants and after death of Janki Singh, the survivor of them Prayag Singh would have succeeded to the grant, and not the son of Janki Singh with respect to *Mauza* Manhu. This was an arrangement between Prayag Singh and Janki Singh and there is evidence that subsequent to the grant they divided the properties so that their respective heirs might succeed to the specific properties. It is conceded that the grantor is not bound by such an arrangement. Therefore the grantor cannot take advantage of the separate arrangement. It is not possible to treat the grant as a lapsed one so long as any male member in the direct line of any of the grantees is alive.

Mr. Das says that the separate holding of the properties subsequent to the grant by Janki and Prayag shows that there was a novation. Now, novation of a contract implies a fresh contract, directly or by implication in place of the original contract, so the parties to the original grant must also be parties to the novation of the new contract. In the present case it has not been shown that the landlord was ever a party to the arrangement so as effectively to create a new contract in place of the old one set forth in the solemn document (Exhibit 1). The principle of novation, therefore, does not apply to the present case.

Mr. Das has referred us to Williams on Real Property 23rd Edition, pages 144 to 147, in order to show the distinction between "joint tenancy" and "tenancy-in-common" and their incidents. There is no dispute as to the meaning and incidents of the two kinds of tenancies. It would, however, appear by reference to page 147 that the incidents of a joint tenancy may be changed and a member of the joint tenancy may sever his connection by effecting partition of his interest and after this is done the rule of survivorship of succession will not apply but that the heirs of the separated tenant would succeed to his interest in the tenancy.

Mr. S. M. Mullick has referred us to the case of *Ram Narain Singh* v. *Chota Nagpur Banking Association* (2). While discussing the objection as to limitation, upon the ground that the cause of action with respect to a moiety of the tenure accrued after the death of one of the *mukarraidars*. Mr. Justice Mookerjee observed.

"The objections as to limitation and recognition are equally fallacious. They are based on the assumption that upon the death of one of the two original grantees, the lessor became entitled to re-enter as to one half of the property demised. This argument overlooks the elementary proposition that the lease would not terminate till the death of the survivor of the two lessees. There is a fundamental distinction between the question of the duration of the lease as a whole and the question of the devolution of the interest thereunder on the death of the first lessee. We are not now concerned with the question, whether upon the death of the first lessee, his heirs or his co-lessee would be entitled to occupy the demised premises. It is sufficient for our present purpose that the landlord was not entitled to re-enter till both the lessees were dead. In this view, no question of limitation or recognition arises."

The learned Subordinate Judge has very ably and clearly discussed this point and we entirely agree with his view that even if the grant was limited to the male heirs in the direct line of the grantees the right of re-entry or resumption in favour of the landlord has not in this case accrued so long as the male descendant of one of the grantees Prayag Singh is alive.

The result is that Issues Nos. 6, 7 and 9 are decided in all their parts in favour of the defendants and against the plaintiffs. We also agree with the Subordinate Judge that the plaintiffs failed to prove that they were ever in *sir* possession of the lands in dispute, and in deciding issue No. 10 against the plaintiffs. The investigation during the survey operations clearly shows that the plaintiffs were not found in possession of the villages in question. The widows of Prayag Singh, were admittedly in possession up to 1916 until the death of *Mt.* Radhika Kuari The orders of the Survey Department upholding the possession of the defendants are dated the 6th March 1917 and 17th March 1917 (Exhibits 5 and 6 already referred to). The dispute must have commenced much earlier, and it is impossible to conceive that the defendants soon after the death of *Mt.* Radhika Kuari would

have allowed the plaintiffs to take possession of the properties in dispute when they were claiming to hold the properties as permanent lessees under the *mukarrari istimrari* deed.

Now to prove that the tenure in question was a limited grant descendible only to the male heirs in the direct line of the grantees and to prove the right of resumption as well as the possession and dispossession, the onus is heavily upon the plaintiffs, not only because they are the plaintiffs, and want reliefs in the present case but the statutory provision raises a presumption of the correctness of the survey entries in favour of the defendants. The defendants have given evidence in the case and the presumption of the Survey Record of Rights has not been rebutted by the plaintiffs.

The same remark applies to the claim of the plaintiffs with respect to Tola Sahorswa. Certain maps have been produced in this Court. Exhibits 9-A and 9-B are separate maps of the two villages filed by the plaintiffs. The defendants have filed a map (Exhibit Q.) showing the two villages to be one. The Assistant Settlement Officer in his judgment (Exhibit 5) says :—

"The *mukarrari* having been granted in 1827 Sohorswa evidently then was a *Tola* of Manhu and since the Revenue Survey of 1864 has been treated as a separate village and this clearly accounts for the omission of Sahorswa from the *mukarrari* deed; besides this the actual rent-receipts granted to the *Mt.* by the Ojhas, Hiranand, Gunanand and others, show that they too have all along treated Sahorswa as a *Tola* of Mahu and have mentioned it to be so in the numerous rent-receipts that have been filed before me. No serious attempt has been made by the Ojhas to throw doubt on the genuineness of these receipts and they all appear to be genuine. Such being the case, I am of opinion that this claim too that Sahorswa was not included in the grant fails miserably."

Here also the onus is upon the plaintiffs to rebut the presumption of the finding of the Survey Officer and the entry made in the Record of Rights in accordance with that finding. The learned Subordinate Judge has come to the same conclusion as the Assistant Settlement Officer.

We have carefully considered the evidence in the case and the arguments of Mr. Das, and we do not think Mr. Das has been able to show that the view taken by the Survey Officers and the learned Subordinate Judge is in any way wrong.

I would in this case commend the judgments of the Survey Officers (Exhibits 5 and 6) who have gone in detail into the matter and have clearly met all the points raised by the plaintiffs in order to found their claim and those urged by Mr. Das in support of his contention.

I have already decided Issue No 9. There was no dispute between defendant No. 1 and defendants Nos. 2 and 3 as regards their own right in the tenure in question and the learned Subordinate Judge should not have raised this question and decided it. The finding of the Subordinate Judge on Issue No. 9 that "the defendants Nos. 2 and 3 have no right in this village and that it is the defendant No. 1 alone who is entitled to the entire village after Radhika's death" must be set aside. We are not at all concerned with the claims of the defendants *inter se*. We are concerned only with the claim of the plaintiffs, and it is already held that they have failed to substantiate their claim, and, therefore, the finding of the Subordinate Judge on issue No. 9 must be set aside.

The result is that the plaintiffs have failed to prove their case. The appeal must fail, and the cross-objection must succeed. The decree passed by the Subordinate Judge is, therefore, confirmed. The respondents will be allowed their costs in the appeal. There will be no separate costs with respect to the cross-objection.

Mcpherson, J.:—I agree that the appeal must be dismissed with costs.

The averments and issues upon which the parties went to trial have been fully set out in the judgment just delivered by learned brother, but I may state succinctly the main conclusions of the Trial Court in so far as they are in contest in appeal or in the cross appeals. It is to be observed that the plaintiffs' prayer for ejectment on the ground that the *mukarrari* has become void because three *kists* or more of the rent of the tenancy were in arrears has been definitely given up in appeal by Counsel for the appellants. The learned Subordinate Judge has held.

(i) that the *mukarri-al-aulad pushtáar pusht* of villages Manhu and Maihigawan created and made *istimrari* by the *patta*, Exhibit 1, in favour of Rajkumar Babus Piyag Singh and Janki Singh is not non-resumable as is shown in the Record of of Rights, but is, in accordance with what he finds to be the custom of *pargana* Palamau, resumable on the failure of the male line of descent of the original grantees;

(*ii*) that the *mukarrari* is not resumable in part on the failure of heirs male of one only of the grantees so long as there are heirs of the other grantee; and in particular that Manhu is not resumable on failure of the line of Babu Janki Singh so long as heirs male of the line of Babu Pryag Singh exist, and that in fact such heirs male do exist;

(*iii*) that *Musammat* Radhika Kuer, widow of Rabu Rampadarath Singh, son of the grantee, Babu Janki Singh, was in possession as heir of her husband, and not merely, as plaintiffs aver, with their permission after they became entitled to resume on the death of her husband;

(*iv*) that plaintiffs were not and never had been in *sir* possession of Manhu or of Sahoreswa and that Sahoreswa is a *Tola* of village Manhu;

(*v*) that defendant No, 4 was not the son of the daughter of Rampadarath Singh, and;

(*vi*) that the suit was not bad for defect of parties by reason of the fact that Amarnath Singh great-grandson of Babu Pryag Singh is not a party.

On behalf of the appellants the second, third and fourth of these findings has been assailed before us. Defendants Nos. 1, 2 and 3 might under Order 41, rule 22 (1), Civil Procedure Code, have supported the decree in their favour on the grounds decided against them in the Court below; but they have also filed a cross-objection to the decree contesting the first and last of the above findings. A cross-objection was also filed on behalf of Babu Chain Singh, defendant No. 4, against the fifth finding but the representative in interest substituted in his place, after his death in the appeal has not entered appearance and the appellants have not attacked the fifth of the above findings.

In support of the appeal Mr. C. C. Das contends first, that the second finding of the trial Court cannot be maintained inasmuch as the *patta* (Ex. 1) granted by the *khairatdar* in 1827 created not a joint tenancy but a tenancy-in-common. This contention has manifestly no force. These two villages together constituted the *khairat* tenancy of the grantor. The document cannot be interpreted otherwise than as conveying the two villages Manhu and Majhigawan jointly in a single tenancy to two persons jointly as the tenant and on a consolidated rental for the whole tenancy. The mere fact that the *mukarrari patta* contains a specification of the rent of each village does not detract from this view of the document as a whole; the specification only shows how the consolidated rental stipulated for was arrived at. It is impossible to find in the document itself anything to support the contention of the appellants that Manhu, which is mentioned first, was the tenancy of Babu Janki Singh who is mentioned second, and Majhigawan which is mentioned second, was the tenancy of Babu Pryag Singh who is mentioned first. On the contrary, it is explicitly provided that the said Babus and their *al-aulad* shall *pusht dar pusht* pay the *mukarrari* rent of rent of Rs. 92 *sikka*", so that both grantees and their descendants are made responsible for the whole tenancy. To my mind Exhibit 1 is altogether unambiguous and this contention of Mr. C. C. Das fails completely.

Mr. Das then urges that the conduct of the parties, and in particular the payment of rent from the outset by Babu Janki Singh for Manhu and by Babu Pryag Singh for Majhigawan shows that Manhu was a separate tenancy of the former. But as the grant is unambiguous evidence is not admissible of conduct of the parties leading to another inference.

The third plea advanced by learned Counsel is ak into the second. It is that the grantor having allowed the two grantees from the outset to pay rents separately, that is, one grantee to pay the rent of one village and the other grantee to pay the rent of the other village, there was a novation. Now all the reliable evidence available in support of this view is merely (1) that from the outset Babu Janki Singh paid the quota of the consolidated rent of Rs. 92 which represents Manhu and Babu Pryag Singh the quota which represents Majhigawan, and (2) that much later the descendants of Babu Janki Singh paid the quota in respect of Manhu to the co-sharer descendants of the original grantor separately in proportion to the shares of these co-sharers in the *khairat* grant and that the position was apparently the same in respect of Majhigawan. In the absence of other circumstances these facts are not sufficient to establish a novation. The fact that the grantees for convenience of enjoyment divided the area demised has no significance, and the fact that the grantor then received the rent of each of the two divisions (even though they were the old natural divisions) from the grantee in enjoyment and even sued him separately, is not sufficient to show that the parties desired to depart from the original contract. On the other hand it is abundantly clear from the litigation of the early years of the present century that though the

khairatdars sued separately for rent in accordance with their shares, and sued the successor-in-interest of Babu Janki Singh in respect of Manhu and the descendants of Babu Pryag Singh in respect of Majhigawan, yet when they sued for ejectment on the ground that the lease had become void, they sued as 16-annas *khairatdars* and impleaded as defendants the descendants or successors-in-interest of both the original grantees and claimed recovery of possession of the *mukarrari* tenancy consisting of both Manhu and Majhigawan as originally created. This is clear from the plaint, Exhibit L. in the ejectment suit No. 121 of 1901-02 the judgment in which is Exhibit R, (Ex. 3 is the judgment in two rent suits Nos. 120 and 121 of 1900). Moreover it was held in that suit that the division by the grantees of their *mukarrari istimrari* grant of Manhu and Majhigawan, which was a joint grant, into two portions was not binding on the grantor even though the grantor realised the rents of the two portions separately, and that the latter was not prevented from evicting from the whole tenancy either by reason of the sub-division or by reason of the separate realisation of rent. Again in Suit No. 1 of 1904 which was brought by the whole body of representatives of the grantor of Exhibit 1 for cancellation of Exhibit 1 and possession of both Manhu and Majhigawan, all the descendants in the male line of Babu Pryag Singh with *Musammat* Radhika Kuer as representing the line of Babu Janki Singh, were impleaded as defendants. In the face of these documents it is impossible to uphold the suggestion of novation. If there had been novation such as is suggested, a separate suit would have been brought in respect of each of the two sub-divisions of the original grant.

Mr. Das has mentioned the fact that English Law struggles against a joint tenancy and prefers a tenancy-in-common. He is, however, vague as to the time when the latter tenancy came into existence in this case, and in any case no analogy ought, if it can possibly be avoided to be drawn between the law of England highly developed in accordance with its own local conditions, and the grant made a century ago in a backward area in even for India the backward *pargana* of Palamau. More possible is the analogy with *istimrari mukarrari* tenancies in the Ramgarh Estate in the neighbouring District of Hazaribagh. Most of these grants whether life grants or *al aulad pusht dar pusht* are made out in the names of two persons and it is well known [see also *Ram Narain Singh* v. *Chota Nagpur Banking Association* (2)] that even in the life grant class the tenancy does not become resumable, even in part, until both grantees are dead. There is certainly no reason why a different rule should apply where, as here, the grant is to two grantees and their offspring generation after generation.

It is admitted that offspring and even heirs male of Babu Pryag Singh, one of the grantees, exist at present.

Accordingly the second finding of the learned Subordinate Judge is correct. The circumstances in which resumption may take place, if it can at all take place, have not arisen.

The third finding also is correct beyond any possibility of doubt. The claim that on the death of Rampadarath Singh, the *khairatdars* resumed Manhu and arranged with *Musammat* Radhika Kuer that she should remain in possession during her lifetime is altogether contrary to all the probabilities and is unsupported by a tittle of credible evidence, and indeed many of the rent receipts granted by the different sets of co-sharer *khairatdars* give the lie to the present claim, since they refer to her and the other *bahurias* as heiresses or heiresses and successors of Babu Rampadarath Singh deceased. It has not even been suggested before us that the finding that the appellants were never in *sir* possession of Manhu proper at any time, or the grounds on which it is based are not correct.

Thus appellants are not entitled to possession of Manhu either by way of recovery of last possession which they never had or by right of resumption, and the appeal in respect thereto fails completely.

A word may now be said as to the remainder of the fourth finding which relates to Sahorswa. Appellants assert that it is a separate village from Manhu, is not a part of the grant of 1827 and is in their *sir* possession. The Record of Rights favours the contention of the defendants Nos. 1 to 3 that Sahorswa is covered by the grant. The defendants further contended that it was always so held. The trial Court held that it is a *Tola* of Manhu in possession of defendants

Nos. 1 to 3 as such and that it has never been held *sir* by appellants. This finding is unquestionably correct. The only evidence placed before us in support of the case of appellants that Sahorswa was not a part of the grant is the two maps Exhibit 9 (*a*) and Exhibit 9 (*b*). These entirely fail to rebut the presumption arising from the Record of Rights. Though erroneously called *thakbast* maps they appears to be copies of something better—a Revenue Survey Map. Each is in fact a copy of the part of the original map of which the third map which is filed by defendants is a full copy. Clearly the only inference which can be drawn is that Sahorswa was a new village formed at the Revenue Survey out of the area till then considered to be the village of Manhu: otherwise the two would not be depicted on the same map. Then the plaintiffs could have produced the details papers of the Revenue Survey or even of the *thak* demarcation, and in their absence no inference in their favour can be drawn from the maps on record. But apart from that the evidence on the other side is overwhelming that Sahorswa is a part of Manhu and that plaintiffs have never been in *sir* possession. The *raiyats* of Sahorswa have testified in favour of defendants Nos. 1 to 3 whereas neither the evidence of tenants nor counterfoil receipts are forthcoming on behalf of the appellants. Furthermore the rent-receipts granted to Musammat Radhika Kuar by the various co-sharer *khairatdars* show that the tenancy was Manhu-Sahorswa, Manhu and Saharewa or *Manhu-asli mai dakkili*. The trial Judge could not possibly have arrived at any conclusion except that Sahorswa is a *Tola* of Manhu and is held as part of Manhu under Exhibit 1, that appellants were never in possession of *Tola* Sahorswa and are not entitled to possession thereof on the ground that it is out with Manhu. It has already been held that they cannot resume Manhu.

This really disposes of the appeal. The fact is, as pointed out more than once by the Courts; " that the plaintiffs are dissatisfied with the arrangements made by their ancestors and have resolved in getting rid of them and of the defendants at all costs." But a few words may be said as to the questions raised in the cross-appeal, if such it can be termed of defendants Nos. 1 to 3.

I agree with my learned brother that Amarnath Singh, a descendant of Babu Pryag Singh who as a share in Manhu, was both a proper and a necessary party to the suit.

As to the first finding of the learned Subordinate Judge, which is in favour of the appellants, all that Mr. S. M. Mullick on behalf of the respondents asked during arguments was that if the suit failed on other grounds, this issue should remain open. The learned Subordinate Judge also considered that the question had lost much of its importance in view of the second finding. Again in the " reliefs " set out in paragraph 15 of the plaint no definite prayer is made for a declaration that the entry " Not resumable " in the Record of Rights is incorrect or of the circumstances in which the tenancy is resumable. It was admitted that no part of the tenancy was resumable until at least the heirs male of one of the grantees became extinct and it has now been decided that no part is resumable so long at least as an heir male of either of the grantees survives. What remains is the question whether the appellants have by evidence rebutted the entry in the Record of Rights so far as to show that the *khairatdars* may resume the tenancy.

(1) When there are heirs other than heirs male of one of the original grantees, or failing that (2) when there are no heirs, either male or female.

I am loath to enter upon this difficult question where it is not absolutely necessary to do so. But I may mention that at first sight the considerations advanced by the learned Court below for his finding in favour of the appellants appear insufficient to rebut the entry in the Record of Rights. The Kunda case is admittedly not in point as appellants have not given evidence of a custom by which *al aulad* in 1827 was restricted in *pargana* Palamau to lineal male descendents. It may well be the case that the general custom in *pargana* Palamu is that *al aulad pusht dar pusht* grants are resumable on failure of heirs male, but I cannot hold that the judgment, Exhibit VII, is sufficient to prove the custom that the tenure in the present instance, in regard to which the entry in the Record of Rights, is not resumable expires on failure of heirs male, The previous rulings refer to cases in which there was no adverse entry confronting the plaintiffs. The grantor too in this instance was a Tirhutia

Bahman newly arrived from Darbhanga, and the grant is not definitely a *jagir* or an *ijara* (even of the *ijaras* in Palamau which often are *doami* in tenure, though the rent is subject to enhancement). In my experience, also, ordinarily it is not possible to predicate a custom of the Division of Chota Nagpur as a whole. It generally goes by estates, *e.g.*, Chota Nagpur (equivalent broadly to Ranchi District, and called 'Nagpur' in the vernacular) or Ramgarh or Pachete, or by great Pargana, often corresponding to estates, such as Porahat, Dhalbhum, Barahabhum, Tori or Palamau : and though analogy of neighbouring *parganas* or estates may help, it does not always do so and is rarely conclusive. I feel insecure, therefore, in disposing of the general question of resumability in this appeal, and I would accordingly leave the question open between the parties as requested by cross-appellants and not objected to by plaintiffs, except of course, to this extent that the *mukarrari istimrari* grant is not resumable so long as there survives any heir male of either of the original grantees.

I would associate myself with the warning addressed by my learned brother at the instance of their Vakil, to defendants Nos. 1 to 3 that incidental remarks or even decisions in the judgments in this litigation must not be taken as determining the rights of defendants Nos. 1 to 3 and Amarnath Sing *inter se*. These may well be governed by considerations outweighing the matters appearing in or relevant to this litigation, and in particular it does not appear to follow from the fact that because the tenancy cannot be resumed while defendant No. 1 or Amarnath survive, that the other defendants or even outsiders may not have interest therein. If controversy arises, settlement by private arbitration would appear to be indicated.

Appeal rejected.

1925 Patna 241.

JWALA PRASAD, A.C.J. AND KULWANT SAHAY, J.

Ramji Ram and others—Plaintiffs-Appellants

v.

Bansi Raut and others—Defendants-Respondents.

S. A. No. 715 of 1922, decided on 25th July, 1924, from the decision of District Judge, Saran, dated 16th March, 1922.

(a) *B. T. Act, S. 116—No raiyati interest can be created in zerait lands by tenants under a registered lease for a term—After the term they are tenants from year to year.*

In zerait lands tenants cannot acquire occupancy rights under S. 116 where they were inducted upon the lands under a registered lease for a term of years. The tenants cannot acquire any right or interest either occupancy or non-occupancy in the lands during the continuance of the lease. They also hold over under the same conditions as the registered leases after the expiry of the lease and they become tenants from year to year. To such a case S. 116 would apply. [P. 246, C. 2.]

(b) *Record of Rights—Entries in record shall be presumed to be correct.*

Entries in the record of rights that lands are Zerait qaimi or Zerait dakhilkar or Zerait Gair dakhilkar shall be presumed to be correct until contrary is proved, by the tenants. Zerait Gair dakhilkar means non-occupancy tenants. [P. 243, C. 2.]

(c) *Words—"Zerait."*

The word "Zerait" means proprietor's private lands. [P. 242, C. 2.]

(d) *Words—"Qaimi."*

The word "Qaimi" means settled raiyat. [P. 242, C. 2.]

(e) *B.T. Act—Zerait land is wholly outside the scope of the Act*

Proprietor's private lands are wholly outside the scope of the Act and settlement of these lands is governed by the codified law in the T.P. Act. Tenants holding Zerait otherwise than under a lease for a term of years or from year to year does not acquire occupancy or non-occupancy rights therein. [P. 248, C. 2.]

(f) *B.T. Act S. 178—No raiyati interest can be created by contract, but registered lease after occupying Zerait is not illegal.*

S. 178 only bars a contract against the accrual of occupancy right. Section 178 is not contravened by the execution of registered lease after occupation of the Zerait lands for some time.

(g) *B T. Act. S. 4—Does not cover lessee of Zerait land.*

A lessee of Zerait land is a tenant of a class outside S. 4. [P. 249, C. 1.]

(h) *B.T. Act, S. 116—Tenant of Zerait land.*

Even apart from a registered lease for a term of years or from year to year no tenancy of occupancy or non-occupancy rights in Zerait lands can arise. [P. 249, C. 2.]

P. C. Manuk and *B. N. Mitter*—for the Appellants.

N. N. Sinha—for the Respondents.

Jwala Prasad, A.C.J.:—These appeals arise out of suits instituted by the plaintiffs to eject the defendants and to recover mesne profits. A number of suits were instituted by the plaintiffs, but we are

concerned in this case only with ten of them.

The Munsif decreed the suits. On appeal the District Judge set aside the decision of the Munsif and dismissed the suits by his judgment dated the 16th March, 1922. The plaintiffs are therefore appellants before us.

The plaintiffs are the 16 annas proprietors of village Jaitpore, thana Manjhi, District Saran. Their case is that the lands in dispute are their *zerait* lands and that these lands along with other lands of the village were in their direct cultivation by growing indigo thereon in connection with their indigo business and that after the said business ceased, the lands were settled with defendants under *kabuliyats*, the terms of which have expired. The defendants, on the other hand, allege that they have acquired occupancy rights in the lands in question and that they are not liable to be ejected therefrom.

There have been two survey and settlement operations in this village : one in 1900 and the other in 1920. The lands in the record-of-rights have been shown as tenancy lands in possession of the defendants. In some of the cases the lands have been recorded in the settlement record as "*zerait dakhilkar*," in some (S. A. 718) "*zerait gair dakhilkar*," in one case "*zerait qaimi*," and in another simply "*qaimi*," in the revisional settlement. "*Zerait qaimi*," "*zerait gair dakhilkar*," and "*zerait dakhilkar*" are words of art introduced by the Settlement Officers with the import attributed to them in the "Guide and Glossary to the Survey and Settlement Operations in the Patna and Bhagalpore Divisions" prepared and printed under the orders of Government and edited by the Directors of Land Records (1907). The terms "*zerait qaimi*" and "*dakhilkar*" have been bracketed and explained as being descriptive of the status of a tenant who has acquired occupancy rights in respect of *zerait* lands with the following note "as he (the tenant) can have only occupancy and not settled rights in respect of such lands, the entry *zerait qaimi* is not so correct from a technical point of view as "*zerait dakhilkar*." The term "*zerait gair dakhilkar*" has not been separately defined, but from the definition of the words "*gair dakhilkar*" as non-occupancy raiyat "*zerait gair dakhilkar*" would upon the analogy of the meaning of the words "*zerait dakhilkar*" in the language of the Settlement Officers be "descriptive of the status of a tenant who has acquired non-occupancy rights in respect of *zerait land*." In accordance with the note against the words "*gair dakhilkar*" usually the number of years for which he (*gair dakhilkar* raiyat) has held the land is added. The word "*qaimi*" has been defined as meaning "settled raiyat." The word "*zerait*" has been defined in the said glossary as "the proprietor's private lands." In the remarks column of the glossary against the word "*zerait*" it is stated "entered in the status column of *khatians* on which details are recorded of lands found to be *zerait*, *kamat*, *nij jote*, *khamar*, etc., within the meaning of section 120, Bengal Tenancy Act." "Settled raiyat" has been defined in section 20, Chapter V of the Bengal Tenancy Act thus :—"Every person who, for a period of twelve years, whether wholly or partly before or after the commencement of this Act, has continuously held as a raiyat land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled raiyat of that village." In this connection it is well to note the definition of an occupancy raiyat defined in section 21 of the Bengal Tenancy Act :—"Every person who is a settled raiyat of a village within the meaning of the last foregoing section shall have a right of occupancy in all lands for the time being held by him as a raiyat in that village." Occupancy raiyats are raiyats having occupancy rights in the lands held by them and non-occupancy raiyats are those raiyats not having an occupancy right as defined in section 4 of Chap. II of the Bengal Tenancy Act. Occupancy raiyats are dealt with in Chap. V and non-occupancy raiyats in Chap. VI of the Act. After dealing with different kinds of raiyats defined in section 4 of the Act and the rules regulating the relationship of landlord and tenant, in Chap. X provision is made for the preparation of a record-of-rights and settlement of rents. The two record-of-rights of 1900 and 1920 referred to above were prepared under Chap. X of the Act. Then comes Chap. XI which is headed "Non-accrual of occupancy and non-occupancy rights and record of proprietors' private lands." Section 116 in that Chapter says :

"Nothing in Chap. V shall confer a right of occupancy in and nothing in Chap. VI shall apply

to lands acquired under the Land Acquisition Act, 1894, for the Government or for any local authority or for a Railway Company, or lands belonging to the Government within a cantonment, while such lands remain the property of the Government or of any local authority or Railway Company or to a proprietor's private lands known in Bengal as *khamar*, *nij* or *nij jote*, and in Bihar as *zerait*, *nij*, *sir*, or *kamat*, where any such land is held under a lease for a term of years or under a lease from year to year."

Section 117 provides for the Local Government to make an order directing the Revenue Officer to make a survey and record of all the lands in a specified local area which are the proprietor's private lands. Section 120 defines the lands which are to be recorded as the proprietor's private lands and the nature of the evidence required to prove the lands to be such lands. Under this section land which is proved to have been cultivated as *khamar*, *zerait*, *sir*, *nij jote* or *kamat* by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of the Act, and (*b*) cultivated land which is recognised by village usage as proprietor's *khamar*, *zerait*, *sir*, *nij*, *nij jote* or *kamat*, are directed to be recorded as proprietor's private lands. Clauses 2, 2 (*a*) and 3 (*a*) of the section say :—

"2. In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom and to the question whether the land was before the second day of March 1883, specifically let as proprietor's private land, and to any other evidence that may be produced; but shall presume that land is not a proprietor's private land until the contrary is shown.

2 (*a*). Notwithstanding anything contained in any agreement or compromise, or in any decree which is proved to his satisfaction to have been obtained by collusion or fraud, a Revenue Officer shall not record any land as a proprietor's private land, unless it is proved to be such by satisfactory evidence of the nature described in sub-section (1) or sub-section (2).

3 (*a*). If any question arises in a Civil Court as to whether land is or is not a proprietor's private land, the Court shall have regard to the rules laid down in this section for the guidance of Revenue Officers."

In preparing the record-of-rights under Chap. X of the Act the Settlement Officer recorded the lands in dispute as *zerait qaimi*. Under section 119 when a survey and record-of-rights of a proprietor's private lands is made the provisions of sections 103-A, 103-B, 106, 107, 108, 109 and 109-A shall apply. We are concerned in this case with section 103-B, clause (3) which says :

"Every entry in a record-of-rights so published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect."

Therefore the entries in the record-of-rights in the present cases of the lands in suit being "*zerait qaimi*," "*zerait dakhilkar*" and "*zerait gair dakhilkar*" shall be presumed to be correct until the contrary is proved. In the light of the definition of *zerait qaimi* given in the glossary and of the definition of *zerait* given in section 120 of the Bengal Tenancy Act the presumption would be that the lands in question are the *zerait* lands of the proprietor within the meaning of section 120 of the Bengal Tenancy Act in which the defendants have acquired the status of occupancy raiyats or non-occupancy raiyats as the case may be, *i.e.*, the status of tenants having occupancy or non-occupancy rights defined in Chaps. V and VI of the Bengal Tenancy Act. The landlords claimed the lands to be their *zerait* lands. Mr. Nirsu Narain Sinha says that the landlords ought to prove that the lands are really their *zerait* such as have been defined in section 120 of the Bengal Tenancy Act and that the landlords not having given evidence of a character mentioned in clauses (1) and (2) of the said section the lands should be held not to be the *zerait* lands of the proprietor but as raiyati land in which the acquisition of occupancy or non-occupancy rights is not barred by section 116 of the Act. I cannot agree with this contention. The record-of-rights was prepared under the statutory provisions contained in the Bengal Tenancy Act with specific directions in regard to these *zerait* lands enjoining upon Revenue Officers to record such lands only as *zerait* which fulfil the conditions laid down in section 120 and which are proved before him by such evidence as is mentioned in clause (2) of that section. The presumption is that before the Settlement Officer the evidence was such as is required by section 120 and that upon that evidence he recorded the lands as *zerait* and that the entry of the lands as such is correct until the contrary is proved. The contrary is alleged by the defendants and therefore until the defendants prove that the lands are not *zerait* the entry will prevail and

the lands in question will be deemed to be the *zerait* lands of the proprietor. The onus therefore of proving the lands to be *zerait* was not upon the plaintiffs, and the onus to prove the contrary was upon the defendants.

The lower appellate Court is wrong in law in interpreting the record-of-rights as showing that the lands are not the *malik's zerait* and in throwing the onus upon the plaintiffs proprietors of proving that the lands are the *malik's zerait*. As a result of misplacing the onus, it has held that the plaintiffs failed to prove that the entry in the settlement record as to the lands not being *malik's zerait* is incorrect. The record has entered the lands as the *malik's zerait* under section 120 of the Bengal Tenancy Act, though it also records that the tenants have acquired in those *zerait* lands the rights of occupancy or non-occupancy raiyat. The plaintiffs have to displace the entry of the acquisition by the defendants of occupancy or non-occupancy rights in their *zerait* lands. The plaintiffs' case is that the lands in suit along with their other *zerait* lands were in their direct possession by growing indigo therein in connection with their indigo business and that after the said business ceased the lands were settled with the defendants under *kabuliyats*. The learned District Judge says that the factory registers (Exhibits Nos. 3, 5, 6 and 7) show that indigo was cultivated by the factory in many bighas of land in village Jaitpore prior to 1885 but this, he says, does not prove the lands in question to be the *zerait* as there is nothing to show that the lands mentioned in the factory books include any of the lands with which we are concerned in the present cases. The plaintiff expressly asserted in their plaint that the lands in suit were formerly the lands in which indigo used to be grown. There is no denial of this fact in the written statement of the defendants and in Second Appeal No. 722 (First Appeal No. 401 and Suit No. 519) referred to above the defendants expressly admitted in their written statement, para. 3, that the lands in suit formed part of those lands (that is, the lands in which indigo was grown). As observed above, there was no denial in the other cases also. There was, therefore, no question as to the identity of the lands in suit with the indigo lands of the plaintiffs. The documents produced by the plaintiffs show that the indigo lands were their *zerait* lands.

The Munsif upon a consideration of the voluminous documents of the plaintiffs came to the conclusion that the indigo lands were the *zerait* lands of the plaintiffs. The learned District Judge has illegally refused to take those documents into consideration on account of the misapprehension regarding the identity of the lands referred to above. The finding of the Munsif that the lands were the *zerait* lands based upon that evidence has not been, therefore, legally displaced by the learned District Judge. The rent receipts granted to the defendants describe the lands as *zerait* lands. Therefore even if the onus lay upon the plaintiffs to prove the lands as *zerait*, the plaintiffs had proved it by evidence which was not taken notice of by the Court below on account of the misapprehension referred to above. The learned District Judge has referred to no evidence on behalf of the defendants to prove that the lands were the raiyati lands, the onus of which was upon them in view of the entry in the survey record-of-rights. Therefore the view of the District Judge that the lands are not the *malik's zerait* lands is wrong, in law as well as on facts. The defendants except in the one case referred to above did not expressly deny that the lands were the *malik's zerait* lands. The view of the learned District Judge on the point is, however, against the pleadings, the entry in the survey record-of-rights and the evidence in the case.

Therefore the lands must be held to be the *malik's zerait* lands. The survey entries show that the defendants acquired rights of occupancy or non-occupancy as the case may be in all the cases, except in one (S. A. No. 718) where they have been recorded as pure *qaimi* in the revisional settlement though in the original settlement as *zerait gair dakhilkar*. The entry being in favour of the defendants as regards the acquisition of the occupancy rights, the onus of rebutting the presumption afforded by that entry is upon the plaintiffs. The question then is how far that onus has been discharged by the plaintiffs. In considering this question the Court below has again overlooked the pleadings and the effect of section 116 of the Bengal Tenancy Act. The defendants in all the cases, except the one referred to above (Second Appeal No. 722) admit

that they were inducted upon the lands by means of settlement from the plaintiffs on a particular date, mostly by means of *kabuliyats*. Their case is that they continued to be in possession even after the expiry of the lease and in some cases it is said that there was no lease in the interval between the registered and unregistered *kabuliyats*. There was no case made by the defendants in their written statement, except perhaps in one or two cases, that the lands in dispute were part and parcel of their old *guzishta* lands. The trend of the written statement appears to be that the defendants pleaded that they were settled raiyats of the village and consequently they acquired under section 20 of the Bengal Tenancy Act rights of occupancy in the lands in dispute. The learned District Judge expressed certain doubts as to the genuineness of the *kabuliyats* relied upon by the plaintiffs. He, however, did not come to a clear finding upon the point and seems to have assumed for the purposes of his decision that the *kabuliyats* were genuine. The learned Munsif has given reasons supported by the evidence referred to by him for his conclusion that the *kabuliyats* were genuine. The written statements admit that in most cases the defendants had executed *kabuliyats* when the lands were settled with them. They deny, however, the subsequent *kabuliyats*. The decision of the learned Judge again seems to have been based upon misapprehension of the pleadings. He has, however, not displaced the findings of the Munsif that the *kabuliyats* were genuine. The learned District Judge, as observed above, has assumed that the *kabuliyats* were genuine and assuming that he has held that the defendants acquired raiyati interest in the lands and were not liable to be ejected after the expiry of the leases. The appeal will, therefore, be dealt with upon the assumption that the *kabuliyats* set up by the plaintiffs are genuine. With these observations, the appeals may now be dealt with separately.

S. A. No. 722 (F. A. No. 401, Suit No. 519).

The lands in dispute in this case have been shown in both the settlement records as "*zerait qaimi*" with the remark in the revisional settlement record of 1920 that the rent for the lands in dispute is included within Khata No. 348 of the defendants. The lands in question, as held already, were the *zerait* lands of plaintiffs, both under the entry in the record-of-rights and upon proof in the case, and that they were held in direct possession by means of indigo cultivation for a long time. The defendants, no doubt, say that the lands are not the *zerait* lands and that they are part of their old raiyati lands, but this has not been proved or found. On the other hand, the defendants admit in their written statement, para. 3, that the lands in suit formed a part of indigo lands. The defendants further admitted that the lands in question were settled with them by means of a registered patta, dated the 14th December, 1887 and "that the entry made in the survey papers is based on the patta executed in 1887." Therefore they having failed to prove their previous possession, they were first inducted upon those lands by means of the aforesaid registered *kabuliyat*. They denied, however, that the lands in question were settled by means of any *kabuliyat* during the time that the estate of the plaintiff was in the hands of a Receiver. They also denied that the lands in question were ever in possession of the plaintiffs since the survey operations of 1900 as their *zerait* lands. The plaintiffs produced unregistered annual *kabuliyats* from 1317 to 1326 F. The learned District Judge says: "It is clear from the rent receipts that the lands in suit were amalgamated with the defendants' ancestral holding as long ago as 1309. The road cess return of the factory manager, dated 1903 (equal to 1310 F.), shows a consolidated *jama* (*vide* Ex. C) but in 1324 F. the plaintiffs tried to separate the lands into two parcels again, evidently with an eye to the revisional settlement proceedings. The rent receipts for 1324 (Exs. A/115 and A/116) have been corrected in red ink accordingly. In 1325 F. rent suits were brought separately for the two parcels and *ex parte* decrees were obtained [Exs. 8 (*a*) and 8 (*b*)]." As to the amalgamation referred to by the District Judge the defendants' statement in the written statement, para. 9, is as follows:—

"When the time for the revisional survey approached Babu Raj Bansi Kuer, *tahsildar* of the plaintiffs, took away the receipt for 1324 from these defendants and cancelled it with red ink; and instead of Rs. 84-14-9 being the total of both the *jamas* he put down Rs. 66-14-9, as the *jama* of the ancestral lands. On the

basis thereof he wanted to have two *jamas* recorded during the recent survey operation but did not succeed. At first a single *parcha* was given for both the *jamas* ; but later on Babu Raj Bansi Kuer fraudulently got two separate Khatas prepared, while the rent was entered jointly." The revisional settlement record shows that two Khatas were entered in the name of the defendants ; one in respect of the lands in dispute and the other with respect to their ancestral holding, Khata No. 348. This fact does not seem to have been taken into consideration by the learned District Judge. The defendants' case is that there were two Khatas and the lands in dispute were separate from their ancestral Khata but that subsequently they were amalgamated in about 1902 or 1903 and again the landlords through their *tahsildars* separated the two Khatas and the Survey Officers recorded their holdings in two Khatas. The amalgamation of the lands in dispute with the ancient Khata does not in any way affect the case of the plaintiffs and the entry in the survey record-of-rights in this respect is in their favour. The identity of the lands of the two Khatas is not in dispute. In other words, the lands in dispute were the lands which were settled with the defendants by means of registered *kabuliyats* (Ex. Q) for a term of 5 years. Except the receipts and the road cess return there is nothing to show that the landlords and the defendants agreed that the two holdings should be so incorporated and amalgamated and that they should be treated alike with regard to the status of the defendants therein. The learned District Judge has, therefore, erred in law in basing his conclusion upon the amalgamation in 1902 or 1903 and in not drawing proper and legal inference from the separation of the two holdings and the entry in the record-of-rights showing that the two holdings were separate. Therefore the status of the defendants with respect to the land in dispute is to be determined by the fact of the settlement made with them in 1887 by virtue of which they were inducted upon this land.

The contention on behalf of the plaintiffs is that the defendants could not acquire any right of occupancy in these lands inasmuch as they were inducted upon these lands by means of a registeredlease for a term of years. This contention is based upon section 116 of the Bengal Tenancy Act already quoted above. The question is whether the defendants were brought upon this land under a lease for a term of years or a lease from year to year. The defendants admitted in their written statement referred to above that they took this land by means of a registered lease, dated the 14th December, 1887. They also admit that the entry in the survey record-of-rights is based upon the aforesaid patta, the registered lease (Ex. Q). During the continuance of the lease therefore the defendants could not acquire any raiyati interest in the lands in question, occupancy or non-occupancy, After the expiry of the lease they became trespassers. The defendants, however, continued to be in possession and the learned District Judge found that receipts were granted to them and he says they were holding from 1295 F. to 1304. There are unregistered annual *kabuliyats* from 1317 to 1326. Mr. Nirsu Narain Sinha says that during the interval between 1299 when the lease of 1887 expired and 1317 the defendants were holding without any lease and therefore section 116 did not apply and they acquired occupancy rights during that period. The answer to that is that they were holding under an expired lease and therefore under section 116 of the Transfer of Property Act read with section 51 of the Bengal Tenancy Act they were holding over under the same conditions as the registered *kabuliyats* of 1887 and they became tenants from year to year. That tenancy from year to year was further converted in 1317 to a yearly tenancy under registered *kabuliyats*. In the present case section 116 of the Bengal Tenancy Act applies and the defendants could not acquire rights of occupancy or non-occupancy. They further held the land under the last unregistered *kabuliyat* of 1326 on the expiry of which they became trespassers. As such they were liable to be ejected in a suit brought within 12 years of the expiry of the lease of 1326 under the decision of their Lordships of the Judicial Committee in the case of *Jagannath Das* v. *Janki Singh* (1). The suit is within 12 years from that date and is therefore not barred. The Court below

(1) 1922 P. C. 142=1 Pat. 340=49 I.A. 81=35 C.L.J. 506=3 P.L.T. 197=43 M.L.J. 55=(1922) M.W.N. 410=31 M.L.T. 231=26 C.W.N. 833 (P.C.).

misconceived the meaning and scope and effect of the entry in the survey record-of-rights in holding that the entry is against the landlord's claim of the land being *zerait* and in requiring them to prove that it is so. The decision of the District Judge is therefore set aside and the decision of the Munsif is restored.

S. A. No. 716 (F.A. No. 396, Suit No. 492.)

The defendants in this case are the same as those in second appeal No. 722. In the original record-of-rights the lands in dispute were entered in the name of Lachuman Dusadh as *zerait gair dakhilkar* and in the revisional settlement it is entered in the name of the defendants as *zerait dakhilkar*, rent being included with Khata No. 348. The plaintiff's case is that the land was their *zerait* land and was first held by Lachuman Dusadh and afterwards the defendants by means of unregistered annual *kabuliyats* for the years 1318 to 1327. The defendants' case is that Lachuman was their ploughman and held this land in lieu of wages and after his death the defendants resumed it. The entry in the survey record-of-rights records this land as separate from the ancestral holding of the defendants. The claim of the defendants to the land in question as a part of their ancestral holding is therefore against the entry in the record-of-rights. In fact it appears that they took the lands by means of unregistered annual *kabuliyats* in 1318 after the death of Lachuman Dusadh and therefore their occupation of the land commences from that year. The last *kabuliyat* being of 1327 the plaintiffs were upon the principle laid down in the previous case entitled to eject the defendants within 12 years of the expiry of the lease. It has already been shown that the entry "*zerait gair dakhilkar*" in the vocabulary of the Settlement Officers means that the tenants have acquired non-occupancy rights in the *zerait* lands of the proprietor. Apart from anything else the entry does not help the defendants, for it is against their contention that it was part of their ancestral occupancy holding. According to the entry the defendants had not held it for 12 years or they would have been recorded as "*zerait dakhilkar*" and this supports the plaintiffs' case that the defendants were brought upon the land in question under the *kabuliyat* of 1318. Here also the Court has misconceived the onus and therefore the judgment and decree of the District Judge are set aside and those of the Munsif restored.

S. A. No. 720 (F. A. No. 392, Suit No. 495).

In this case the land has been recorded both in the original and revisional settlement record as *zerait gair dakhilkar*. The defendants admit in para. 3 of their written statement that the plaintiffs settled the lands in dispute with the ancestors of the defendants under a patta, dated 1297. There is no denial in the written statement of the plaintiffs' claim that the lands are *zerait* lands. In any case the defendants were first inducted upon the lands by means of an unregistered patta and then they held under registered *kabuliyats* from 1309 to 1313 and under unregistered *kabuliyats* from 1318 to 1327. For the reasons given above the plaintiffs are entitled to eject the defendants after the expiry of the lease of 1327. The defendants claim right of occupancy in these lands on the ground that they are the settled raiyats of the village under sections 20 and 21 of the Bengal Tenancy Act. The learned District Judge has accepted this contention. He has, however, overlooked the provisions of section 116 of the Act which bars the application of Chapter V in which section 20 occurs, to the case of *zerait* lands where the lands are held under a lease for a term of years or from year to year. In this case too the decision of the learned District Judge will be set aside and that of the Munsif restored.

S. A. No. 715 (F. A. No. 397. Suit No. 506).

Both in the original and in the revisional settlement the lands were recorded as *zerait gair dakhilkar* with this difference that in the original settlement the area was 10·20 acres and in the revisional settlement the area was 1·64 acres. In this case the defendants admit that the lands were settled with them under a registered patta (Ex. 1 P). The entry shows that the defendants have held it for less than 12 years and this supports the case of the plaintiffs, and in fact it is admitted by the defendants that their occupation of the land commenced from the execution of the aforesaid lease. The defendants afterwards held the land under annual *kabuliyats* from 1318 to 1327 and therefore the plaintiffs

are entitled to eject them on the expiry of the term of the last lease. This appeal is also decreed, the decision of the District Judge is set aside and that of the Munsif is restored.

S. A. No. 723 (F. A. No. 394, Suit No. 501).

In this case the land was recorded in the original settlement in the name of Bhardul Hajam as *zerait gair dakhilkar* and in the revisional settlement in the names of the defendants as *zerait gair dakhilkar*. The defendants were brought upon the land by means of unregistered annual *kabuliyats*. The last one expired in 1327 and therefore the plaintiffs are entitled to eject them. Here also the decision of the learned District Judge is set aside and that of the Munsif is restored.

S. A. No. 719 (F. A. No. 409, Suit No. 498).

In the original settlement the land in question was recorded in the name of Dukhan Rai and Kalu Rai as *zerait gair dakhilkar*. In the revisional settlement it was recorded in the name of Banai Raut as *zerait gair dakhilkar*. The defendants' case in para. 3 of their written statement is that the lands in dispute were formerly settled with Dukhan Rai and others and as they relinquished the land the plaintiffs settled the same with the defendants by means of a registered patta (Ex. B-3) from 1309 to 1313. The defendants are not the settled raiyats of the village. They were brought upon the land under registered lease and afterwards they held the land under unregistered annual *kabuliyats* from 1318 to 1327. For the reasons given in the previous cases this appeal is also decreed, the decision of the learned District Judge is set aside and that of the Munsif restored.

S. A. No. 725 (F. A. No. 391, Suit No. 504).

This is the strongest case for the defendants. In the original settlement the land is recorded in their names as *zerait gair dakhilkar*. In the revisional settlement the land has been recorded as *zerait gair dakhilkar*. The registered *kabuliyat* is from 1309 to 1313 and their unregistered annual *kabuliyats* from 1318 to 1326. The registered *kabuliyat* is a year or two later than the original settlement record and therefore they were in possession of this land before the registered *kabuliyat* was executed. It is therefore said that they were inducted upon the land not under the *kabuliyat* aforesaid but verbally and therefore section 116 does not save the accrual of non-occupancy rights which the settlement record has shown inasmuch as it is contended that that section prevents the accrual of rights of occupancy and non-occupancy only where the land is held under a lease for a term of years or a lease from year to year. No doubt there are authorities to show that in order to avail himself of the provisions of section 116 the landlord must take the precaution of settling *zerait* lands under a lease for a term of years or a lease from year to year and consequently where he brings the tenant upon the land under a verbal lease he is not entitled to the benefit of section 116. The trend of the authorities no doubt favours this contention but after having given due consideration to the point and having considered fully the object and scope of the Bengal Tenancy Act, I doubt whether the contention is sound and the view taken by the various authorities is correct. It appears to me that the Bengal Tenancy Act purports to deal principally with raiyati lands and to deal with the relationship between landlord and tenant. It seems to me that the proprietor's private lands are wholly outside the scope of the Bengal Tenancy Act and settlement of those lands are governed not by the Bengal Tenancy Act, but by the codified law in the Transfer of Property Act. The concluding words of section 116 are not happy and may give rise to the view hitherto advocated that the accrual of occupancy and non-occupancy rights in *zerait* lands will only be barred in cases where the landlord settles the land with a tenant under a lease for a term of years or under a lease from year to year which read with section 107 of the Transfer of Property Act means a registered lease in writing. These words in my view were put down in section 116 in view of the language in section 20 of the Bengal Tenancy Act, which says that, "Every person who, for a period of twelve years, whether wholly or partly before or after the commencement of this Act, has continuously held as a raiyati land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled raiyat of that village." Now a lessee of *zerait* land is not a raiyat.

He is a tenant of a class outside those enumerated in section 4 of the Bengal Tenancy Act. This point has been made clear in my decision in the case which went to the Privy Council: *Mahanth Jagarnath Das* v. *Janki Singh* (1). A lessee of a raiyati land whether holding verbally or under a lease acquires the status of a settled raiyat provided he holds it for 12 years. In order to prevent any confusion arising between the holders of two kinds of land, one mentioned in section 20 and the other in section 116 of the Bengal Tenancy Act, the legislature wanted to make it clear that even where *zerait* lands are under a term of years or under a lease from year to year no occupancy or non-occupancy right would accrue, for if it is held otherwise than under a term of years or from year to year the tenant becomes a tenant-at-will and a tenant-at-will cannot acquire a right of occupancy or non-occupancy, and he can be turned out at any moment and even without any notice. No question of such rights can arise in the case of a tenant-at-will. Therefore the section needed providing only against a lease for a term of years or under a lease from year to year. Now let us see what the defendants say in their written statement in this case. They say that the land was settled with their ancestors; so they came upon this land by means of a settlement and they did not disclose in the written statement when and how the lands were settled with them. It is obvious, however, from the entry in the record-of-rights that the lands were settled not long before the registered *kabuliyat* of 1902; otherwise they being settled raiyats of the village would have been entered as occupancy raiyats. They might have held the *zerait* lands just before the rights of the parties were settled by means of the registered *kabuliyat* in 1309. The lands being *zerait* and the defendants holding under a registered *kabuliyat*—these being the only two conditions required in section 116, they could not claim to have acquired any rights under Chapter VI or Chapter V of the Bengal Tenancy Act relating to occupancy or non-occupancy rights. It may, however, be contended that section 178 would come in and affect the registered *kabuliyat* in question. That section only bars a contract against the accrual of occupancy rights. No occupancy right could be taken away by any contract between landlord and tenant but before the registered *kabuliyat* in the present case was executed no raiyati interest was created at all in favour of the tenant. Therefore section 178 does not apply. I would therefore in this case also hold that the tenants were brought upon the land by means of settlement and the last settlement expired in 1326 at the expiry of which they were liable to be ejected by the landlord. The appeal in this case also is decreed, the decree made by the Court below is set aside and that of the Munsif is restored.

S. A. No. 726 (F. A. No. 390, Suit No. 510).

In this case in both the original and the revisional settlement the land is recorded as *zerait gair dakhilkar*. The plaintiffs filed a registered *kabuliyat* from 1309 to 1318 and unregistered *kabuliyats* from 1319 to 1327. The same remarks apply to this case as to the previous cases and the appeal is therefore decreed, the decision of the District Judge is set aside and that of the Munsif is restored

S. A Nos. 727 and 718 (F. A. Nos. 385 and 395, Suit Nos. 500 and 505).

The defendants are the same in these two suits.

As regards No. 718 the lands were recorded in the original settlement in the name of Lachuman Dusadh and Hira Kuer and Dhoba Ahir as *zerait gair dakhilkar*. In the revisional settlement they have been recorded in the names of the defendants as *qaimi*, rent included in Khata No. 42. This is under misapprehension and has been fully rebutted by evidence. In No. 727 the lands are recorded in the names of Lachuman Dusadh, Hira Kuer as *zerait gair dakhilkar* and in the revisional settlement in the names of the defendants as *zerait gair dakhilkar*, rent included in Khata No. 422. These defendants were not upon the land when the first settlement record was prepared in 1900. They were subsequently brought upon the land and the plaintiffs show that they executed registered *kabuliyat* for the year 1309 and thereafter unregistered *kabuliyats* from 1318 to 1327. Under the survey record-of-rights it is obvious that these tenants were inducted upon the lands under a lease for a term of years. Such is also their written statement and they did not expressly deny the nature of the land being *zerait* and admitted that

they occupied the land by means of settlement. The defendants in the present case are different in caste from those in the original record and this corroborates the case of the plaintiffs that the defendants were subsequently brought upon the land under annual leases. The leases expired in 1327; for the reasons given in the previous cases, these defendants are also liable to be ejected, and the decision of the District Judge must be set aside and that of the Munsif restored.

The result is that all these appeals must be decreed and the decrees made by the learned District Judge must be set aside and those of the Munsif restored.

The Respondents have filed an application with a certified copy of the judgment of the District Judge of Saran in respect of certain ejectment suits brought by the plaintiffs against other tenants and in respect of other lands in the village. This judgment is wholly irrelevant for the purposes of this case and we, therefore, reject the application and refuse to accept the judgment as evidence.

The appellants are entitled to their costs throughout.

Kulwant Sahay, J.:—I agree that all the appeals should be decreed.

Appeals allowed.

1925 Patna 250.

DAWSON MILLER, C.J.,
FOSTER AND KULWANT SAHAY, JJ.

Mathura Prasad Singh—Petitioner

v.

Emperor—Opposite Party.

Mis. Judicial Case No. 67 of 1924, decided on 24th June, 1924.

Legal Practitioner—Professional misconduct—Honest endeavour for seven years to re-establish character entitles practitioner debarred from practice to be restored thereto.

The High Court is under a manifest duty to give a legal practitioner, who has been removed from the roll of legal practitioners in consequence of a serious offence in the course of his professional duties, but who realises the gravity of his offence and having made up his mind for the future to lead a straightforward and honourable life is able to satisfy the High Court that for the past seven years since his removal from the roll of legal practitioners, it has been his genuine and earnest endeavour to rehabilitate his character, another opportunity of practising the law, by cancelling he order standing in the way of his practising. [P. 51 C. 2.]

Hasan Imam, K. P. Jayaswal, J. P. Sinha, L. K. Jha and *S. Nooruddin*—for the Petitioner.

Dawson Miller, C.J.:—This is an application on behalf of Mathura Prasad Singh formerly practising as a mukhtar at Motihari. He was guilty of a serious offence in the course of his professional duties which I need not refer to in detail here as it has been the subject of an enquiry and was referred to again when an application was made to this Court for his reinstatement. On the 12th March, 1917, in consequence of the offence to which I have referred, his case was dealt with by a Bench of three Judges of this Court and owing to the gravity of the offence which was proved, his certificate was cancelled and he was debarred from further practice. Five years later in May 1922 he applied to this Court asking the Court to reinstate him in his practice as a *mukhtar* alleging that since he was debarred some five years earlier he had endeavoured to lead an honest and straightforward life and certain certificates from various people giving him a good character were produced before the Court. We considered, however, on that occasion, in view of the gravity of his offence that the probationary period through which he had passed was not sufficient to enable us to arrive definitely at the conclusion that he had in fact reinstated his character so as to make it safe for the Court to reinstate him as a member of an honourable profession. The certificates produced on that occasion were not very full and did not really give the Court sufficient information upon which it could safely act. Consequently the application was at that time refused.

The present application, made some two years later is fortified by full particulars of the life which the petitioner has led since he was debarred from further practice in March 1917. It appears that in 1918 he did some work for Mr. Kailaspati, a vakil of this Court and Mr. Kailaspati has given him a certificate of good character stating that he found him well behaved, diligent and honest in his work. In the year 1919, he was engaged as an Assistant Manager in the Cawnpore Branch of the General Trading Company, during a part of that year. He was in charge of the stock of papers as well as of the sales and cash and the certificate given by Mr. Upadhya, a Vakil of this

Court, whose family was connected with that business, states that he discharged his duties faithfully and honestly, and that subsequently in the same year he worked at Mr. Upadhya's *zemindari* at Ramanagar in the Champaran district being partly in charge of the collection work and partly in charge of Court cases, that he proved diligent and trustworthy and did his work well. Mr. Upadhya further says that he comes of a respectable *kayasth* family. In the early part of the year 1920 he obtained employment with the "Jharia Iron and Brass Works" at Jharia in Manbhum and the proprietor of that concern states that during that time he found him honest and truthful. Later in the same year he worked for about six months with the "Chowdhury Coal Co." also at Jharia. He kept correspondence and accounts and he also purchased and sold coal. The proprietor of that concern states that he found him straightforward and reliable and he left his service of his own accord when he got employment with Messrs. Dulichand-Prabhudayal of Jharia. He then entered the service of the Dulchand Prabhudayal Coal Co. at Jharia in the year 1920, the proprietor of which concern Prabhudayal Gupta states that he thoroughly satisfied himself as to his character and ability before giving him an appointment. He was appointed as manager of the firm in January 1921 and since that time he has remained in that service. His duties were to look after Court cases concerning the firm, the purchase and sale of coal and to keep accounts and also to go on occasions to the *mufassil* to realise arrears from customers and he had the management of work on a considerable scale and large sums of money passed through his hand during that time. He was getting Rs. 50 per month *plus* a commission upon the net profits and the proprietor certified that his conduct has been quite satisfactory and praiseworthy and he has proved himself trustworthy and he strongly recommends him for any position of trust.

That shortly is the history of this young man since he was debarred from further practice in 1917. There are in addition a number of certificates from judicial and executive officers at Dhanbad, that is, in the neighbourhood in which he was residing and in which he was employed. They are all to the same effect that they have found him honest and straightforward and further that they have found him courteous and self-respecting. I need not refer to them in detail. I am glad to find also that in the petition which he himself has presented to this Court, he fully recognises the gravity of his offence and has expressed his great penitence and his determination to set himself a high standard of morality and honesty as a guide in his future life. I have no doubt that this young man whose certificate was cancelled after two years' practice as a *mukhtar* has since that time honestly endeavoured to reinstate his character. He has also realised that his offence was a grave one and has made up his mind for the future to live a straightforward and honest life. In these circumstances seeing that it was seven years ago that he was debarred I think our manifest duty is to give him another chance. I am satisfied that he is endeavouring to lead an honest and straightforward life and I hope in the future he will continue to do so. I think that his application should be granted. The order made on the 12th March, 1917, debarring him from further practice will be cancelled and he may apply in the ordinary course for the grant of a fresh certificate.

Foster, J.:—I agree.

Kulwant Sahay, J.:—I agree.

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* 1925 Patna 251.

DAS AND ROSS, JJ.

Jamuna Prasad Singh—Plaintiff-Appellant

v.

Mt. Sheorati Kuer and others—Defendants-Respondents.

S. A. No. 1844 of 1921, decided on 5th December, 1923, from the decision of District Judge, Gaya, dated the 19th September, 1921.

• *Hindu Law—Gift—Acceptance is necessary to complete gift—Acceptance of the deed of gift is prima facie evidence of the acceptance of the gift—Acceptance may be made at any time during lifetime of the donor.*

Under Hindu Law express acceptance is necessary for the completion of a gift even assuming that under Hindu Law acceptance of gift by the donee may be presumed. [P. 252, C. 2]

Until he signifies his dissent, the Court must be satisfied that there was acceptance by the donee before it can give effect to a deed of gift relied upon by a party to the suit. Acceptance of a deed of gift

is *prima facie* evidence of the acceptance of the gift but the doone's whole conduct concerning the acceptance has to be carefully scrutinised in order to determine the question whether there was an acceptance of the gift in fact. The two point sought to be very carefully considered by the Court whenever a question of acceptance is raised, *viz.*, (1) whether the donees is in possession of the deed of gift and (2) whether he is in possession of the properties gifted. ?[P. 253, C. 2.]

Sushil Madab Mullick and *Kailash Pati*—for the Appellant.

Murari Prasad and *P. C. Roy*—for the Respondents.

Das, J.:—This appeal arises out of a suit instituted by the appellant for a declaration of his title to certain properties specified in the plaint and for confirmation of his possession and for an order restraining the defendant No. 1 from doing certain acts of ownership in relation to those properties. The case of the plaintiff is, that Raghunath, who was the owner of these properties, made a gift of these properties to him by a registered deed of gift, dated the 24th of March, 1905, and that he obtained possession of these properties on the 24th of March, 1905, and that ever since he has been in possession thereof. It is not disputed that a deed of gift was in fact executed by Raghunath on the 24th of March, 1905, but it is contended on behalf of the defendants, who are the respondents before us, that the deed of gift was a colourable transaction and was not acted upon, and that in fact Raghunath, by another document, dated the 26th of April, 1905, purported "to release" these lands in favour of his wife and others. The learned District Judge has come to the conclusion that there was no acceptance of the gift by or on behalf of the plaintiff, and in that view, agreeing with the decision of the Court of first instance, he dismissed the plaintiff's suit.

The short question before us is, whether the finding of the learned Judge in the Court below to the effect that there was no acceptance of the gift by or on behalf of the plaintiff, can be regarded as a legal finding binding on this Court in second appeal. Mr. Sushil Madhab Mullick strongly contends that the learned Judge, in so far as he placed the onus upon the plaintiff, clearly committed an error of law and that it was not for the plaintiff to prove that there was any acceptance of the gift by or on his behalf. Reliance was placed upon a decision of this Court *Muhmmad Abdul Nayeem* v. *Jhonti Mahton* (1). It was indeed laid down in that case that it was essential to a Hindu gift that there should be acceptance by the donee, but the learned Judge thought that acceptance could be express or implied, and that it should be presumed unless dissent is signified. The learned Judge referred to the view expressed in the 15th volume of the Laws of England, at page 418, which is as follows: "Express acceptance by the donee is not necessary to complete a gift. It has long been settled that the acceptance of a gift by the donee is to be presumed until his dissent is signified even though he is not aware of the gift, and this is equally so, although the gift may be of an onerous nature or of what is called an onerous trust'. I have myself some doubt whether this statement of law is equally applicable to cases under Hindu Law. In England it is not necessary that there should be express acceptance by the donee. Under the Hindu Law, as I understand it, express acceptance is necessary for the completion of a gift, and one may refer to the definition of "Gift" in section 122 of the Transfer of Property Act: "Gift is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee."

In my opinion it is unnecessary to express any final opinion on this point. Let it be assumed that acceptance of a gift by the donee may be presumed until his dissent is signified. But still, upon the whole case, the Court must be satisfied that there was acceptance by the donee, whether express or implied, before the Court can give effect to a deed of gift upon which a party to the suit may rely. The learned Judge in the Court below says that the plaintiff has failed to adduce evidence of acceptance and if we are to examine the facts in this case it is difficult to come to the conclusion that there was in fact any acceptance by or on behalf of the minor. Mr. Sushil Madhab Mullick has referred to the terms of the deed of release and his argument is that the deed of release completely establishes that there was acceptance of the gift by the father of the donee on behalf of the donee, who was at the time of the gift a minor, and he expressly

(1) (1917) 41 I.C. 389.

refers to the following passage in the deed of release: "Whereas on account of some indifference with my wife and others I have before this executed a deed of gift, dated the 24th March, 1905, in favour of Jamuna Prasad, son of Ganesh Narain Singh, inhabitant of Mahuain, Pargana Charkawan, District Gaya, who is my cousin, in respect to the shares, lands and houses aforesaid and got it registered and in that deed of gift certain conditions relating to the performance of personal services and to meeting the expenses of my daughters' marriages were laid down, and when I demanded from Ganesh Narain Singh the expenses of (my) daughter's marriage he totally refused to pay it and expressly told me that he would not meet those expenses. Thereupon I told him that as he himself refused to fulfil the conditions of the deed of gift and to pay the expenses, there could be no expectations of future benefit from Jamuna Prasad who was then three years old and was merely an infant, and that, therefore, it would be better that he should return back my original deed of gift. Accordingly, Babu Ganesh Narain Singh has to day returned back the said deed of gift in the presence of certain reliable persons on taking from me Rs. 79-9 0 on account of expenses incurred and now the said deed of gift has become invalid and inoperative, and it was not given effect to." The argument is that there is a clear admission in this document that the original deed of gift was made over to Babu Ganesh Narain Singh, the father of Jamuna Prasad, and it was contended before us that the acceptance of the deed of gift operated as an acceptance of the gift. But if we are to examine the alleged admission contained in this document it is necessary for us to examine the whole document in order to see how far the admission helps the case of the plaintiff. It is clear from this document that there were certain conditions in the gift more or less of an onerous nature and that the donor demanded the performance of the obligations with which the gift was burdened, and that Babu Ganesh Narain Singh, on behalf of his minor son, declined to perform those obligations and that thereupon the donor asked Babu Ganesh Narain Singh to return the deed of gift which Babu Ganesh Narain did. Now I quite agree that the acceptance of a deed of gift is *prima facie* evidence of the acceptance of a gift; but then the whole conduct in connection with the acceptance must be carefully scrutinized for the purpose of the determination of the question whether there was in fact an acceptance of the gift. Now, what are the facts stated in the deed of release. They are, first, that the document was made over to Babu Ganesh Narain Singh; secondly, that the donor called upon Babu Ganesh Narain Singh on behalf of his minor son to perform the obligations with which the gift was burdened; thirdly, that Babu Ganesh Narain Singh (to quote the words of the document) "totally refused to do so"; fourthly, the donor thereupon called upon Babu Ganesh Narain Singh to return the deed of gift and Babu Ganesh Narain Singh did so. Now, upon these facts, the question arises whether there was in fact an acceptance of the gift by Babu Ganesh Narain Singh on behalf of the minor. It should be noticed that, acceptance need not be made at once but that it must be made during the lifetime of the donor and while he is still capable of giving. I am unable to agree, having regard to the circumstances stated in the deed of release, that the acceptance of the deed of gift operated in this particular case as an acceptance of the gift. As I have stated, the gift was burdened with various obligations and it was necessary for Babu Ganesh Narain Singh, as the father of the donee, to examine the deed before he could possibly come to the conclusion whether the gift should or should not be accepted, and the fact that he returned the deed of gift, in my opinion, establishes that he did not accept the gift on behalf of the minor.

Whenever a question of acceptance is raised, there are two points which ought to be very carefully considered by the Court: first, whether the donee is in possession of the deed of gift; and, secondly, whether the donee is in possession of the properties. Admittedly, the deed of gift has been produced by the defendants. It was the case of the plaintiff in the Courts below that he was in possession of this deed of gift and that it was stolen from him by the donor. That case has failed in the Courts below and it has not been persisted in in this Court. On the question of possession of the properties, the Courts below have concurrently come to the conclusion that the plaintiff has never been in possession of the properties in dispute.

In my opinion the finding of the learned Judge in the Court below on the question of acceptance is a finding of fact and is binding on us in second appeal. I would dismiss this appeal with costs.

Ross, J.:—I agree.

Appeal rejected.

1925 Patna 254.

DAWSON MILLER, C.J. and KULWANT SAHAY, J.

Chikhuri Ram—Plaintiff-Appellant

v.

Gopal Narayan Ram and others—Defendants-Respondents.

S. A. No. 1274 of 1921, decided on 29th June, 1923, from a decision of Sub-Judge, Arrah, dated 16th March, 1921.

Minor—Contract void for one party's minority cannot be consideration for fresh contract by minor on attaining majority—Hypothecation by minor on attaining majority in consideration of pre-existing liability is invalid unless the pre-existing liability is legally enforceable.

A contract entered into by a person on attaining majority cannot be supported on the consideration of the liability of that person under a contract which is void by reason of that person having been a minor at the time of making it. The hypothecation of property by a minor on attaining majority, to secure payment of debt under a contract by the minor's father, is void. But where proof is given that the liability was incurred in consideration of necessaries or for benefit of the minor or that at the time the hypothecation was made the creditor had a genuine claim against the minor, enforcible by suit and that the creditor on an adjustment of the accounts accepted a certain sum and undertook not to sue, the hypothecation will stand. [P. 255, C. 2 and P. 256, C. 1.]

N. N. Sen and *S. M. Mullick*—for the Appellants.

P. Dayal—for the Respondents.

Dawson Miller, C.J.:—This is an appeal on behalf of the plaintiff against a decision of the Subordinate Judge of Arrah reversing a decree of the Munsif of the First Court at Buxar.

The plaintiff, who is the appellant before us, entered into certain transactions with Tribeni Ram, the defendant No. 4 in the suit. The transactions in question were the ordinary transactions between a customer and a tradesman, the plaintiff being the tradesman. The goods were supplied, principally cloth, and a certain amount of money was lent to the defendant No. 4. At the time when these transactions took place the other defendants in the suit, namely, those numbered 1, 2 and 3, were minors although they were living together jointly at that time. The three defendants are all the sons of *Musammat* Sahodra Kuer. The defendant No. 1 Gopal Narain Ram is her son by her first husband, now deceased. The second and third defendants, Ram Narain Ram and Sheo Narain Ram, are also her sons by her second husband, who is Tribeni Ram, the defendant No. 4. In February 1916 it appears that there was an adjustment of the account existing between the plaintiffs and Tribeni Ram. The account was on *bahi khata* and a certain Pleader who had been employed both by the plaintiff and by Tribeni Ram was engaged to go through the account and make an adjustment. In the result, it was found that a sum of about Rs. 900 was due from Tribeni Ram. The plaintiff agreed to forego a sum of Rs. 300 reducing the amount due to Rs. 600 and the parties entered into a mortgage which is the subject of the present suit whereby a house belonging to the defendants Nos. 1, 2 and 3, the sons of *Musammat* Sahodra Kuer, was hypothecated to secure the debt due amounting to Rs. 600 under the *bahi khata* transaction. The mortgage was executed by Gopal Narayan Ram who is said to have been of age at that date and by Tribeni Ram purporting to act as guardian of the other two defendants his sons who were still minors. The property mortgaged was not the property of Tribeni Ram at all but was the separate property of the three sons of Sahodra Kuer they having inherited it from her as part of their maternal grandfather's estate. The present suit was brought to enforce that mortgage against the first three defendants. Although Tribeni Ram was made a defendant in the suit no relief is claimed against him presumably on the ground that he merely acted in the capacity of guardian of his sons, the second and third defendants.

The genuineness and validity of the bond was challenged by each of the defendants except Tribeni Ram who entered no defence at all. It was also pleaded that the defendants had not entered into any loan or cash transactions at all with the plaintiff or taken any things from his shop nor was there any reason for their doing so and they denied all liability under the mortgage bond.

The learned Munsif before whom the case came for trial and before whom various issues were raised including an issue as to whether the mortgage-deed was genuine and for consideration found in favour of the plaintiff. He found that the goods had in fact been taken and the loans given to Tribeni Ram; that there had been an adjustment of account; that the bond in suit was genuine and for consideration and that the defendant No. 1 had attained his majority at the date when the bond was executed. He did not deal in terms with the question of whether the transactions under which the goods were supplied and the money lent to Tribeni Ram were for the benefit of the minors.

When the case went on appeal to the Subordinate Judge he came to the conclusion that no consideration had been proved for the execution of the bond by or on behalf of the first three defendants. The *bahi khata* which showed the transactions which formed the considerations for the bond had not been produced in evidence and although it was true that at the time when the bond was entered into there was a sum of Rs. 600 due from Tribeni Ram it was nowhere shown that the goods supplied or the money lent had in any way been supplied or lent for the benefit of the minors and in these circumstances, having found that all the first three defendants were minors at the date when the transactions took place he came to the conclusion that the bond was not binding upon them because the only consideration for executing the bond was the liability under the *bahi khata* which was not in any way binding upon the minors. He did not in terms differ from the learned Munsif in finding that the first defendant, Gopal Narayan Ram, was of age in February 1916 when the bond was executed. He did, however, find that he was a minor at the date of the *bhai khata* transactions. He further came to the conclusion that it had not been proved that the bond was properly executed in the presence of two attesting witnesses. Upon this point I think the learned Subordinate Judge took a rather narrow view. One of the attesting witnesses was called and proved that the executants of the bond executed it in his presence and that he attested it, and the bond was produced and showed the signatures of the other attesting witnesses. The learned Subordinate Judge seems to have been under some confusion as to the exact effect of section 68 and the following sections of the Indian Evidence Act which require execution of a document of this nature to be proved by one of the attesting witnesses. He said that, as a mortgage-bond must be subscribed by two attesting witnesses under the provisions of section 59 of the Transfer of Property Act, and as in this case only one attesting witness had proved it, that proof was wholly insufficient. I am inclined to think that there was some confusion in the learned Judge's mind in finding that the requirements of the law had not been complied with in so far as proof of the execution of the bond was concerned. In the view I take of this case, however, it is unnecessary to consider whether the evidence of the attesting witness, who was called, when closely looked into was really sufficient to prove the due execution of the bond.

The plaintiff, in my opinion, must fail for this reason. It is nowhere shown that the goods supplied to Tribeni Ram or the loans taken by him were for the benefit of the other three defendants in the case who were minors at that time. They were not liable upon the *bahi khata* account. Had it been shown that the goods were purchased for their benefit or that the loans were taken for their benefit then it might be that they would have been liable as members of a joint family even though minors under the *bahi khata* account. In the present case there is an entire absence of evidence upon that most important question. It is contended, however, that the defendant No. 1, at all events, ought to be held liable upon the bond because at the time he executed it he was of age. Assuming, although it is not very clear from the learned Judge's judgment whether he considered that the defendant No. 1 was of age or not, but assuming that he was of age at that time, then it seems to me that, in so far as he was concerned, there was in fact no consideration for the bond. The consideration alleged is the liability under the previous *bahi khata* account. It is quite clear to my mind that in the absence of any evidence showing that the defendant No. 1 had any liability under that account it cannot be said that the liability which was really a liability of his father Tribeni Ram was any consideration

for entering into the mortgage-bond of February 1916. It is well-established that a liability under a contract which is void on the ground that one of the contracting parties is a minor is no consideration for a fresh contract made by the minor on attaining majority. Several cases have been quoted in support of this proposition. I need only refer to *Arumugam Chetty* v. *Vellaichami Thevan* (1) and *Narendra Lal Khan* v. *Hrishikesh Mukherjee* (2). It would seem to follow, therefore, that where there is no previous contract by the minors at all but only by their father the liability of the father can be no consideration for fresh contract by the minor on attaining majority whereby he hypothecates his property to secure payment of a loan. Had it been shown that at the time the bond was entered into there was a genuine claim against the minors and had a suit against them been threatened, then this adjustment of account whereby the plaintiff accepted a smaller sum than that which was due and his undertaking not to sue the minors for the sum due might possibly have been a good consideration for the bond, but nothing of the sort has been proved in this case and, in so far as anything can be gathered from the terms of the bond itself, it simply recites that there were dealings between Tribeni Ram and the plaintiff on *bahi khata* and that on adjustment an amount of Rs. 600 was found due. There is not a word in it to show that the defendant No. 1 ever admitted that he was in any way liable in respect of the goods supplied to his father. If in fact the goods supplied were necessaries and for the benefit of the minors, then it seems to me that the plaintiff has only himself to blame in failing in this case to bring sufficient proof before the Court of that fact. There is no proof at all as to what the goods supplied were, or the circumstances under which they were supplied, and there is certainly no proof to show that there would have been any valid claim against the estate of the minors in respect of the *bahi khata* account. In these circumstances, although I have no doubt that the transaction is quite genuine as between the plaintiff and Tribeni Ram, I regret that I must come to the same conclusion as that arrived at by the learned Subordinate Judge and dismiss this appeal with costs.

Kulwant Sahay, J.:—I agree.

Appeal rejected.

(1) (1911) 37 Mad. 38 = 21 M.L.J. 1077 = 10 M.L.T. 385 = 12 I.C. 568 = (1911) 2 M.W.N. 461.
(2) (1918) 46 I.C. 765.

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* 1925 Patna 256.

DAWSON MILLER, C.J. and MULLICK, J.

Ramdhani Gope and another—Defendants-Appellants

v.

C. V. Scott and others—Plaintiffs-Respondents.

L. P. A. No. 97 of 1923 decided on 12th November, 1924, from the judgment of Foster, J., dated 24th July, 1923, confirming a decision of Sub-Judge, Patna, dated 25th July, 1921.

(a) *Landlord and tenant—Tenancy-at will—Demand for possession is sufficient to terminate the tenancy Tenancy terminable at will of either party is a tenancy-at will.*

It is settled law both in India and England that in the case of a tenancy at-will no formal notice is necessary. A demand for possession is sufficient. Tenancy terminable at the will of either party is a tenancy-at-will. Where tenancy is determined by the death of either party there can be nothing that the heir can take. This is also the English Law.

*(b) *Transfer of Property Act—Reserving yearly rent does not necessarily create tenancy from year to year.*

Reserving yearly rent or providing that rent is payable in proportion to certain aliquot parts of the year does not necessarily create a tenancy from year to year.

Atul Krishna Roy—for the Appellants.

S. M. Mullick and *N. N. Sen*—for the Respondents.

Mullick, J.:—The decision of this appeal depends on the construction of a *kabuliyat* executed on the 6th January, 1894, by one Khaderan Passi in favour of Mr. James Scott in respect of 1 katha 16 dhurs of land in mauza Bankipur Jaibar. Khaderan was a seller of toddy and took the land to build a shop on it for carrying on his business. Subsequently Mr. James Scott devised the land by will to his son George Scott who in his turn devised it to the plaintiffs, and upon Khaderan's death, which took place some time before the year 1909, the land came into the possession of his four daughters, one of whom Musst. Subhagia together with her son Tuni on the 2nd March, 1909, executed a mortgage in respect of the whole 1 katha 16 dhurs in favour of

Defendant No. 2 who is the son and *benamidar* of Defendant No. 1. Eventually Defendant No. 2 sued upon this mortgage and purchased the property in execution in 1917. Musst. Subhagia's three sisters thereupon brought a partition suit against her and Defendant No. 2 and recovered their 12 annas share in the holding leaving an area of 9 dhurs constituting the four annas share of Musst. Subhagia in the possession of Defendant No. 2. It is said that the plaintiffs have come to terms with the three sisters, and that in regard to Musst. Subhagia's share, they on the 15th April 1919 wrote to Defendant No. 1 asking him to execute a *kabuliyat* if he wished to be recognised as a tenant and that on the 23rd April 1919 Defendant No. 1 declined. Thereupon, on the 29th April 1919, the Plaintiffs served Defendant No. 1 with a notice calling upon him to give delivery of possession on the 14th May 1919. The present suit was instituted on the 27th August 1919 for the ejectment of the Defendants.

The Munsif dismissed the suit holding that Defendant No. 2 had a right of occupancy and also that in any event he was entitled to 6 months' notice.

On appeal, the Subordinate Judge held that Khaderan was a tenant-at-will, that neither he nor Mussammat Subhagia had any transferable interest in the property, that the Plaintiffs never recognised Defendant No. 2 as a tenant and that no notice was necessary. The learned Subordinate Judge accordingly made a decree for ejectment.

There was then a second appeal to the High Court which was heard by Mr. Justice Foster. The learned Judge agreed with the Subordinate Judge and dismissed the appeal.

The present Letters Patent Appeal has been preferred by the Defendants against the decree of Mr. Justice Foster.

Now, the first question is, whether Musst. Subhagia was a tenant at all, and if so, whether she was a tenant-at-will or a tenant from year to year or a tenant from month to month.

Now, in this case, the principle that a doubtful grant is to be construed in favour of the grantee has no application. The *kabuliyat* is clear and I agree with the Courts of Appeal below that it creates a tenancy-at-will. Every document which reserves a yearly rent or which states that the rent is payable in proportion to certain aliquot parts of the year does not necessarily create a tenancy from year to year. In *Morton* v. *Woods* (1) the lease was for a term of ten years at a yearly rent of £800, but it provided that notwithstanding anything therein contained and without any notice or demand of possession it should be lawful for the lessor to determine the term of the tenure and to eject the lessee. It was held by Chief Baron Kelly that the lease created a tenancy-at-will and not one for a term of years because, whatever might be the nominal duration of the tenancy, it was intended that it should be in the power of the lessor at any time to put an end to it. Here the relevant words in the lease in question are as follows:—

"I shall, without any objection and plea whatsoever on my part, continue to pay the said fixed rent annually from 1301 F. S as per instalments given below and taking receipts therefor. Should the rent of one instalment, *i.e.*, of six months in respect of the said land remain due by me or by my heirs or representatives, the said proprietor shall be competent to realise from me or my heirs or representatives, the said rent with interest thereon at 2 annas per rupee per month from the date of default to that of realisation, in case of non-payment of the same without instituting a suit. So long as I shall remain in possession of the said land with the consent of the said landlord, on payment of fixed annual rent, I shall continue to pay the same."

These words, in my opinion, leave no room for doubt that it was the intention of the parties that the tenancy should be terminable at the will of either party.

In *Vaman Shripad* v. *Maki* (2) the lease gave the lessee the right to hold the land so long as the lessee chose to occupy it and it was held that the lease was a tenancy-at-will terminable upon the death of the lessee.

In *Jagjivandas Javherdas* v. *Narayan* (3) the *kabuliyat* provided that the tenant might claim possession for one year and that he should pay rent so long as the landlord should leave the land with him. It was held that the lease was not for a period beyond one year but created a tenancy-at-will.

In the present case, the express words limiting the duration to the will of the lessor cannot be ignored.

The next question is whether the tenancy was heritable. In Halsbury's Laws

(1) (1869) 4 Q. B 293=9 B. & S. 632=38 L. J. Q. B 81=17 W. R. 414.
(2) (1879) 4 Bom. 424.
(3) (1884) 8 Bom. 493.

of England, Vol. XVIII, p. 437, the rule is stated thus:

"A tenancy-at-will is a personal relation between the original landlord and tenant, and is determined by the death of either of them."

Woodfall in his Law of Landlord and Tenant, 14th Edn., p. 237, varies the rule slightly and states it as follows:

"An estate-at-will may be determined by a demand of possession or by the express declaration of either of the parties, or by implication of law: of the latter description will be the death of either party, which in general determines the will."

The reason for the rule is, that as death determines the will, the tenancy terminates by efflux of time and that in such a case the successor of the tenant being at best a tenant by sufferance, he may be ejected without notice: *James* v. *Dean* (4).

It is necessary, however, to observe that in *Morton* v. *Woods* (1), Chief Baron Kelly expressed an opinion regarding the subsistence of a tenancy-at-will after the death of one of the parties in the following wodrs:

"The whole law on this subject is based on very fine distinctions; but when we come to look at the cases, it would rather seem that a tenancy-at-will may continue to subsist after the death of one of the parties, unless the heir or legal representative shall do something to manifest his intention to determine the tenancy. At all events it is necessary to say that the mention of heirs and assigns does not necessarily manifest an intention to create anything more than a tenancy-at will."

It would appear that these words were *obiter*, and in my opinion they are not an authority for holding that a tenancy-at-will is necessarily heritable. They might perhaps be applicable to the facts of such a case as *Killick* v. *Manser* (5), where a tenant-at-will died intestate and his administratrix in her affidavit for the inland revenue treated the land as copyhold and valued it at £200. Subsequently she was accepted as a tenant by the landlord on signing the usual acknowledgment that she held as a tenant-at-will. The intestate's next of kin having asked for a decision whether the new tenancy acquired by the widow formed part of the intestate's estate, and also for general administration, the Court without delivering a formal judgment made an order for administration of the intestate's real and personal estate, including the property comprised in the widow's acknowledgment. It would seem that for the purpose of administration the new tenancy was treated there as an accretion to the intestate's estate; but the case is not an authority for the general proposition that all such estates are heritable. Where the intention of the parties is that the tenancy is to be determined by the death of either party, there can be no estate which the heir can take, and I think it follows upon principle, that the Indian law on the subject must be the same as the English law, and that in the present case Musst. Subhagia had no tenancy in the land.

In any event, she had no transferable interest in it, for even if she became a tenant-at-will by inheritance, the tenancy was determined by an act of assignment. The Defendant No. 2 acquired no title to the property by the execution purchase.

Our attention has been drawn to the words in the *kabuliyat* providing that in the event of any rent remaining due from Khaderan or his heirs or his representatives, the proprietor would be competent to realise it from him or his heirs or his representatives. The reference to the heirs in this connection has been found by the learned Judge of this Court to relate to the realisation of rent accruing due before and not after his death. In my opinion that is a correct construction of the lease.

Finally, it is to be determined whether the Plaintiffs are entitled to a decree for ejectment in this suit. Now it is settled both in England and in India that in the case of a tenancy-at-will no formal notice is required but a demand for possession is sufficient. *Deonundan Pershad* v. *Meghu Mahton* (6). In the present case it is established that a demand for possession was made and I can see no reason why the Defendants should not deliver up possession to the Plaintiffs.

The decrees of the Subordinate Judge and the learned Judge of this Court were correct and the appeal is dismissed with costs.

Dawson Miller, C. J.—I agree.

Appeal dismissed.

(4) (1805) 11 Ves. 383.
(5) (1910) W. N. 61.
(6) (1906) 34 Cal 57 11 C. W. N. 225= 5 C. L J 181.

1925 Patna 259.

JWALA PRASAD AND KULWANT SAHAY, JJ.

Rudra Das Chakravarti—Appellant

v.

Kamakhya Narayan Singh—Respondent.

Appeal from Original Decree No. 90 of 1922, decided on 10th June 1924, from a decision of the Addl. Sub-J., Hazaribagh, dated 29th December 1921.

(a) *Court of Wards Act, S. 70, r. 15—Commissioner cannot be compelled to sanction lease where he insists on sanction from Board of Revenue.*

Even though r. 15 of the rules framed under S 70 of the Court of Wards Act empowers the Commissioner to sanction a lease so as to make the lease valid, yet he cannot be compelled to exercise his power under that rule where he insists on the sanction of the Board of Revenue being obtained [P. 269, C. 2.]

(b) *Specific performance—Condition precedent—Specific performance will not be granted where parties have intended that it is not to be considered to be a concluded contract until it has been confirmed by a third party—Specific Relief Act, S. 21 (b) and (c).*

Where an agreement to grant a prospecting license and lease to the plaintiff was entered into by the Manager of an infant's estate under the Court of Wards, but it was found that it was not the intention of the parties that this agreement was to be considered a concluded contract until the draft license and lease had been submitted to and sanctioned by the Board of Revenue,

Held: that the plaintiff could not sue for a decree for specific performance of the contract. (*Winn* v. *Bull*, 7 Ch D. 29 *Applied*; 42 Cal. 1079 and 40 Cal 784 *Ref to*) [P 274, C. 2.]

(c) *Specific performance of agreement to grant lease can't be enforced where no date for commencement of lease is fixed—Specific Relief Act, S. 21 (b) and (c).*

In the absence of a date fixed, from which the lease is to be granted, specific performance of an agreement to grant a lease cannot be ordered. [P. 273, C. 2.]

(d) *Contract—Contract to enter into a contract is not enforceable—Contract to grant mining and prospecting license is not enforceable.*

Inasmuch as the law does not recognise a contract to enter into a contract to grant a mining and prospecting license is not enforceable in law because that contract is only a contract to execute a lease if and when the licensee requires it to be executed (*Von Hatz Feldt* v. *Alexander*, 1 Ch. 284, *Foll.*) [P. 274, C. 1.]

(e) *Court of Wards Act—Manager of estate.*

The manager of an estate under the Court o Wards can make an agreement to grant a prospecting license and mining lease. (4 Pat. L. J. 580, *Dist.*) [P 272, C. 2.]

(f) *Specific Rel. Act, S. 24.—Licensee having under, prospecting license option to have mining lease concluded within fixed time and not doing so in time can't sue for specific performance.*

Where the licensee, under a prospecting license, is given an option to have a mining lease concluded within a certain time and he does not exercise the option within that time, specific performance of the agreement to grant the lease cannot be decreed (*Gilbey* v. *Cossey*, 105 L. T. 607 and *Walsh and Lonsdale*, 21 Ch. D. Ref. to.) [P. 277, C. 2. P. 278, C 1.]

(g) *Minor—Even in presence of Board of Revenue's refusal to order minor's manager to execute lease, minor can be sued for specific performance of agreement to lease—Court of Wards Act.*

A minor represented by a Court of Wards can be sued for specific performance of an agreement to grant lease even though the Board of Revenue has refused to order the Manager to execute the lease [P. 279, C 1.]

B. Chakravirti and *Harihar Prasad Sinha*—for Appellant.

L. P. Pugh and *Sultan Ahmed*—for Respondent.

Kulwant Sahay, J.—The facts leading to the present suit are not seriously in dispute and may be shortly stated. The minor defendant is the proprietor of the Ramgarh estate, in the district of Hazaribagh, which is under the management of the Court of Wards. In the year 1916, one Mr. D. W. O. Mcgregor was the manager of the Ramgarh estate under the Court of Wards. The original plaintiff, Kalachand Chakravarti, was a proprietor of coal lands and was anxious to take a mining lease of coal lands in the Ramgarh estate On the 19th December 1916, he filed a petition before the said manager, where he stated that he was desirous of carrying on coal business in the district of Hazaribagh under the Ramgarh estate, and that in contemplation of the same, he had already applied to the Deputy Commissioner for the necessary certificate of apuroval, permitting him to take settlement of mines in the Province. He prayed that certain villages (seven in number) set out in the petition, which were outside the area granted to the Ramagarh Bokharo Company and to Bird and Company, may be settled with him on such terms and conditions as might be convenient, both to the estate and to the petitioner. He expressed his readiness to deposit the requisite amount of *salami* for granting the prospecting license which would ultimately go towards part payment of the full *salami* money at the time of actual settlement, and he asked for information as regards the amount of money which it was necessary for him to deposit for the grant of the prospecting license, and also the date within which such deposit was to be made. Kalachand was apparently informed that he would have to deposit a sum of Rs. 2,000 as a preliminary

deposit, and it appears from the *chalan* that a sum of Rs. 2,000 was actually deposited on the 22nd December 1916, and the manager's acknowledgment of receipt dated the 22nd December 1916, also shows the fact of the deposit on that date. On the 19th January 1917, Babu Bhudeb Chandra Sarkar, as pleader for Kalachand Chakravarti, made a formal application on a printed form, to the manager, for the grant of the prospecting license, giving the names of six villages, all in *thana* Nawadih, some of which were different from those contained in the previous application of the 19th December 1916; and it was stated that this petition might be deemed as supplementary to the petition filed on the 19th December. Later on, on the 22nd January 1917, a fresh application was made by Kalachand for grant of prospecting license for coal over ten villages in *thana* Nawadih and eight villages in *thana* Gumia making a total of eighteen villages comprising an area of 7,850·07 acres. It was stated that this application, which was also on a printed form, might be treated as in continuation of the first application, dated the 19th December 1916. It appears that no action was taken upon the three applications made by Kalachand, or in any event, no intimation was given to Kalachand of what steps were being taken on those applications, and consequently on the 2nd February 1917. Bhudeb Chandra Sarkar, Kalachand's pleader, presented another application before the manager, wherein the manager was asked to take up the matter at once and to fix the *salami* which Kalachand had to pay. It was pointed out, that having regard to the state of the market, it was desirable that the matter should be expeditiously finished, both for the benefit of the estate as well as for the applicant. It appears from a note in the margin of this petition of the 2nd February 1917, that a reply was ordered to be given to the effect that the matter was under consideration and that until all points had been considered and settled, no definite reply on any question in connection with the application could be given. After certain further correspondence, to which it is not necessary to refer in detail, we come to a petition filed by Kalachand on the 27th February which is not on the record, but the reply thereto, dated the 3rd of March 1917, is on the record and in this the manager stated that he was unable to follow the intention as expressed in the said petition of the 27th February and he stated, that in the event of either a lease or license being granted, the *salami* or rental will have to be paid in advance. It is important to bear in mind this condition of payment in advance insisted upon by the manager, as the plaintiff subsequently wanted to vary this term as will appear from subsequent correspondence, and his argument is that under the contract the whole sum was not payable in advance. Further negotiations appear to have been carried on between the manager and Kalachand and we find that on the 21st of March 1917, a letter was sent by Kalachand to the manager wherein he expressed his willingness to pay, *in advance*, the prospecting rent according to the rates settled by Messrs. Anderson and Wright or Bird and Company in respect of similar leases granted by the estate to them, or in accordance with the rates laid down in paragraph 30 (*ii*) of the Mining Rules framed by the Government; and on the 5th of April 1917, we find a letter sent by the manager to Babu Bhudeb Chandra Sarkar in which a reference is made to the application, dated the 22nd January 1917, referred to above, wherein the manager states that as the result of the various conversations regarding the rental, *etc.*, he was willing to fix a rental of Rs 1-8-0 per *bigha* subject to the confirmation of higher authorities, as rent for a prospecting license of the villages applied for, with the exception of one village, Doojha, contained in the petition of 22nd January 1917, for which another village, was to be substituted. Kalachand apparently agreed to the rental proposed by the manager and on the 14th April 1917, he wrote a letter wherein, after expressing his thanks for reducing the rental to Rs. 1-8-0 per *bigha*, he asked for a copy of the terms of indenture for a prospecting lease at an early date so that he might be in a position to consider the terms, and he also wanted to know the date by which he should deposit the rental. The next document that we have got on the record in point of time, is a note sent by the manager to the Deputy Commissioner, dated the 5th May 1917, wherein he informed the Deputy Commissioner about the application of Kalachand Chakravarti for the prospecting license and the terms as settled between him and Kalachand. In this note he gave a list of the villages for which application had been made by Kala-

chand for the prospecting license and it consisted of eight villages in *thana* Nawadih and six villages in *thana* Gumia, comprising a total area of 12,619·64 acres or 37,858 92 standard *bighas*. The rent fixed for this area, as stated in this note, was Rs. 1-8-0 per standard *bigha* for two years for which the license was proposed to be given. The manager stated in this note that Kalachand Chakravarti had come over for the purpose of the prospecting license only and wanted to know definitely whether his offer was to be accepted or not. The question which the manager referred for decision to the Deputy Commissioner was as regards the term of the draft lease. It appears that a draft lease to be executed in the event of the licensee agreeing to take lease of any lands after prospecting is usually attached to a prospecting license, and the manager could not come to any conclusion as regards the period for which the lease was to be granted, in case the licensee desired to take the lease, and as the draft lease had to be annexed to the prospecting license, the period of the lease had to be stated in such draft and the manager stated in paragraph 6 of his note :

"the only point at variance between Babu Kalachand Chakravarti and myself is in connection with the term of the draft lease of lands that may be taken in lease during the period of license that is generally attached to the prospecting license."

Reference was made in paragraph 7 of the note to other draft leases attached to prospecting licenses given to other persons, especially to the Bokharo Ramgarh Company, wherein the term was for 999 years. The manager stated that Kalachand Chakravarti wanted the period to be entered in the draft lease to be for 30 years with option of renewal for successive periods of 30 years up to 990 years, and he asked the Deputy Commissioner to settle this point. On this note we find an original note by the Deputy Commissioner to the effect that he thought 30 years with an option of another 30 years was ample ; but that he should not recommend any proposal of the kind until the question as regards the "red line" was definitely settled. " The red line " referred to in this marginal note is the line within which licenses or leases had already been granted to other persons in the Ramgarh estate, and the Deputy Commissioner wanted definitely to know as to whether the area proposed to be taken by Kalachand was outside the area granted to those licensees. The manager sent a reply to this marginal note to the effect that the villages asked for by Kalachand did not touch the "red line" and that the Ramgarh Bokharo Company, to whom the previous license had been granted, had accepted the proposal that the field as far as they were concerned, should be within and include villages touched by the " red line." Then he referred to certain circumstances in order to come to a conclusion as regards the period for which the lease should be granted, and asked the Deputy Commissioner's opinion on the point. To this note the Deputy Commissioner gave reply to the following effect :

" Manager, If you are satisfied as to the status of Babu Kalachand Chakravarti, I think definite proposals should be submitted for the Board's sanction."

In accordance with this note of the Deputy Commissioner, the manager sent an official letter to him, dated the 18th May 1917, wherein he set out the terms arrived at between Kalachand and himself ; namely (1) that a prospecting license over the villages in question be granted for a period of two years, and (2) the prospecting rental for the two years period of the license to be Rs. 1-8-0 per standard *bigha* approximately Rs. 56,787 0-0. In paragraph 2 of this letter, the manager stated that along with the prospecting license it was customary to attach a draft form of lease to be executed for any area the licensee wished to take a coal mining lease of, during the period of his prospecting license, in this instance the draft lease would follow the lines sanctioned in Bokharo Ramgarh and Karanpura, with one exception which has to be decided, *viz.*, the period of the lease. Then he referred to the fact that in the Bokharo Ramgarh and Karanpura leases the period was for 999 years. In the case of Karmatand, negotiation for a lease of 600 *bighas* was going on in which the term of the draft lease was 30 years with the option of renewal for a further 30 years, and he asked the Deputy Commissioner to settle the period of the lease. It will be noticed that the terms of the proposed prospecting license agreed to between the manager and Kalachand had been settled and were not dependent upon the terms of the license granted to the Bokharo Ramgarh Company and the terms of the proposed draft lease only were to be on the lines

sanctioned in the Bokharo Ramgarh and Karanpura leases. The Deputy Commissioner forwarded this letter of the manager to the Commissioner of Chota Nagpur with his letter, dated the 26th May 1917. He recommended the proposal for acceptance and he stated that the only question on which he was doubtful was the period for which the draft lease should be drawn up and he asked the Commissioner to obtain the orders of the Board of Revenue on this point, *viz.*, the period of the lease. The Commissioner of Chota Nagpur sent a letter to the Secretary to the Board of Revenue, dated the 10th June 1917, wherein it was stated that the terms arrived at between the manager and the applicant, Kalachand, as regards the prospecting license were that the license for the villages in question be granted for a period of two years and that the rent payable during the prospecting period should be Rs. 1-8-0 per standard *bigha*. A reference is then made to the usual practice to submit along with the prospecting license a draft form of lease to be executed hereafter, in case the licensee wishes to take the mining lease of any portion of the area to be covered by the proposed prospecting license. Reference is also made to the previous licenses and the Commissioner states in paragraph 3 of his letter that the only question on which a doubt was felt was as regards the period for which the draft lease should be drawn up. In paragraph 4 of his letter, the learned Commissioner states as follows:

> "As far as I can judge I see no objection to the grant of the prospecting license on the terms proposed."

He therefore, apparently, accepted the terms settled by the manager on the question of the prospecting license; but as regards the mining lease, he referred to the Board for opinion as to the period for which the lease should be granted, his own recommendation being that the lease should be for 99 years. The Secretary to the Board of Revenue sent a reply to this letter to the Commissioner on the 16th July 1917, wherein he stated that the Hon'ble Member of the Board considered that in the present case it would be sufficient is a lease is granted for 60 years, which was equal to the maximum term allowed by Government for an original lease and its renewal. A copy of this letter was forwarded by the Commissioner to the Deputy Commissioner with his memo, dated the 30th July 1917, with a request for a draft prospecting license and a draft agreement for a mining lease being sent to him. On receipt of this memo. with a copy of the letter of the Secretary to the Board of Revenue, the manager wrote a letter to Kalachand Chakravarti on the 10th August 1917, informing him that the Board of Revenue had fixed the period of the lease, a draft of which would be appended to the proposed license, to be for 60 years. In this letter, the manager stated that the *whole proposal* was submitted to the Board of Revenue for sanction and that the Board had fixed the period of the lease to be 60 years. Nothing, however, seems to have been done for sometime after the receipt of this letter by Kalachand, but on the 14th September 1917, we have got a telegram sent by Kalachand to the manager informing him that he could be coming to Hazaribagh on Friday. This telegram was apparently sent in reply to the manager's letter asking him to come and do the needful. On the 22nd September another telegram was sent by Kalachand to the manager informing him that he would start as soon as the cholera epidemic subsided and settle everything with him. The cholera epidemic referred to in the telegram was an epidemic then prevailing in Hazaribagh as we find from the evidence in the case. Further correspondence appears to have passed between the parties and Kalachand apparently failed to see the manager and to settle the matter, and on the 11th October 1917, the manager sent a letter to Kalachand requesting him to come before the 18th *idem* failing which he was informed that other applications would be considered. It appears that Kalachand appeared before the manager on the 14th or 15th October 1917, and submitted before him a letter, dated the 14th October 1917, wherein he asked the manager to give him the terms of the prospecting license and of the mining lease as he stated that he was willing to take a lease at once for 350 *bighas* in Chandrapura and 250 *bighas* in Raterri. In paragraph 3 of this letter, Kalachand stated that the period of the mining lease was insufficient: he apparently referred to the period of 60 years fixed by the Board of Revenue and he prayed that the manager might be pleased to recommend for the extension of the period to 99 years or in case of the period being 60 years, option of

renewal might be allowed to him, and in conclusion, he prayed that early steps might be taken to expedite the matter. In this letter we find a note of the manager, wherein it is stated, that Kalachand was prepared to accept the Board's decision as regards the period of the lease but begged that the matter might be reconsidered and the term suggested by the manager and the Commissioner, namely, 99 years, might be granted. There is another note of the manager on the same letter which shows that the original counterpart of the prospecting license granted by the estate to the Ramgarh Bokharo Company was sent to Kalachand and he and his pleader read the same and that Kalachand came to the manager and saw him on the 15th and told him that he was satisfied with the terms of the lease and license, but wanted 8 days' time to show them to his partners and that within the next 10 days, he would come and definitely settle the matter. It appears that the period of 8 days and 10 days referred to in the note of the manager expired and Kalachand did not turn up. On the 1st November 1917, however, Kalachand sent a telegram to the manager to the following effect :

"My son suffering seriously, coming soon."

This telegram was sent on the 1st November and it appears from the evidence that the son died on the 5th November. At this time Mr. Mcgregor, who was the manager of the Ramgarh estate and with whom the negotiations had been going on so far, retired from service and Mr. Walter, the present manager, was appointed in his place. There was, however, a gap between the retirement of Mr. Mcgregor and the taking over charge by Mr. Walter, and on the 2nd November 1917, we find that one Babu Jainarain was acting as manager and the telegram appears to have been received when Babu Jainarain was so acting. We find a note on this telegram, over the signature of Jainarain, to the effect :

"Head clerk, put up on 10th November 1917, if he does not come meanwhile."

Then, on the 10th November 1917, we find a note on this telegram signed by Mr. Walter which runs thus :

"Applicant has not appeared He is ordered to file a petition at once according to the Board's terms, as it appears that this has not been done. A week's time from the receipt of this order be given."

In accordance with this note of Mr. Walter, a formal letter was sent to Kalachand on the 10th November 1917, telling him that on going through the file it was found that he had not till then definitely agreed to the terms offered by the Board and this must be done within one week from the receipt of the letter if Kalachand wished to take settlement of the villages. On receipt of this letter, Kalachand appeared before the manager on the 19th November 1917, and accordingly we find a note by Mr. Walter on this letter to the effect that Kalachand appeared before him with his pleader and asked for time to consider his verbal proposal to take up a portion only of the area. The manager disallowed this proposal, but granted him time till the 21st November to definitely state what he intended doing. This, as I have said, took place on the 19th November and on the 20th November a letter was written by Kalachand to the manager which has been marked as Exhibit 13 and which is of very great importance in the present case. This letter runs as follows :

"Sir,

With reference to your letter No. 1042, Registered, A D., dated the 10th November 1917, I beg to state that I accept the terms and area approved by the Board of Revenue. Therefore, I pray that draft deed and agreement of the coal area applied for might be prepared by the estate, a copy of which should be given to me in order that I may be able to have it examined by the attorneys and pleaders.

With reference to the period of mining lease your predecessor in office assured me that he would write to the Board of Revenue for kindly giving me an option of renewal for another sixty years to which effect he has left a note in consideration of the fact that it will take a long time to develop the mines by bringing machinery, etc., for the period of sixty years without the option of renewal is insufficient for the purpose. So I pray that your honour may be pleased to send a recommendation of another sixty years. An early reply is solicited."

The words "and area" in the first paragraph of this letter, after the words "I accept the terms", are written in red ink above the line and it is stated on behalf of the plaintiff-appellant that these words were added subsequently at the express desire of the manager in order to make the correspondence complete and legal. It is further stated that the manager was not satisfied with this letter and he made Kalachand write a note at the end of this letter which runs thus.

"In order to make the above statement perfectly clear I beg to state that I accept the terms, approved by the Board and also the area of

12,619·64 acres mentioned in the manager's memo. dated the 5th May 1917."

This postscript is also in red ink. There can be no doubt that this was added to the letter at the suggestion of the manager. At the end of this letter Mr. Walter wrote the following order :

"Office to draw up a provisional draft prospecting license and mining lease and to supply the same to applicant."

The word "provisional" in this order is written above the line and appears to be in a different pen and it has been suggested by the learned counsel for the appellant that this word has been subsequently inserted for the purposes of the present suit. The case of the appellant is, that the contract was complete on this date, namely, the 20th November 1917, when Kalachand accepted the terms sanctioned by the Board of Revenue and specific performance is sought of this contract. On behalf of the defendant it is argued that the contract was not complete on this date as further negotiations went on between the parties and the terms were subsequently altered. This leads us to examine the further steps taken by the parties in the matter of this contract.

It will be remembered that the terms agreed to between the parties as regards the prospecting license were complete in themselves and were not dependent upon the terms granted by the defendant's estate to the Ramgarh Bokharo Company. It was only the draft lease which was to be in terms of the draft annexed to the prospecting license of the Ramgarh Bokharo Company, the only difference being that the period for which the lease was to be granted was under orders of the Board fixed to be 60 years instead of 999 as fixed in the draft lease of the Ramgarh Bokharo Company. From the correspondence set out above, it is clear, that as regards the terms of the license the manager, the Deputy Commissioner and Commissioner were all agreed ; the terms were those set out in paragraphs 1 and 2 of the manager's letter of the 18th May 1917. When the matter went before the Board of Revenue the only point considered by the Board was as regards the period of the lease and the Board decided that the lease should be for a period of 60 years. Therefore the terms so far agreed between the parties, namely, Kalachand on one side and the Court of Wards on the other, were that a prospecting license should be granted for a period of two years in respect of the fourteen villages set out in the manager's note, dated the 5th May 1917, to the Deputy Commissioner which forms an annexure to the letter, Exhibit 32, the area comprised in those fourteen villages being approximately 37,858·92 *bighas* and the rental fixed for the said period of two years being at the rate of Rs. 1-8-0 per *bigha* which approximately comes to Rs. 56,707 and that a draft lease, in terms of the lease to the Ramgarh Bokharo Company, was to be annexed to the license, the only difference being that the period of the lease was to be for 60 years. The further steps taken after the 20th November, 1917, were as follows : On the 21st December, 1917, the manager sent a letter (Exhibit 14) to Babu Kalipado Sarkar, pleader for Kalachand Chakravarti. With this letter he sent two drafts of the prospecting license and mining lease for approval ; they are Exhibits 22 and 23 in the case but have not been printed in the paper-book. In paragraph 2 of this letter the manager wrote as follows :

"Please note that the above draft is sent to you in anticipation of sanction of the higher authorities and is subject to any correction or alteration which they may make."

He further stated that to facilitate matters, Kalachand Chakravarti should be wired to come to Hazaribagh and complete the business by the 24th *idem* and to consider the matter as urgent. The draft that was sent to Kalipado Sarkar, along with the letter Exhibit 14, was not in accordance with the lease of the Ramgarh Bokharo Company. What happened after the receipt of this letter by Babu Kalipado is narrated by him in his deposition in this case. He states in his examination-in-chief as follows :

"On the day following 21st December 1917, on which date I got this letter (Exhibit 14) I saw Mr. Walter, and perhaps Bhudeb was with me (Bhudeb is Babu Bhudeb Chandra Sarkar, the junior pleader, who was acting with Babu Kalipado Sarkar and is plaintiff's witness No. 1 in the present case). I had with me a petition at the time to be submitted to Mr. Walter, which I have produced, being required by summons from here to do so (produces the petition, dated the 22nd December 1917). Mr. Walter returned the petition to me assuring me that he was getting the drafts prepared in accordance with the terms approved by the Board and he assured me of this after seeing the orders shown by me. Mr. Walter did not object about the drafts being prepared on terms similar to those of the Bokharo Ramgarh and Karanpura lease, with one exception as to the period of the lease. In

returning the petition he said that it was unnecessary to file as the drafts would be prepared as desired."

So, from the evidence of Babu Kalipado Sarkar, it appears that on receipt of the draft, which was not in accordance with what had been agreed to between the parties, Babu Kalipado saw Mr. Walter on the 22nd December and pointed out to him that the draft was not in accordance with the agreement come to between the parties. He had with him a petition ready to be filed before the manager, but the manager returned it saying that he would have a fresh draft prepared and that it was not necessary to file the petition. That petition has, however, been produced by Babu Kalipado Sarkar in the present case and is marked as Exhibit 30. Five days later, on the 27th December, 1917, Mr. Walter sent fresh drafts of the license and the lease to Babu Kalipado Sarkar with a covering letter which is marked Exhibit 14 (*a*) and runs thus:

"In continuation of our conversation on 22nd instant at which you brought to my notice Mr. Mogregor's letter to the Deputy Commissioner, No 428, dated the 18th May 1917, that draft deed of the prospecting and mining agreements should follow the lines of the Bokharo and Ramgarh terms, I have the honour to forward the draft deeds embodying the proposed terms and request that they may be scrutinised by you and returned to me at an early date."

It may be mentioned here that the original of this document (Exhibit 14 *a*) is not found on the records of this appeal; it has been mislaid somewhere. The learned counsel on both sides agreed that Exhibit 14 (*a*) was the letter sent by Mr. Walter on the 27th December 1917, and Mr. Pugh, who appeared for the defendant, produced a copy of that letter which, with the consent of both sides, was placed on the record as Exhibit 14 (*a*) in the case. The draft leases sent along with the letter, Exhibit 14 (*a*), are Exhibits *P* and *P* 1. From this letter, Exhibit 15 (*a*), it appears that Mr. Walter was under the impression that the deed of prospecting license was also to be on the lines of the deed granted to the Bokharo and Ramgarh Company. This appears to be a wrong impression formed by him on looking into the previous correspondence. However, it appears that Babu Kalipado Sarkar was not at Hazaribagh when this letter (Exhibit 14 *a*) was sent and he had been to Calcutta on account of the X'mas holidays. On his return to Hazaribagh, he wrote a letter to the manager on the 31st December 1917 (Exhibit 15), in which he stated that on his return to Hazaribagh he had gone through the drafts received in his absence and he found that certain modifications were to be made and certain omissions to be inserted, and he annexed thereto his notes pointing out the modifications and the omissions referred to in the letter. One of the modifications suggested by him was that out of Rs. 57,261 12 0, representing the rent at the rate of Re. 1-8-0 per standard *bigha* for the period of two years for which the prospecting license was to be granted, a sum of Rs. 15,000 only ought to be paid forthwith at the time of the registration, and the balance to be paid six weeks after the date of registration failing which the sum of Rs. 150 0 should not be repaid to the licensee but should remain and be the sole property of the manager. In the draft, Exhibit *P* (1), sent by the manager it was provided that the whole amount of Rs. 57,261-12 0 was to be paid immediately on the execution of the license. The modification proposed by Babu Kalipado Sarkar was on the basis of the license granted to the Ramgarh Bokharo Company, wherein it was provided that out of Rs. 1,00,000 *salami* agreed to between the parties, Rs. 25,000, or one-fourth thereof was to be paid at the time of the execution of the license and the balance of Rs. 75,000 was to be paid six weeks thereafter, within which period of six weeks the titledeeds and other documents had to be examined by the solicitors of the company. Another provision suggested was that there ought to be a provision for extension of the prospecting term as contained in the license of the Ramgarh Bokharo Company; such a provision had not been made in the draft, Exhibit *P*. There were other modifications proposed which were in conformity with these two main modifications suggested by Babu Kalipado Sarkar. It will be remembered that the agreement between the parties as regards the terms of the prospecting license had been definitely settled and the terms were set out in the manager's letter to the Deputy Commissioner (Exhibit 32) and these terms were approved by the Commissioner. There was no reference to the Ramgarh Bokharo license in so far as the prospecting license to Kalachand was

concerned. The terms of the prospecting license had been settled between the parties and these terms were that the prospecting license was to be granted for a period of two years, and the prospecting license was to be for a rental of Rs. 56,787 and in the letter of the manager, dated the 3rd March 1917 (Exhibit *D*), it was clearly stated that in the event of either a lease or a license, the *salami* or rental would have to be paid in advance, and from the whole of the correspondence that passed between the parties, it is to my mind evident that the parties agreed that the whole of the rental of Rs. 57,261-12-0 was to be paid in advance and not by instalments of Rs. 15,000 and Rs. 42,000 as suggested by Babu Kalipado Sarkar on the footing of the license of the Ramgarh Bokharo Company. This was therefore a new term proposed by Babu Kalipado Sarkar on behalf of Kalachand Naturally the manager did not accede to these terms and he at once sent a reply, dated the 3rd January 1918 (Exhibit 16), to Babu Kalipado Sarkar wherein he stated that he was unable to accede to his proposals to treat the points raised by him on exactly the same footing as the Bokharo and Ramgarh lease and he further impresed upon him the desirability that the matter ought to be settled immediately. It appears, that on receipt of this letter, there was a conference on the 3rd of January in which Mr. Walter the manager, Kalachand Chakaravarti, Kalipado Sarkar and Bhudeb Chandra Sarkar were present and in that conference certain terms were agreed to between the parties which are set out in the manager's note, dated the 3rd January 1918 (Exhibit *N*.) The terms settled in this conference were that Rs. 15,000 was to be paid in before the 7th January and the balance of Rs. 42,261-12-0 to be paid on the date of registration, which was to be completed within six weeks from the 7th January, failing which, Babu Kalachand Chakravarti agreed to forfeit to the estate the sum of Rs. 15,000 including the sum of Rs. 2,000 which he had already deposited as security. As regards the duration of the license, it was agreed that the prospecting license was to be granted for a term of two years from the date of registration, with an option to extend for one year more, on payment of the rent, Annas 12 per standard *bigha* in advance. As regards the mining lease it was agreed that at the time of registration of the prospecting license, Babu Kalachand Chakravarti was to take a mining lease of 600 *bighas* of coal land and he further agreed to take a minimum area of 600 *bighas* during the period of the prospecting license. These terms appear to have been modified at a second conference held on the 6th January 1918, and the terms agreed to in this conference are set out in the manager's note of that date (Exhibit *O*). These terms were :

(1) Rs. 15,000 to be paid on the 16th January 1918, and the balance Rs. 42,261-12-0 to be paid on the date of registration which was to be completed not later than two months after the 16th January 1918, that is to say, a clear two months were to be granted, failing which Babu Kalachand Chakravarti agreed to forfeit to the estate the sum of Rs. 15,000 including the sum of Rs. 2,000 which he had already deposited as security ;

(2) as regards the duration of the license, it was agreed that the prospecting license was to be granted for a term of two years from the date of registration, with an option to extend for one year more, on payment of the rent at annas 12 per standard *bigha* in advance ; and

(3) as regards the mining lease, it was agreed that one month after the date of registration of the prospecting license Babu Kalachand Chakravarti was to take a mining lease of 600 *bighas* of coal land without raising any objection whatsoever and pay *salami* for the same on the date of the registration of the mining lease, failing which he agreed to pay damages to the estate to the extent of Rs 15,000 for the breach of the contract and further agreed to take a minimum area of 600 *bighas* from the period of the prospecting license. This note is signed by Kalachand Chakravarti and Bhudeb Chandra Sarkar.

From the above, it is clear that the original contract entered into by and between the parties, namely, Mr. Mcgregor on behalf of the defendant and Kalachand Chakravarti, and sanctioned by the Commissioner was not adhered to. Several new terms were proposed and agreed to between Kalachand and Mr. Walter. These terms were very material terms and were not mere minor details to be settled at the time of the preparation of the draft. It was clearly agreed to between the parties before the sanction of the Commissioner and the Board of Revenue had been obtained that the entire amount of the rental for the prospecting license at the rate of Re. 1-8-0 per *bigha* was to be paid in advance. The payment of this sum had nothing to do with the terms upon which the license had been granted to the

Ramgarh Bokharo Company and yet the proposal was made by and on behalf of Kalachand Chakravarti, to introduce a new term as regards payment, namely, a quarter of the sum to be paid in advance and three-quarters thereof to be paid two months after the registration of the license. The manager had under the law no authority to alter the terms without the sanction of the Court of Wards, which, in the present case, was never obtained. Then as regards the duration of the license, the term agreed to was that it was for two years only and the new term of an option to extend the period of the prospecting license for one year more on payment of fresh rent was again a very material point which had to be sanctioned by the Court of Wards and which could not be agreed to under the law by the manager. Furthermore, the agreement to take the mining lease of 600 *bighas* of coal and to pay the *salami* for the same within one month after the date of the registration of the prospecting license was also a new term which had not been sanctioned by the Board of Revenue. These terms, as set out in the note (Exhibit *O*), showed clearly that the original contract which was settled between the parties and approved of by the Court of Wards and which Mr. Chakravarti on behalf of the appellant contends was complete on the 20th November 1917 as evidenced by Exhibit 13 was not adhered to and fresh terms were proposed on both sides. It seems clear that neither party treated the agreement as evidenced by the letter (Exhibit 13) to be a completed contract and each party thought that he was at liberty to introduce new terms and that the negotiation was considered to be still open and it was never the intention of the parties to treat the matter as a settled contract.

What happened after this is of still more importance. After this conference of the 6th January 1918, the manager sent fresh drafts of the license and the lease to Kalachand Chakravarti with a covering letter (Exhibit 17), dated the 10th January 1918. These drafts are Exhibits 18 and 18 (*a*). The manager was very careful in his letter (Exhibit 17) to say :

"Please note that these drafts are provisional and subject to the approval of the higher authorities."

What happened after the 10th January is thus stated by Bhudeb Chandra Sarkar (plaintiff's witness No. 1):

"10th of January was a Thursday. On that date, in the afternoon, the mining clerk of the estate had been to Kalachand, who was then staying in a house at Hazaribagh, with two drafts, and the latter did not take the drafts as the time was then inauspicious. On the next day the drafts were again taken over to Kalipadu Babu's place and Kalachand came over and I was also present and the drafts were read over and it was found that the blank against *mauzas* at page 2 had been filled in by the insertion of the names of the two *mauzas*, Ghatiari and Rangamati. So the drafts were returned. Then I got correct draft, Exhibits 18 and 18 (*a*), on 19th January 1918, and I approved of them. At the same time I got two duplicates of the drafts and I sent them, the same day, to Kalachand at Bagdigi and subsequently, I learnt that he received them on 22nd January 1918."

These drafts bear the endorsement of approval signed by Bhudeb Chandra Sarkar and Kalipado Sarkar on the 19th January 1918. It will be noticed that in the note, Exhibit *O*, dated the 6th January 1918, it was stated that the sum of Rs. 15,000 was to be paid on the 16th January 1918, *i.e.*, a period of nine days was granted to Kalachand to pay the sum of Rs. 15,000. The nine days, however, expired but the money was not deposited. It is contended on behalf of the plaintiffs that the nine days ought to be reckoned from the date of approval by the defendant or his legal advisers which was the 19th January 1918. Assuming this to be so, the nine days expired on the 28th January 1918, but no payment was made even up till then, and consequently on the 28th January 1918, the manager sent a note to the Deputy Commissioner which has been marked as Exhibit S whereto he attached the note, dated the 6th January 1918, and it was stated that Babu Kalachand Chakravarti had agreed to pay Rs. 15,000 on the 16th January and Rs. 42,261-12-0 on the date of registration of the prospecting license, that on account of certain reasons set out therein the draft license and lease could not be sent until the 10th January on which date Kalachand refused to take delivery on certain objection as regards the area to be mentioned in the provisional draft which necessitated a further change in the draft and thus delayed the matter for a further period of eight days and that the draft was finally made over to Kalachand on

the 10th January. He stated that the time allowed was nine days from the date the draft was finally accepted, that the time had expired and that Kalachand Chakravarti had not paid the sum of Rs. 15,000 as agreed to by him. The manager referred to the fact that for the last fourteen months the matter was being protracted and other applicants were being prevented from coming in. He stated that the estate had incurred loss by reason of this delay, that every chance had been given to Kalachand Chakravarti, and the manager was not prepared to give any more time. He therefore recommended that the application of Kalachand, for the license and lease, be cancelled. Babu Kalipado Sarkar who was acting as Kalachand's pleader in this matter states that he came to know of this report of Mr. Walter to the Deputy Commissioner on the 29th January 1918. On that date he was called by the Deputy Commissioner (Mr. Berthoud) in his chambers who told him about Mr. Walter's report, that thereupon Kalipado Babu asked that time might be given to him, so that he might inform his client and the Deputy Commissioner accordingly gave him time till the 1st February 1918. On that very date, *i.e.*, 29th January 1918, Kalachand was informed by wire about this report and the grant of time by the Deputy Commissioner. Kalipado Sarkar says that on the 31st January 1918, he sent Bhudeb Babu to Kalachand's place at Bagdigi to bring Rs. 15,000 and on the 1st February 1918, he saw the Deputy Commissioner again and as up to that time he had received no intimation, either from Bhudeb or from Kalachand, he asked for a day's further postponement and the Deputy Commissioner was pleased to grant it. It appears that on receipt of this information, Kalachand despatched a sum of Rs. 9,000 direct to the Deputy Commissioner in Government currency notes by means of five registered insured covers and on the 1st February he sent a telegram to the Deputy Commissioner, which is marked as Exhibit 19, intimating the despatch of the sum of Rs. 9,000 by insured post and stating that Rs. 2,000 had already been deposited and that the balance would follow immediately. Babu Kalipado Sarkar states that he received a telegram from Bhudeb on the evening of the 1st or the morning of the 2nd February 1918. On the 2nd February he saw Mr. Berthoud and told him that Rs. 9,000 had already been sent to him by registered insured post and that Bhudeb was coming with the balance of Rs. 6,000 and he requested him to take it. He says that he had made arrangements with certain bankers of Hazaribagh to raise the money and that he and the banker were waiting with the money in the outer verandah of the Deputy Commissioner's chambers The Deputy Commissioner, however, refused to accept the sum Rs. 9,000 from Kalipado Babu. The Deputy Commissioner also told him that he would refuse the insured covers as they did not contain the full amount of Rs. 15,000 and as they were addressed to him instead of to the manager. On the 2nd of February, the Deputy Commissioner passed the following order, a copy of which is marked Exhibit *Q*:

"The time within which Babu Kalachand Chakravarti was to deposit Rs 15,000 has expired several days ago and the money has not been paid. He has given endless trouble to the estate and I do not think he will be a satisfactory lessee. The money will now not be accepted. Manager is at liberty to make other proposals."

On the 4th February, however, a petition appears to have been filed, on behalf of Kalachand, through Babu Bhudeb Sarkar before the Deputy Commissioner stating that Rs. 9,000 had already been remitted in five insured registered covers and that he had brought Rs. 6,000 in cash on that date and he prayed for leave to deposit the amount. This application was rejected by Mr. Berthoud with the following order:

"I have received no money so far and the term for deposit has long expired. I decline to accept any money now."

It appears that the insured covers were received after this order was passed by the Deputy Commissioner who refused to take them. Against this order of the Deputy Commissioner, Kalachand went up before the Commissioner of the Division who after calling for a report from the Deputy Commissioner, ultimately rejected the application under letter dated the 8th March 1918 (Exhibit *D*), to the Deputy Commissioner of Hazaribagh. Kalachand preferred an appeal before the Board of Revenue and the Board also rejected his application by a resolution, dated the 15th June 1918 (Exhibit *U*), which has led to the institution of the present suit.

Now, the first point raised in this appeal is whether there was a concluded contract so as to be binding upon the defendant and of which specific performance can be decreed by the Court. It has been contended by the learned counsel for the appellant that the contract was concluded on the 20th November 1917, by the acceptance of the terms sanctioned by the Court of Wards as evidenced by the letter, Exhibit 13, and that this concluded contract is capable of being specifically enforced. Had the matter rested there, there would have been a good deal of force in this contention. The learned Subordinate Judge has, however, found that even on the 20th November 1917, there was no concluded contract. He refers to the correspondence which passed between the Manager, the Deputy Commissioner and the Board of Revenue, and has come to the conclusion that the only point settled by the Court of Wards, without whose sanction no lease could have been executed by the manager, was the period of the lease to be entered in the draft lease to be attached to the prospecting license. The correspondence, set out in detail above, does lend a good deal of support to this conclusion. It had been stated by the Commissioner in this letter to the Secretary to the Board of Revenue that the only point upon which the opinion of the Board was sought was the period of the draft lease. No doubt, other terms, as regards the prospecting license and as regards the draft lease being on lines of the Bokharo and Ramgarh lease were also set out in the letter, but then at the end of the letter the Commissioner distinctly wrote that on receipt of the Board's order a draft prospecting license and a draft agreement for a mining lease would be submitted to the Board (*vide* Commissioner's letter, dated the 10th June 1917, Exhibit 8) Again the Secretary to the Board of Revenue in his reply, dated the 16th July, 1917 (Exhibit 9), refers to the Commissioner's letter of the 10th June 1917,

"in which you ask for the Board's orders as to the period for which lease may be promised to Babu Kalachand Chakravarti in the draft lease to be annexed to the prospecting license for which he has applied for coal over certain villages appertaining to the Ramgarh Wards Estate."

This quotation from the letter of the Secretary clearly shows that the only matter which the Board of Revenue did consider was the period for which the lease was to be promised and nothing else. No reference is made in this letter to the terms of the prospecting license and there is nothing in this letter from which it can be said that the other terms of the proposed contract were considered by the Board. The fact that the final sanction of the contract was not to be made until the draft prospecting license and draft mining lease were submitted to the Commissioner is clear from the memo. of the Commissioner, dated the 30th July 1917, forwarding copy of the Board's letter to the Deputy Commissioner, in which a request is made to send a draft prospecting license and a draft agreement for the mining lease. Stress has been laid by the learned counsel for the appellant on the manager's letter, dated the 10th August 1917, to Kalachand Chakravarti wherein the manager states that the Board of Revenue had sanctioned the period of the lease to be for 60 years and he says that this period had been fixed by the Board of Revenue.

"to whom the *whole proposal* was submitted for sanction."

It is argued that this letter clearly shows that it was not only the period of the lease but the whole proposal including the terms of the prospecting license and the other terms as regards the mining lease which had been submitted to the Board and sanctioned by it. It has further been contended that as a matter of fact the Commissioner, who was under the law authorized to sanction the grant of leases, had approved of all the terms and the only term upon which he was in doubt was the period of the lease and he wanted the opinion of the Board of Revenue upon that point only; and it was not necessary that the sanction of the Board of Revenue should be obtained as regards the other terms. But the whole tenor of the correspondence goes clearly to show that the Court of Wards authorities had no desire to conclude the contract without the final sanction of the Board of Revenue and that the draft license and lease had to be submitted to the Board for sanction. The power given to the Commissioner, under rule 15 of the rules framed by the Court of Wards under section 70 of the Court of Wards Act, to sanction leases is a power which may or may not be exercised by him. He may, if he chooses, sanction the grant of a license and

lease without reference to the Board; but if he does not choose to exercise that power, there is nothing in law to compel him to do so, and from the whole tenor of the correspondence in the case it seems to be clear that the Commissioner had no intention to exercise that power and he wanted to refer the matter to the Board for final sanction on all the points involved in the contract. That this was the practice in the case of previous licenses and leases is evident from the fact that in the case of grant of leases of coal mines and mica mines, the sanction of the Board of Revenue had been invariably obtained. In the letter (Exhibit 10) the manager was no doubt under the impression that the whole proposal had been submitted before the Board of Revenue for sanction and assuming that the manager's view was correct, it is necessary to see whether the sanction given is sufficient to entitle the plaintiff to a specific performance of the alleged contract. As I have said, had the matter rested as evidenced by the letter of the 20th November 1917 (*Exhibit* 13), there would have been a great deal of force in the contention of the appellant but the subsequent events go clearly to show that neither party understood that the contract was completed on that date. It is clear from the subsequent correspondence set out in detail above that each party thought that the negotiation was still open and that new matters, which had never been before the Board of Revenue or the Commissioner, could be introduced. When the draft lease and license were sent to the legal advisors of Kalachand and to Kalachand himself, they came forward with three very material points which were never before the Court of Wards authorities. Those points related to material terms to be settled between the parties. They were : first, as regards the payment of the rent or fee for the prospecting license for two years in advance. As I have said above, it was insisted upon by the manager that the whole of the prospecting fee should be paid in advance and this was accepted by Kalachand, but after the 20th November 1917, and after the receipt of the draft license, Kalachand and his legal advisors came forward with the objection that only a quarter of the prospecting fee ought to be paid in advance and the remaining three-quarters could be paid sometime after the execution of the license. The second term was as regards the duration of the license. It had been distinctly settled between the parties that the license was to be for two years, but a new proposal was brought forward in the conference of the 6th January 1918, that the license should be for two years, with an option to extend for one year more. The third term was as regards the option to take a mining lease and a proposal was brought forward that one month after the date of registration of the prospecting license, Kalachand had to take a lease of 600 *bighas* of coal land and pay the *salami* for the same on the date of the registration of the mining lease, and he further agreed to take a minimum area of 600 *bighas* during the period of the prospecting license. That these were material terms varying the original terms as settled between the parties there can be no doubt and, in fact, it is admitted by Babu Kalipado Sarkar, plaintiff's legal advisor in charge of this matter, that these terms were "major terms." Whether the terms are major or minor does not very much vary the situation. What has to be seen is whether any term had to be settled yet and was not settled on the 20th November, 1917. If any term had to be settled, it cannot be said that there was a concluded contract on that date. As I have said, Babu Kalipado Sarkar admits that other terms had to be settled, from which it follows that the matter was still subject to negotiation and to settlement.

Reliance has been placed by the learned Counsel for the appellant upon the case of *Gulab Singh* v. *Gokhul Das* (1) as an authority for the proposition that it was not necessary that the draft license and lease to be executed by the manager should be submitted to the Court of Wards authorities for their sanction, nor that the sanction should be to the precise terms of the license and lease. The judgment in that case, however, has no application to the facts of the present case. What happened there was, that the Deputy Commissioner of Hoshangabad in the Central Provinces had assumed charge, as a Court of Wards, of the estate of a joint Hindu family governed by the *Mitakshara* school of Hindu Law. As such Court of Wards, the Deputy

(1) (1913) 40 Cal. 784=40 I. A. 117=17 C. L. J. 619=17 C. W. N. 918=15 Bom. L. R. 613=(1913) M. W. N. 542=14 M. L. T. 55=25 M. L. J. 179=19 I. C. 521=9. N. L. R. 117 (P. C.).

Commissioner made a proposal to the Commissioner to raise a loan for the liquidation of the debts due from the estate. One of the proposals was to borrow from the plaintiff in that suit a sum sufficient to liquidate the then indebtedness of the family on the security of a mortgage of the ancestral property. The proposal was sanctioned by the Commissioner in his letter, dated the 28th January 1891. The mortgage in suit in that case was executed by the Deputy Commissioner for a sum of Rs. 1,20,000 hypothecating to the plaintiff-mortgagee the right, title and interest of the joint family in the property. The mortgage money was to be repaid with interest by annual instalments extending over more than twenty years. It appears, during the two years 1892 and 1893, the Court of Wards paid to the mortgagees Rs. 16,000 only and since then no other instalments had been paid. The Court of Wards found it impossible to pay the balance of the mortgage or any other instalments or interest, and on the 10th December 1901, the plaintiff called upon the Court of Wards either to put them in possession of the mortgaged property or to pay the sums due under the mortgage according to the stipulations contained in the bond. On the 13th March 1903, the Deputy Commissioner of Hoshangabad, who was the Court of Wards, gave the plaintiff notice that the relinquishment of the management of the estate by the Court of Wards had been sanctioned and offered to make over to them the mortgaged portion of the estate in full satisfaction of the claims with all outstanding rental arrears and debts, except the cultivating rights in *sir* land which were to be reserved for the maintenance of the wards. The offer which was, however, not in compliance with the terms of the contract, was declined by the plaintiff and the Court of Wards relinquished the superintendence of the estate without payment to the mortgagees. Thereupon the suit was brought by the mortgagees to enforce the mortgage. One of the objections taken in defence in that case was that the mortgage was void because the previous sanction to it of the Chief Commissioner had not been obtained as required by section 18 of the Central Provinces Court of Wards Act (Act XVII of 1885). Their Lordships of the Judicial Committee on a consideration of the facts of that case and especially the letter, dated the 28th January 1891, referred to above, were of opinion that it must be inferred from that letter that the Chief Commissioner had given his sanction to the proposal that the Court of Wards should mortgage the property of the family in order to raise a sum sufficient for the liquidation of the indebtedness. Their Lordships observed, that it was not in their opinion necessary, under section 18 of Act XVII of 1885 that the actual mortgage to be made by the Court of Wards should be submitted to the Chief Commissioner for his sanction; nor was it necessary that the Court of Wards should have his sanction to the precise terms of the mortgage. The sanction, which was to be inferred from the letter of the 28th January 1891, empowered the Court of Wards to mortgage the property under section 18 of Act XVII of 1885. In accordance with this sanction, a mortgage had actually been executed and a sum of Rs. 1,20,000 had actually been advanced by the plaintiff and applied towards the discharge of the indebtness of the family. In the present case, the circumstances are such that no inference can be drawn that the terms of the proposed license and lease were finally sanctioned by the Court of Wards. No doubt, if the main details had been settled and sanctioned by the Court of Wards, the mere drawing up of a formal deed would not render the contract void for want of submission of the draft deed before execution; but in the present case we find that very material terms never obtained the sanction of the Court of Wards.

Reliance has further been placed by the learned counsel for the appellant upon the case of *Ram Kanai Singh Deb Darpashaha* v. *Mathews n* (2). That was a suit for a declaration that a *patni* lease granted by the manager under the Chota Nagpur Encumbered Estates Act (VI of 1876) was *ultra vires* and void for want of sanction of the Commissioner as required by section 17 of the Act. It was established by the evidence in that case that all the essential particulars had been sanctioned by the Commissioner and their Lordships observed that the main elements of the transaction being settled and the amount of the premium arranged what remained to be

(2) [1915] 42 Cal. 1039=44 I. A. 97=19 C. W. N. 585=17 M. L. T. 377=13 A. L. J. 554=21 C. L. J. 446=17 Bom. L. R. 449=30 I. C. 55=2 L. W. 555=29 M. L. J. 80 (P. C.).

done was to have the actual deed drawn up and executed ; and that their Lordships were of opinion " that when it is affirmatively established that a transaction itself, in all its essential particulars, has obtained the sanction of the Commissioner, and when it is requisite that the transaction be carried into effect by the preparation of the appropriate deeds, a challenge merely on the ground that the document ultimately prepared had not been submitted for sanction, cannot be sustained. In administrative and departmental action it must necessarily be the case that formal details may have to be entered upon in order to carry into practical effect, and put into legal shape, the arrangement to which sanction was adhibited." In the present case the evidence adduced shows that the essential details of the contract had not been sanctioned. No doubt the terms of the prospecting license had to all intents and purposes and in all its essential particulars been sanctioned by the Commissioner ; but had he not even sanctioned all the essential points as regards the draft lease and he expressly stated in his letter that the draft license had to be submitted to him and by him to the Board of Revenue for sanction. Where by a written agreement the defendant agreed with the plaintiff to take the lease of a house for a certain term at a certain rent " subject to the preparation and approval of a formal contract " and no other contract was ever entered into between the parties, it was held by Sir George Jessel, M. R., that there was no final agreement of which specific performance could be enforced against the defendant [*Winn* v. *Bull* (3)]. The principles underlying cases of this class were thus laid down by the Master of the Rolls : "I take it the principle is clear. If in the case of a proposed sale or lease of an estate, two persons agree to all the terms and say, 'We will have the terms put into form,' then all the terms being put into writing and agreed to, there is a contract."

" If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled." In the present case there can be no doubt on a reference to the correspondence that the intention of the parties was that the contract would not be a concluded contract until the draft license and lease had been submitted before the Commissioner and the Board of Revenue and sanctioned by them.

In this view of the case, I agree with the learned Subordinate Judge that there was no concluded contract in the present case which is capable of specific performance. This finding is sufficient for the disposal of the appeal, but a number of other points have also been raised and it is desirable that I should express my opinion upon these points also.

It has been argued that the sanction of the Commissioner to the terms submitted to him by the manager was a sufficient sanction as provided by the law and that the want of formal sanction by the Board of Revenue did not render the contract void. No doubt, rule 15 of the rules framed by the Court of Wards under section 70 of the Court of Wards Act gives power to the Commissioner to sanction leases and for the purpose of granting leases by the Court of Wards on behalf of the estate under its superintendence a sanction so granted by the Commissioner would make the contract valid. But the evidence produced in the present case shows that in this particular estate all leases were sanctioned by the Board of Revenue before execution Although the Commissioner had the power to grant the sanction there was nothing in law to prevent him from refusing to exercise that power. It has been admitted by the witnesses examined on behalf of the plaintiff that it has been the invariable practice in this estate to obtain the sanction of the Board of Revenue, and if the Commissioner, although possessing the power to grant the sanction, refused to do so and insisted on sanction being obtained from the Board of Revenue there can be no valid contract without such sanction of the Board of Revenue. I agree with the learned Subordinate Judge, that in the present case the alleged contract was void for want of sanction of the Board of Revenue.

It has next been contended that having regard to the circumstances of the case it must be held that there was an implied sanction by the Board of Revenue to all the terms forming the contract and stress has been laid upon the fact that the manager

(3) (1877-78) 7 Ch. D. 29=47 L. J. Ch. 139 =26 W. R. 230.

in his letter to Kalachand had stated that the whole proposal had been submitted to the Board of Revenue. The opinion of the manager seems clearly to be erroneous. There can be no doubt that the only matter referred to the Board of Revenue by the Commissioner was the question as regards the period for which the proposed lease was to be executed in case the licensee desired to take a lease after prospecting the lands. It has been very vehemently argued that the Board could not sanction the period of the lease without being appraised of all the other terms of the proposed contract. No doubt the other terms of the proposed contract were set out in the letter of the Commissioner to the Board of Revenue, and in sanctioning the period of 60 years, the Board had before it the other terms proposed by the parties. But the letter of the Secretary to the Board of Revenue to the Commissioner clearly shows that the only point referred to the Board was the consideration of the period of the lease; and having regard to the fact that in the same letter in which the Commissioner set out the terms and asked for the opinion of the Board as regards the period of the lease, he had also stated that on receipt of the Board's order a draft prospecting license and a draft agreement for a mining lease would be submitted, the only reasonable conclusion that can be drawn is that the Board did not apply its mind to all the terms of the proposed contract. It has been argued by the learned Counsel for the appellant that the object of submitting the draft to the Board was only for the purpose of keeping it on the record in the Board, but I am unable to understand why, if the intention was that the deed of license and lease should be submitted to the Board only as a formal matter to be placed on the record, a copy of the finally executed license and lease was not thought fit to be submitted to the Board instead of the draft license and the lease. The fact that the draft of the two documents was intended to be submitted and not the copies of the deeds finally executed by the manager, goes clearly to show that the intention of the parties was that the final deed would not be executed until the drafts had been submitted to the Board and had received their sanction. I agree with the learned Subordinate Judge that there was not even an implied sanction by the Board of Revenue in the present case.

It has next been argued that there was a concluded contract on the 20th of November 1917, and that the subsequent terms settled in the conference on the 3rd and the 6th of January 1918, were forced upon the plaintiffs by Mr. Walter and may be left out of consideration altogether, and the concluded contract as evidenced by the letter of the 20th November 1917, should be specifically enforced. I have already held that there was no concluded contract on the 20th November 1917; both parties thought that the matter was still open to negotiation. In fact more material terms had according to the plaintiff to be settled, and upon the evidence on the record the learned Subordinate Judge was fully justified in his conclusion that there was no concluded contract on the 20th November 1917, which could be specifically enforced.

Assuming, for the sake of argument, that the contract evidenced by the letter of the 20th of November 1917, was a concluded contract, it is contended by Mr. Pugh for the defendant that the contract was bad on account of uncertainty. There was nothing in the contract to show from what time the license or the lease was to commence. The date of commencement of the lease is a material term in a contract for grant of a lease, and if this does not appear in the contract either by express terms or by inference the contract is incomplete (*vide* Fry on Specific Performance, 6th edition, section 378). No date was fixed in the original proposal as submitted by the manager to the Commissioner on the 18th May 1917, and we do not find any trace of any date for commencement of the license or the lease having been fixed in any of the documents until we come to the note of the conference held on the 3rd of January 1918, when it is for the first time stated that the prospecting license was to commence from the date of the registration thereof. The appellant, however, does not rely upon this settlement in the conference of the 3rd of January 1918; his case is that the contract was concluded on the 20th November 1917, and it is the specific performance of this contract which is sought to be enforced. But up to the 20th November 1917, we find absolutely no trace anywhere of the date of the commencement of the lease having been fixed. There is no date for commence-

ment of the lease to be found in the note of the manager to the Deputy Commissioner, dated the 5th May 1917, nor in the letter of the manager to the Deputy Commissioner, dated the 18th May 1917, nor in the Board's sanction conveyed in the letter of the Secretary to the Board of Revenue to the Commissioner, dated the 16th July 1917, nor even in the letter, dated the 20th November 1917 (Exhibit 13), which is the sheet anchor of the plaintiff's case. I am therefore of opinion that the contract of the 20th of November is incapable of specific performance for want of a date of commencement of the lease. Then up to the 20th November 1917, we find that the area of which the lease was to be taken had not also been fixed ; it was for the first time fixed in the conference held on the 6th of January 1918. Therefore, these two material defects in the alleged contract of the 20th of November 1917, render the said contract incapable of specific performance.

It has next been contended by Mr. Pugh that the contract sought to be enforced is a contract to execute another contract between the parties for the prospecting license and is in effect a mere contract to execute the final lease, and reliance has been placed on *Von Hatz Feldt Wildenburg* v. *Alexander* (4) which has been referred to in *Seth Hukumchand* v. *Raja Ram Bahadur Singh* (5). There is some force in this contention. The prospecting license is merely ancillary to the mining lease and a draft of the lease is invariably annexed to the license. In effect, the license is merely a contract to execute the lease, if and when the licensee requires it to be executed. If this is so, then the contract sought to be enforced, *viz.*, to grant the license, is not a contract which is enforceable in law, because the law does not recognize a contract to enter into a contract.

The next point for consideration is whether time was of the essence of the contract and if so, was this term complied with. The defendant's plea on this point is contained in paragraph 9 of the written statement, where it is stated that the payment of Rs. 15,000 within the time was an essential part of the contract, that the estate was suffering daily loss as it could not entertain or dispose of other applications, and that the plaintiff having failed to make the deposit within the promised time, he is not entitled to the specific performance of the agreement. In paragraph 13 of the plaint, the plaintiff states that on the 6th of January 1918, the plaintiff and his pleader having interviewed the manager, the memo of the 3rd of January was superseded by a memo. of the 6th of January in which, among other matters, it was stated that Rs. 15,000 was to be paid on the 16th January 1918, and the balance to be paid on the date of registration which was to be completed within two months, and within one month from the date of registration of the license, plaintiff was to take a mining lease of 600 *bighas* of coal lands on payment of *salami*, and also a minimum area of 600 *bighas* during the prospecting period, and it was understood that the draft with modified details would be submitted to the plaintiff and approved by him at least nine days before the payment. In paragraph 14, it is stated that as the modified draft was given to the plaintiff's pleader, on the 19th January 1918, and approved by him on that date, no money could be deposited on the 16th January 1918. There is, therefore, an admission by the plaintiff that the contract was to be completed within nine days of the approval of the draft and the draft having been approved by the plaintiff's pleader on the 19th January 1918, nine days from that date, *i.e.*, 28th January 1918, would be the time within which the Rs. 15,000 was to be paid ; but the plaintiff asserts in paragraph 15 of the plaint that he did not receive the draft or any information thereof until the 22nd of January 1918, and he wants the time to be computed from the 22nd of January 1918, which would take us to the 31st of January 1918. It is contended on behalf of the defendant that the nine days' time should be calculated from the 19th January 1918, and the same having expired on the 28th of January and no payment having been made, there was a breach of contract and specific performance of it cannot be enforced. The learned Subordinate Judge has held that time was of the essence of the contract and Kalachand did make default in complying with the time limit imposed for the performance of the contract. Now, on examining the correspondence and the evidence on the record, it is quite clear

(4) (1912) 1 Ch. 484=105 L. T. 434=81 L. J. Ch. 184.

(5) (1919) 4 Pat. L. J. 580=53 I. C. 833=(1919) P. H. C. C. 805.

that there was no limit as regards time fixed between the parties up to the 20th of November 1917. The time limit insisted upon by the defendant was that imposed, for the first time, in the conference held on the 3rd and then on the 6th of January 1918. It will be remembered that the plaintiff carefully avoids the terms settled on those two dates. His case is that the contract was complete on the 20th November. As regards the terms fixed on the 3rd and 6th of January 1918, the plaintiff's case is that they were forced upon him by the manager. Be that as it may, it is nobody's case that they ever received the sanction of the Court of Wards, and as the manager had no authority to conclude the contract embodying those terms without such sanction, those terms cannot be treated as part of the contract. It is, therefore, clear that in the contract set up by the plaintiff there was no time-limit fixed at any time and therefore, there is no impediment in the way of the plaintiff obtaining specific performance of the contract alleged to have been completed on the 20th of November 1917, on the ground of any default as regards the time limit. The suit, therefore, cannot be defeated on this ground. The learned Subordinate Judge has, however, considered in detail the terms fixed on the 3rd and the 6th of January 1918, and has come to the conclusion that the time limit of nine days was an essential term in the contract and that no money having been paid in accordance with that term within the time limited by the contract there was a default which would disentitle the plaintiff from getting specific performance. As I have said, it is not necessary to consider in the present case whether the time limit fixed on the 3rd and 6th of January was an essential term in the contract. But, even assuming that the contract, to be enforced, is that concluded on the 6th of January and in that contract nine days' time was an essential part of the contract, I am not inclined to hold that the default made by the plaintiff would disentitle him to relief in the present case. Having regard to the circumstances of the case, to the long period for which the negotiations had been going on, to the fact that the plaintiff was not to blame for the delay up to the 20th of November 1917, and to the fact that the final draft was approved by his pleader on the 19th January 1918, and that the plaintiff himself did not receive intimation thereof until the 22nd of January, and that when information was given to his pleader that the manager had reported to the Deputy Commissioner to cancel the negotiations on the ground that no payment had been made within the time fixed on the 6th of January 1918, and the pleader approached the Deputy Commissioner for extension of time, the Deputy Commissioner had extended it up to the 2nd of February 1918, and that the money was actually tendered on the 4th of February 1918, I am inclined to hold that there is nothing in the circumstances of the present case which would make it inequitable to modify the said term and to grant specific performance. Having regard to all the circumstances of the present case I am of opinion that the delay of a few days in making the payment will not, in the present case, disentitle the plaintiff to specific relief simply on the ground that time was of the essence of the contract and that the term as regards the time limit had not been complied with. I therefore hold, that if the plaintiff had been entitled to specific performance of the contract, his failure to pay the money until the 4th of February 1918, would not disentitle him to a decree for specific performance.

The next point for consideration is whether the Court of Wards or the manager was competent in law to enter into an agreement to grant a prospecting license and mining lease. It has been contended on behalf of the defendant that no power is given by the Statute to the Court of Wards to enter into agreements to grant leases: the power conferred by the Statute is simply to grant leases and not to enter into an agreement to grant leases and therefore the Court of Wards had no power under the law to enter into an executory contract to grant a lease, and that even if a contract had been entered into in the present case, by the Court of Wards, such a contract was void as being beyond the powers of the Court of Wards, and that no claim for specific performance can be based on the foot of such an agreement. The learned Subordinate Judge has given effect to this contention of the defendant. He has relied on general principles as regards powers conferred by Statutes and has referred to the case of *Seth Hukum Chand* v. *Raja Ram Bahadur*

Singh (5) where it has been held that the power to grant lease given to the manager by section 17 of the Chota Nagpur Encumbered Estates Act (1876) does not, apart from section 18 (*b*) enacted in 1909, include the power to enter into an executory contract to grant a lease. He has also referred to Farwell on Powers, pages 394 and 395 (3rd edition), and has held that the Court of Wards is a creature of Statute and it can only have such powers as are expressly or impliedly vested in it by the Act to which it owes its existence. As regards the general proposition of law that where power is conferred upon any individual or any statutory body by an act of legislature, such power must be confined strictly to that conferred by the Statute there can be no doubt ; but on a careful consideration of the various provisions of the Court of Wards Act, I am unable to hold that the Court of Wards had no power to enter into an executory contract. Section 14 gives the Court general powers to do all things requisite for the proper care and management of the property which the Court may take or retain charge of under the Act. It gives him all the powers which the proprietor of any such property, if not disqualified, might do for its care and management. Section 15 provides for the exercise of those general powers either by the Court itself, or through other officers or other persons to whom it may delegate these powers. Section 18 gives the Court a clear authority to sanction the giving of leases of farms and the power to direct the doing of all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward. Now, entering into contracts is one of the powers which a proprietor of immoveable property unquestionably possesses. If all the powers possessed by the proprietor are conferred upon the Court, I fail to understand why the power to enter in to a contract in relation to that property should be considered to have been withheld by the legislature from the Court of Wards. If such power be considered to have been withheld, circumstances may arise when the power to grant leases will become absolutely nugatory. Indeed, the case under consideration furnishes an illustration in point. It is clear from the evidence in this case, that leases of coal lands are always preceded by a license for prospecting and search for coal ; it would be impossible to grant a mining lease for the purpose of raising coal without, in the first instance, giving a license to prospect and search of coal. It has been the invariable practice in this estate to grant prospecting licenses to search for coal and to annex to such license a draft of the mining lease to be executed on behalf of the estate in case the licensee wishes to take a mining lease. All such prospecting licenses with draft leases attached thereto are in the nature of contracts to grant a lease, and if it be held that power to enter into a contract is not given by the Statute to the Court of Wards, it must necessarily be held that no lease for mining purposes can be granted by the Court of Wards in the present case. No doubt the Court of Wards is a creature of the Statute and its powers must be limited to those conferred by the Statute, but the powers so conferred by the Statute must be reasonably construed so as to make those powers available to the Court and be such as to enable the Court to effectively manage the estate under its charge. Upon a consideration of the various provisions of the Court of Wards Act, I am clearly of opinion that the power to enter into an agreement to grant leases has been conferred by the Statute upon the Court of Wards. No doubt, it is not always essential to the proper exercise of a power to grant a lease that the the lessor should also have the power to enter into a contract to lease : but no hard and fast rule can be laid down so as to be applicable to every case which may come up for consideration by the Court. The judgment of a Division Bench of this Court in *Seth Hukum Chand* v. *Raja Ram Bahadur Singh* (5) proceeded on the construction of the provisions of the Chota Nagpur Encumbered Estates Act, the provisions whereof are not in all respects similar to those contained in the Court of Wards Act. Section 17 of the Encumbered Estates Act does not contain general terms giving general powers as those contained in sections 14, 15 and 18 of the Court of Wards Act, and indeed the fact that the legislature thought it necessary to amend the Chota Nagpur Encumbered Estates Act by inserting therein a new section [section 18 (*b*)] in the year 1909 giving specific power to the manager to enter into agreements, goes to show that no such power was conferred upon the manager before the enactment of 1909. The case of *Seth Hukum*

Chand v. *Raja Ram Bahadur Singh* (5) is, therefore, not of much assistance in the present case. It has been contended by Mr. Chakravarti for the appellant that the view expressed by this Court in *Seth Hukum Chand* v. *Raja Ran Bahadur Singh* (5) has not been approved by the Privy Council in the appeal against the judgment of this Court in that case, *Hukum Chand* v. *Ram Bahadur Singh* (6). No doubt their Lordships of the Judicial Committee did not refer to this point in their decision and they disposed of the appeal on other points; but that does not show that the decision of this Court, upon the construction of section 17 of the Chota Nagpur Encumbered Estates Act, was either disapproved of or dissented from. However, as I have said, that decision does not affect the decision of the present case which rests on the construction of a different Statute, the provisions whereof are not at all similar to those contained in the Chota Nagpur Encumbered Estates Act. I am, therefore, of opinion that the Court of Wards and the manager, with the sanction of the Court of Wards, had power to enter into the agreement to grant the lease.

It has next been contended by the respondent that the term of the prospecting license, as settled in the contract set up by the plaintiff, has already expired and that the Court will not decree specific performance of a contract the period whereof has already expired. In this connection all that is necessary to say is that in the contract set up by the plaintiff no period for the commencement of the license or the lease had been fixed and therefore it cannot be said that the term has expired. It has been contended by Mr. Chakravarti that what has to be seen is whether, on the date when the action was commenced and the plaint was filed, the term had expired or not. Assuming that the term of the license was two years from 20th November 1917, it is clear that in the present case the period of two years had not expired on the date the present suit was commenced, but at the time the judgment was delivered by the Subordinate Judge and now that the judgment is being delivered by this Court, the term has expired. The learned Subordinate Judge holds that as a general rule the Court will not grant specific performance of an expired contract. The learned counsel for the appellant relies upon the case of *Gilbey* v. *Cossey* (7). That case, however, is distinguishable from the facts of the present case. The facts of that case were that the plaintiff agreed to let the defendant a cottage and farm for the term of seven years from 29th September 1904, but no lease was ever executed. The defendant entered into possession under the agreement in 1907 and thereafter, with the plaintiff's consent assigned his interests in the agreement and the premises. In June 1911, the defendant was in arrear with the rent and before the expiration of the term, the plaintiff commenced an action in the High Court to recover the amount due. This action was heard in October 1911, *i.e.*, after the expiration of the term when the learned Judge gave judgment for the plaintiff. The defendant appealed against the decree and it was contended on his behalf that the agreement under which the defendant was in occupation of the premises was not a lease but only an agreement for one, and that being so, the plaintiff could only succeed if specific performance of that agreement could have been granted at the time when the action was heard, and that that being so, no specific performance would have been granted and that consequently the plaintiff was not entitled to maintain an action for rent due under it. The Court held that there was not a good demise of the premises on account of a formal defect by reason of the fact that it was not under seal: it was simply an agreement under the hands of the parties but it was capable of being turned into a good demise by reason of the doctrine of equity by which a right would be founded upon it to get an order for the specific performance of the agreement, that is to say that the parties should execute it and then it would be a good lease for seven years. Darling, J., referred to the contention of the learned counsel for the appellant that it was impossible that specific performance of the agreement could be ordered by the Court after the expiration of the agreement itself, and observed as follows: "Speaking frankly, I have no doubt that the Court of Chancery

(6) 1924 P. C. 156=3 Pat. 625=51 I. A 203=34 M. L. T 336=47 M. L. J. 562=(1924) M. W. N. 710=5 Pat. L. T. 689=22 A. L. J. 995=5 L. R. P. C. 190 (P. C.).

(7) (1912) 106 L. T. 607=56 S. J. 363.

would not have granted specific performance in the present case, but I think that the basis upon which the specific performance would be granted has been altered in later times." Then his Lordship observes : "At one time it was said in the Court of Chancery that there could not be a decree for specific performance of an agreement from year to year upon the ground that it was inconceivable that a case could be heard within a twelve-month. That idea, however, has now been given up and the Court would make such an order before a tenancy of this kind would have expired." In the case before his Lordship this term had expired on the date of judgment and therefore he proceeded to consider as to what should be the proper form of the decree and the principle upon which that decree should be based. His Lordship referred to the doctrine laid down in *Walsh* v. *Lonsdale* (8) where Sir George Jessel, M. R., said : "There is only one Court and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore under the terms of equity, as If a lease had been granted." Relying on this doctrine his Lordship observed : "If the landlord is to be regarded here as if the lease had been granted, it is perfectly plain that he must have the same rights as if it had been, and we must look at this case as if a lease had been actually granted." His Lordship then proceeded to consider that if the lease was to be considered as actually granted, at what date it was to be put, and he held that it must be taken to have been granted at the date of the agreement for the lease. If that was so, then clearly the plaintiff was entitled to the rent. The decree made in the case was for rent and not for specific performance of the contract. Their Lordships had to do some violence to the principle that no specific performance could be decreed of an expired contract, and they had to invoke the doctrine of *Walsh* v. *Lonsdale* (8), and to treat the agreement as a concluded contract and to decree the arrears of rent. Had the action been one for specific performance and not one for recovery of rent of the land of which the defendant had already been in occupation, I am not sure that the Court would have decreed specific performance of the agreement. I agree with the learned Subordinate Judge that no specific performance of the contract of the prospecting license could be decreed in the present case as the two years' period fixed thereby had already expired.

The next point for consideration is whether, under the peculiar circumstances of the present case, the Court will decree specific performance. Having regard to the fact that it is in the discretion of the Court to do so, the learned Subordinate Judge has come to the conclusion that it would not be exercising a sound discretion to allow the defendant specific performance of the contract. It is not necessary to discuss the point in detail. Had the other points been found in favour of the plaintiff, I would not have hesitated to decree specific performance on this ground. The minor plaintiff is represented, in this action, by his uncle who is also a plaintiff in his own right and it must be presumed that he knows his own interest better than the Court is in a position to judge of it. If he thinks that it would be beneficial for him as well for the minor-plaintiff to enforce specific performance, I would not stand in his way on mere possibilities and hold that it would not be proper to allow him to enter into a speculative adventure.

The next point for consideration is whether the alleged contract can be specifically enforced against the defendant No. 1 who is also an infant. The learned Subordinate Judge has found that no specific performance can be decreed against the infant. Here also I am unable to agree with him. The infant defendant here is represented by the Court of Wards and the Court of Wards has, under the Statute all the powers and all the liabilities which can be exercised or incurred by the disqualified proprietor had he been in a position to enter into the agreement. I would not therefore refuse specific performance on the ground that the defendant is an infant.

As regards the points raised by the issues Nos. 11, 18 and 22, it is not necessary to enter into any discussion thereof. The learned Subordinate Judge has decided these issues in favour of the plaintiff and I agree with him in his decision.

As regards the contention of the defendant that the Court will not compel the manager of the Ramgarh estate toexecute a lease

(8) (1882) 21 Ch. D. 9=52 L. J. Ch. 2=46 L. T. 858=31 W. R. 109.

infavour of the plaintiff when the Board of Revenue has refused to sanction it, and the Board has not been made a party to the suit, I am of opinion that there is no substance therein. All suits against the Court of Wards must be brought against the manager who represents the Court of Wards, and the fact that the Board of Revenue had on appeal by the plaintiff refused to order the manager to execute the lease, will not prevent the Court from decreeing specific performance if it was otherwise satisfied that specific performance should be decreed.

The only other point which need be considered is as regards the deposit of Rs. 2,000 made by Kalachand on the 22nd December 1916, as a preliminary security in anticipation of the sanction. This was a deposit without any prejudice and I see no reason why the plaintiff should not be entitled to a refund of this deposit. Mr. Pugh, who appears for the defendant-respondent, frankly admits that he has no objection to a decree being made for a refund of this sum of money. Having regard to the fact that the money is lying in the hands of the manager under the Court of Wards since December 1916, I am of opinion that the plaintiff is entitled to a reasonable interest upon this sum.

The result is that I would vary the decree of the Court below in so far that I would make a decree in favour of the plaintiff entitling him to a refund of Rs. 2,000 from the defendant with interest thereon at 12 *per cent. per annum* from the 22nd December 1916, up to date of realization. In other respects, the decree of the Court below is affirmed and the appeal is dismissed with costs.

Jwala Prasad, J.—I agree.

Decree varied.

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* 1925 Patna 279.

Ross, J.

Munshi Mander and others—Petitioners

v.

Karu Mander—Opposite Party.

Criminal Rev. No. 37 of 1924, decided on 13th February 1924, from an order of the Dist. Mag., Bhagalpur, dated 8th January 1924.

*(a) *Criminal Pro. Code, S. 437—Order of commitment by the District Magistrate—High Court can revise both on point of law and facts.*

! An order of commitment passed by the District Magistrate can be revised by the High Court on points of law as well as of facts. [P. 280, C. 2.]

*(b) *Criminal Pro. Code, S. 209—Preliminary enquiry in a case triable by a Court of Sessions is not without jurisdiction—Commitment is not proper on unreliable evidence and improbable case.*

A Magistrate holding a preliminary enquiry should not commit a person for trial if he is of opinion that notwithstanding direct evidence, the evidence is unreliable and the case is improbable and a preliminary enquiry made by him in a case triable by Sessions Court is not beyond his jurisdiction if he examined the credibility of the testimony. [P. 280, C. 2.]

Jayaswal, S. M. Gupta, M. L. Bannerji, and *M. N. Lal*—for Petitioner.

G. C. Pal—for Opposite Party.

Judgment.—This is an application by Munshi Mander and seven others against an order of the District Magistrate of Bhagalpur, dated the 8th of January 1924, setting aside an order passed by the Sub-Divisional Magistrate of Madhipura on the 30th of November 1922, discharging the petitioners under section 209 of the Criminal Procedure Code in a case under sections 148 and 304 of the Indian Penal Code which had been brought against them. The District Magistrate by the order complained against, has remanded the case to the Sub-Divisional Magistrate with a direction that he should take additional evidence regarding possession of the disputed land and commit the case to the Court of Session under sections 148 and 304 of the Indian Penal Code.

It appears that on the 13th of July 1922, a riot occurred at *Mauza* Barhaiya out of which two counter cases arose, information being lodged before the Police by both sides on the 14th. One case was instituted by Karu Mander, the opposite party to the present application against Munshi Mander and other petitioners, and the other case was brought by one Ramphal Gangota against Ramkishun Singh and others. Karu Mander's information was first investigated with the result that the accused in his case were discharged on the 30th of November 1922. An application was then made on behalf of Karu Mander to the District Magistrate of Bhagalpur against the order of discharge and that application was rejected on the 6th of January 1923. Karu Mander then made an application to the High Court where it was held that the Magistrate was right in

refusing to interfere at that stage; and it was observed that after the case which was then proceeding had been tried, the question of reviving the present case could, if necessary, be taken up. There the matter rested, until after the disposal of the counter-case which ended in the acquittal of the accused on the 8th of October 1923. On the 17th of November, the District Magistrate was again moved against the order of discharge in Karu Mander's case with the result that he passed the order now under consideration. His grounds for this order are that "the accused in the counter case having been acquitted and it having emerged from that trial that there is evidence to show that Karu Mander was in possession of the disputed land, that the removal of the crops was the occasion of the riot and that the riot occurred in the neighbourhood of the disputed land, it appears to me that there is a *prima facie* case against Munshi Mander and others."

The learned Counsel for the petitioners contended that the District Magistrate had no jurisdiction to pass the order because he had already passed an order refusing to interfere with the discharge of the petitioners; also, that he had no jurisdiction to direct the Sub-Divisional Magistrate to take further evidence and commit the case to the Court of Session. He could either make or direct a further enquiry or order a commitment for trial, but he could not do both; and while ordering the Magistrate to take further evidence, he at the same time fettered his discretion. Further, it was contended that the whole case had been before the Court, that the witnesses for the prosecution had been fully examined and cross-examined and their evidence had been exhaustively dealt with by the Sub-Divisional Magistrate, and there was no ground for directing a commitment.

I do not propose to discuss the question of jurisdiction although it is not clear to my mind how, after the Magistrate had once refused an application against an order of discharge, he could subsequently grant it. The form of the order does not appear to be proper, but the principal objection is on the merits of the case. The learned Vakil for the opposite party relied upon the decision in *Sheobux Ram* v. *Emperor* (1) and contended that the test for a commitment was laid down in that case; and that judged by this test there ought to be a commitment in the present case. It was argued that the Committing Magistrate could only sift the evidence with a view to seeing whether a *prima facie* case was made out or not, and not to judge guilt or innocence. Now the question that was under consideration in *Sheobux Ram's case* (1) was whether there was any evidence on which to go to a Jury. If there was none, then that was a ground of law on which a commitment could be quashed. The question in the present case is entirely different; it is, whether on the evidence recorded by the Magistrate, a commitment should be ordered and whether the commitment which has been ordered under section 437 of the new Criminal Procedure Code should stand. This was precisely the question which arose in *Rash Behary Lal Mandal* v. *Emperor* (2) where it was held that "the High Court has full jurisdiction under section 437 of the Criminal Procedure Code to revise a commitment order made under section 436 on points of law as well as facts." The learned Judges there observed as follows: "The District Magistrate has based his conclusion on the assumption of the truthfulness of the witnesses for the purposes of the preliminary enquiry before commitment, but in dealing with the evidence he had to consider whether a *prima facie* case had been made out and to perform, in the position of an appellate Court, as nearly the same duties as the Magistrate who had held the preliminary enquiry. It has been repeatedly held by the Superior Courts in India that the Magistrate holding a preliminary enquiry would not exceed his jurisdiction if he examines the credibility of testimony and should not commit a person for trial in the Sessions Court if he be of opinion that, notwithstanding direct evidence, the case is improbable and the evidence unreliable." This decision was followed in *Tinkouri* v. *Emperor* (3).

Briefly, Karu Mander's complaint was that he was in possession of 26 *bighas* of land partly on his own behalf and partly through *bataidars*, and that the accused had come to this land and looted the makai; the counter case was that the riot had taken place, not on this land, but at a Kamat house some distance off. Before

(1) (1905) 9 C. W. N. 829=2 Cr. L. J. 534.

(2) (1907) 12 C. W. N. 117=6 C. L. J. 760=6 Cr. L. J. 406.

(3) (1920) 1 Pat. L. T. 153=55 I. C. 600=21 Cr. L. J. 328.

the learned Sub-Divisional Magistrate, the prosecution witnesses were cross-examined and in his judgment their evidence was dealt with with the utmost care and fullness. It was found that the *bataidars* were fictitious and on the evidence as presented to the Magistrate, it would be difficult to arrive at any other conclusion. The Magistrate also came to a finding adverse to Karu Mander's possession of the land itself. He also found the evidence of the looting of the crop unreliable and the statements of the witnesses as to the details of the occurrence materially different from their statements before the police. He found that the evidence before the police showed signs of an occurrence at the Kamat house and on the field close to it, and not on the field alleged by Karu Mander as the place of occurrence. He also gave weight to the fact that the prosecution had refused to prove a dying declaration or to examine the Doctor who had recorded it or the attesting witnesses who were present in the Court. He commented unfavourably on the fact that four important witnesses were not called by the prosecution which had applied to the Court to examine them as Court witnesses. When this was refused, one of the witnesses was examined by the prosecution and his evidence supported the defence. Now, it seems to me, that the Magistrate has given sound and sufficient reasons for not committing the accused for trial, and I can find nothing in the judgment or the charge to the Jury of the learned Sessions Judge in trying the counter case, which affects his order. So far as the opinion of the learned Judge is concerned, it seems to have been that the scene of occurrence was not the field alleged by Karu Mander but the neighbourhood of the Kamat house. The fact that Karu Mander may have been in possession of some part of the land which he alleged to be the scene of occurrence has no material bearing on the question, and the fact that the accused in the counter case were given the benefit of the doubt is in itself no reason for interfering with the order of discharge. The Sub-Divisional Magistrate went into the case with great care and his arguments which, in my opinion, justified him in refusing to commit, have in no way been met in the order under consideration.

In my opinion, this is not a case in which a *prima facie* case has been made out. I would, therefore, set aside the order of the District Magistrate and restore the order of the Sub-Divisional Magistrate discharging the petitioners and quash further proceedings.

Order set aside.

** 1925 Patna 281.

DAWSON MILLER, C. J. AND MULLICK, J.

Saiyid Ali Imam—Petitioner

v.

King-Emperor—Opposite party.

Mis. Judicial Case No. 58 of 1924, decided on 14th November 1924.

**(a) *Income Tax Act, S. 4 (1)—Money due to assessee from Native State and paid by being credited to his account in a bank in that State but afterwards transferred to his account with another branch of the same bank in British India is not received in British India.*

An assessee was appointed to a salaried post in a Native State for five years (though without any contract or agreement) and was allowed to resign before the expiry of five years and was granted an honorarium in a lump sum, equal to the salary which he would have drawn had he served for the whole five years. Accordingly, the Imperial Bank branch in the Native State was instructed to arrange to pay the sum to the assessee through their branch at Patna, to which place the assessee had returned after resigning his appointment, and to take a formal acknowledgment from him. The Agent of the Imperial Bank in the Native State wrote to the Agent of the Patna branch of the Bank enclosing duplicate receipts to be signed by the assessee and requesting him to pay the amount to the assessee and return the receipts signed in duplicate. The Patna branch sent the receipts to the assessee requesting him to sign and return the same. The receipts were in the following form: "Received from the Imperial Bank of India the sum of.....being the amount placed at my disposal by the Imperial Bank of India at..... (the Native State)." The receipts were duly signed by the assessee who enclosed them with a letter to the Patna branch of the Bank requesting them to instruct the branch in the Native State to place the money to his credit at that branch until further instructions. On the same day, the Patna branch wrote the Native State branch forwarding a copy of the letter received requesting the money to be placed to the assessee's credit with the Native State branch of the Bank. They added in that letter that no entry had been passed at Patna. About a fortnight later, the assessee wrote to the Agent of the Imperial Bank of India at the Native State, to transfer the balance standing to his credit at their branch to his account with the Patna branch. The Native State branch instructed the Patna branch to place the sum in question to the assessee's credit in Patna which was accordingly done.

Held: that the sum was received by the assessee in the Native State, outside British India, and so S. 4 (1) was not applicable. [P. 284, C. 2.]

(b) *Income Tax Act*, S. 4 (1)—*Receipt refers to first occasion on which recipient got money under control.*

The receipt of the income referred to in S. 4 must refer to the first occasion upon which the recipient got the money under his own control. [P. 284, C. 1.]

(c) *Evidence—Receipt is evidence but not conclusive evidence of receipt of money.*

The written acknowledgment of receipt is undoubtedly evidence of the fact that the money has been received, but it is not conclusive. [P. 284, C. 2.]

K. P. Jayaswal—for Petitioner.
L. N. Singha—for Crown.

Dawson Miller, C. J.—The matter comes before us on a reference made by the Commissioner of Income Tax under section 66 (1) of the Income Tax Act, 1922. The question for our decision, as stated by the Commissioner, is

> "Whether, when an assessee was appointed to a salaried post for five years (though without any contract or agreement) and was allowed to resign before the expiry of five years and was granted an honorarium in a lump sum equal to the salary which he would have drawn if he had served for the whole five years, this sum is liable to taxation."

The question thus stated in somewhat general terms must be answered with reference to the particular facts found in the case. Two points were argued on behalf of the assessee, first, that the sum so paid was not salary within the meaning of section 7 (1) of the Income Tax Act, 1922, and, secondly, if this should be decided against him, that the sum which was directed by the employer to be paid to the assessee through the Patna branch of the Imperial Bank of India, but was first paid to the Hyderabad branch of that Bank and from there transferred to the assessee's account at Patna is to be regarded as having been received at Hyderabad and not in British India. It will be convenient to deal with the second point first.

The assessee, Sir Ali Imam, according to the facts found, was offered and accepted the post of President of the Executive Council of H. E. H. the Nizam of Hyderabad for five years on a salary of Rs. 7,000 per month. His employment began on the 20 August 1919. After serving for just over three years, namely, on the 4th September 1922, he resigned his office. His resignation was accepted and he made over charge of his office on September 6th, 1922 to his successor. Subsequently, on the same day, the Nizam issued a *Firman* in the following words :—

> "As owing to certain reasons, Sir Ali Imam has asked to be relieved of his duties, I have accepted his resignation. I take this occasion to express my appreciation of the loyal devotion with which he has performed the duties of his high office during the past three years."

He then directs Sir Faridoon Mulk to act as his successor until permanent arrangements are made for filling up the appointment. The document then continues as follows :

> "I also hereby order that payment should be made to Sir Ali Imam, through the Imperial Bank of India, of the honorarium at the rate of seven thousand B. G. rupees per mensem due to him for the two years which will remain to be completed out of his term of office of five years and a formal receipt obtained."

Then follow certain directions as to minor arrangements connected with the President's office, which are not material, and the document ends thus :—

> "Ordered that this my *Firman* be read out by Sir Faridoon Mulk on Thursday, the 14th of the present month of Moharram, in the Executive Council in the presence of the Members, and that it should be published immediately by Notification in Jarida Extraordinary."

On the evening of the 6th September, Sir Ali Imam left Hyderabad for Patna where he arrived a day or two later. On the 8th September, the Finance Member of the Nizam's Government asked the Agent of the Hyderabad branch of the Imperial Bank to arrange to pay the sum in question, which amounted to Rs. 1,63,333-5-4 to Sir Ali Iman through their Patna branch and to take a formal acknowledgment from him. On the 9th September, the Agent of the Hyderabad branch wrote to the Agent of the Patna branch of the Bank enclosing duplicate receipts to be signed by Sir Ali Imam and requesting him to pay the amount named to Sir Ali Imam and return the receipts signed in duplicate. On the 13th September, the Patna branch sent the receipts to Sir Ali Imam who was at that time in Patna requesting him to sign and return the same. The receipts were in the following form :

> "Received from the Imperial Bank of India the sum of rupees one lac sixty three thousand three hundred and thirty three, annas five and pies four only, being amount placed at my

disposal by Imperial Bank of India, Hyderabad, Deccan, under instructions from the Finance Member, H. E. H. the Nizam's Government, *vide* their letter No 555, dated 8th September 1922, being my pay for the unexpired portion of my term."

The receipts were duly signed by Sir Ali Imam, who on the 16th September enclosed them with a letter to the Patna branch of the Bank, requesting them to instruct the Hyderabad branch to place the money to his credit at the Hyderabad branch until further instructions. On the same day the Patna branch wrote to Hyderabad forwarding a copy of the letter received requesting the money to be placed to the assessee's credit with the Hyderabad branch of the Bank. They added in that letter that no entry had been passed at the Patna branch, which I take to mean that the money had not been credited to Sir Ali Imam by any book entry at the Patna branch. About a fortnight later, on the 30th September 1922, Sir Ali Imam wrote to the Agent of the Imperial Bank of India at Hyderabad to transfer the balance standing to his credit at their branch to his account with the Patna branch. On the 4th October, the Hyderabad branch instructed the Patna branch to place the sum in question to Sir Ali Imam's credit in Patna, which was accordingly done. It is conceded by the Government Pleader on behalf of the Commissioner of Income Tax that salaries earned by a British subject outside British India are not ordinarily chargeable under the Indian Income Tax Act and it is not contended that the income earned by Sir Ali Imam as President of the Nizam's Executive Council before his resignation was taxable. Sec. 1 of the Act which limits the area to which the Act applies provides in sub-sec. (2) as follows :—

"It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, and applies also, within the dominions of Princes and Chiefs in India in alliance with His Majesty, to British subjects in those dominions who are in the service of the Government of India or of a local authority established in the exercise of the powers of the Governor-General-in-Council in that behalf, and to all other servants of His Majesty in those dominions"

It appears therefore that although the Act extends to certain classes of persons within the dominions of the ruling Princes and Chiefs in India, the assessee was not one of the persons named in the sub-section. He was neither in the service of the Government of India or of the local authority there mentioned nor was he a servant of His Majesty in those dominions. It was the opinion, however, of the Commissioner of Income Tax that, in the circumstances which I have already referred to, the sum in question must be taken as having been received by the assessee in British India within the meaning of sec. 4 (1) of the Act. That section provides as follows :

"Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in sec. 6, from whatever source derived, accruing, or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

There are two cases and only two referred to in the act where profits received outside British India are deemed to have been received in British India. The first appears in sec. 4 (2) and relates to the profits and gains of a business accruing without British India to a person resident within, where such profits or gains are brought in within three years of receipt. The second appears in sec. 11 which provides that professional fees paid in any part of India to a person ordinarily resident in British India shall be deemed to be professional earnings which are taxable under sec. 6. Neither of these provisions apply to the present case, nor was it so contended. The sum in question in the present case was neither the profits of a business nor professional fees. The question for determination, therefore, is whether in the circumstances stated the sum in question can be said to have been received in British India within the meaning of sec. 4, sub-sec. (1). It should be stated, as would appear from the correspondence which has been printed with the record, and indeed it is not disputed, that at all material times the assessee as well as the Nizam had an account with the Hyderabad branch of the Imperial Bank of India although this fact is not specifically mentioned in the statement of the case. The opinion of the Commissioner of Income Tax is expressed thus :

"In my opinion the sum is taxable because it was really received by the assessee in British India on September 16th. The instructions of the Finance Member show the intention of the employer and the assessee's acknowledgment, signed at Patna, constitutes a receipt in British India. The object of his instructions of September 16th was to transfer the amount back to Hyderabad ; if he had not given these instructions, the amount would clearly have remained at Patna."

This passage quoted from the case submitted is merely an expression of opinion. It is not conclusive as a finding of fact. The fact found in the earlier part of the case is that the sum was first paid to the Hyderabad branch and from there transferred to the assessee's account at the Patna branch. The question for our decision is as to the meaning which should be given to the word "received" in sec. 4 of the Act and it is still open to us to consider that question, notwithstanding that in the opinion of the Income Tax Commissioner the money was received in British India on September 16th. It is true that the money was eventually received by the assessee in British India in the sense that it was transferred from his account at Hyderabad to his account at Patna, but the receipt of the income referred to in sec. 4, must, in my opinion, refer to the first occasion upon which the recipient got the money under his own control. This question was considered by the Full Bench of the Lahore High Court in 1922, [see *Sunder Das* v. *Crown* (1)], where it was held, under the Income Tax Act of 1918, sec. 3, sub-sec, (1), that income earned and received in British Baluchistan (which at that time was exempt from the operation of the Act except as to salaries paid by Government) and subsequently brought into or transmitted into the Punjab was not liable to be assessed to income-tax not having been received in the Punjab within the meaning of sub-sec. (1) of sec. 3 of the Act of 1918 which is similar in terms to sec. 4, sub-sec. (1) of the Act of 1922. The same view was also taken by a Special Bench of the Madras High Court in the following year in the case of *Secretary, Board of Revenue* v. *Ripon Press and Sugar Mills Co.* (2) where the decision of the Lahore High Court was approved and followed. I entirely agree with the judgment pronounced in those cases.

It remains to consider, however, upon the facts stated, at what period of time did the assessee actually receive the money. The Commissioner was of opinion that the instructions of the Finance Member of the Hyderabad State to the Hyderabad branch of the Bank to arrange for payment to the assessee through their Patna branch shewed the intention of the employer, but the question for determination is not what the intention of the employer was but what the actual fact is. Incidentally, I may remark that it was of no moment to the employer whether the money was placed to the assessee's credit at Hyderabad or at Patna; but the Commissioner further considers that the assessee's acknowledgment signed at Patna constitutes a receipt in British India. The written acknowledgment of receipt is undoubtedly evidence of the fact that the money has been received, but it is not conclusive. Such receipts are frequently demanded before actual payment of the money and there can be no question that in the present instance nothing was credited to the assessee in the books of the Patna branch of the Bank up to the time the acknowledgement was signed on the 16th September or at any subsequent time until after the money had been placed at the credit of the assessee in his account with the Hyderabad branch. The Commissioner has expressed the view that the effect of the instructions given by the assessee to the Patna branch of the Bank on the 16th September was to transfer the amount back to Hyderabad and that otherwise it would have remained at Patna. This argument appears to me, with due respect to the Commissioner, to be fallacious. There was nothing to transfer. The money had not been paid and no credit entry in favour of the assessee had been made in the books of the Patna branch of the Bank. The fact is, that sometime in September, the money was first credited to the account of Sir Ali Imam in Hyderabad and was subsequently, by a letter dated the 4th October, transferred from the branch of the Imperial Bank there to the Patna branch. In this state of affairs, I have no hesitation in finding that the sum in question which it is sought to charge was received by the assessee at Hyderabad outside British India and that sec. 4, sub-sec. (1) of the Act has no application.

The further point was also argued by the assessee, *viz.*, that even if the money was received at Patna it was not taxable as salary within the meaning of sec. 7 (1) of the Act. That section provides as follows:—"The tax shall be payable by an assessee under the head salaries in respect of any salary or any wages, any annuity, pension or gratuity and any fees,

(1) 1923 Lah. 14=3 Lah. 349 (F. B.).

(2) 1923 Mad. 574=46 Mad. 706=44 M. L. J. 529=17 M. L. W. 584=32 M. L. T. 506=(1923) M. W. N. 321 (F. B.).

commissions, perquisites or profits received by him in lieu of, or in addition to, any salary or wages, which are paid by or on behalf of Government, a local authority, a Company, or any other public body, or association, or by or on behalf of any private employer." It was contended on the authority of the English cases of *Turner* v. *Cuxon* (3) and *Cowan* v. *Sepmour* (4) and the Scotch case of *Duncan's Trustees* v. *Inland Revenue* (5), that voluntary payments made in circumstances such as the present to the holder of an office did not accrue by reason of his office or employment. These cases were decided under the English Income Tax Acts of 1842 and 1853 in which the wording is not similar to that of sec. 7 (1) of the Indian Income Tax Act of 1922. The section of the Indian Income Tax Act is very wide and includes fees, commissions, perquisites or profits received in lieu of or in addition to any salary or wages. The question whether the payment made in the present case was made as a gratuity in addition to the assessee's salary or was merely in the nature of a testimonial or mark of affection or respect to the recipient raises points of some difficulty, but in view of the opinion already expressed on the other point it is unnecessary to decide this question, for even assuming, without deciding, that the sum received was salary within the meaning of sec. 7 (1) of the Act, it was not received in British India within the meaning of sec. 4 (1) and is therfore not chargeable to income-tax.

The answer to the question upon which our decision is asked should, in my opinion, be in the negative with reference to the facts found in the case. The Petitioner is entitled to his costs including the costs incidental to printing the paper-book. The hearing fee is assessed at Rs. 300.

Mullick, J.—I agree. I think the reference must be decided in favour of the Petitioner on the ground that the income was neither received in British India nor was such as can be deemed to have been so received. If it be urged that it is sufficient that the money was brought into British India, the reply is that it is not permissible to base an argument on the English Acts and on the case of *Gresham Life Assurance Society, Ltd.* v. *Bishop* (6). The Indian Act seems clearly to contemplate that income accruing outside British India shall not be taxable (1) unless it is received in British India or is deemed to accrue, or arise, or to be received in British India, or (2) unless it constitutes the profits and gains of a business received or brought into British India, within the meaning of sec. 4, cl. (2) of the Act. Whatever the English Law may be upon the subject, I think the Indian Act requires that the income earned by the Petitioner at Hyderabad should have been actually received in British India and on the evidence I think it is clear that it was not so received ; nor is there any provision in the Act, such as sec. 11 by reason of which it can be deemed to have been received in British India. Further not being profits and gains arising from a business, it was not sufficient merely to bring the money after receipt.

With regard to the question whether the income was derived from salaries, I agree that it is unnecessary to decide the point.

Reference answered in the negative.

(3) (1888) 22 Q. B. 150=58 L. J. Q. B. 131=60 L. T. 332=37 W. R. 254 : 53 J. P. 148.

(4) (1920) 1 K. B. 500=89 L. J. K. B. 459=122 L. T. 466=64 S. J. 259=36 T. L. R. 155.

(5) (1909) S. C. 1212.

(6) (1902) 4 A. C. 287=71 L J. K. B. 618=86 L. T. 693=50 W. R. 593=18 T. L. R. 626=4 Tax. Cas. 464=66 J. P. 755.

1925 Patna 285.

DAWSON MILLER, C. J. AND FOSTER, J.

Kesho Prasad Singh—Plaintiff—Appellant

v.

Narayan Dayal and others—Defendants—Respondents.

S. A. Nos. 1859 and 1860 of 1921, decided on 26th June, 1924, from the decision of the Sub-Judge, Shahabad, dated 19 May 1921.

(a) *Civil Pro. Code, O. 41, r. 33—Does not apply where the plaintiff whose claim is decreed in part appeals with regard to part not decreed and defendant files neither appeal nor cross-objections.*

Rule 33, O. 41 does not apply where a plaintiff whose claim is decreed in part, institutes an appeal with regard to the part not decreed and the defendant prefers neither an appeal nor a cross-objection. In such a case the Court of appeal has no jurisdiction to enter into the question whether the plaintiff is entitled or not to any decree at all and to dismiss his suit wholesale. [P. 287, C. 1.]

(b) *Civil Pro. Code, O. 41, r. 33—Appellate Court must not interfere save when justice peremptorily requires interference.*

To enable the Appellate Court, in case its decision interferes with, or modifies, or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary even with the rights and liabilities of those who were not in fact appealing from that decision of the trial Court, is the object of O. 41, r. 33. Save when it is necessary, in the interests of justice, to give effect to the Appellate Court's decision by interfering in some way or other with the rights of those parties which are not the subject of appeal before the Appellate Court there is no right whatever in the Appellate Court to interfere. [P. 287, C. 2.]

L. N. Singh and *N. N. Sinha*—for Appellant.

P. Dayal—for Respondent.

Dawson Miller, C. J.—These two appeals arise out of two suits which were instituted by the plaintiff for rent against the tenants of certain holdings. They were two suits numbered 1102 and 1107. The questions arising for determination in both these cases are similar. Although the rent claimed and the area of the holdings is different, the facts in other respects relating to both these suits are quite similar and the appeals have been heard together. It appears from the first suit (of which alone it is necessary to give any details of the facts) that there was a holding consisting originally of 9·62 acres, the rent for which was Rs. 41-5-6. This holding was presumed to lie within the ambit of *Mauza* Dumri the proprietor of which is the present plaintiff, the Maharaja of Dumraon. During the survey and settlement proceedings, the proprietors of a neigbouring village, Sheopur Diara, who included the present plaintiff, contended that a portion of the land which comprised these two holdings was within Sheopur Diara and not within Dumri. After a dispute before the Settlement Authorities, it was finally determined that of the 9·62 acres of the holding in question, in the first of these suits 6·94 acres alone were within village Dumri the balance being within Sheopur Diara. In the Survey *khatsan* the area of this holding was recorded as 6·94 acres but the old rent of Rs. 41-5-6 was also recorded as the rent of that holding. Similarly with regard to the other holding in the other suit, the original rent was Rs. 34-15-6 and that also was recorded as the rent of the diminished holding in *Mauza* Dumri. The plaintiff then brought the present suit claiming, in the one case Rs. 41-5-6, and in the other Rs. 34-15-6, describing the area of the holdings not as the original area but as 6·94 acres in the first case and similarly a diminished area in the second case.

The defendants raised various objections in their written statements and amongst other pleas, they contended that the plaintiff had instituted the suit after splitting up the holding and that in such circumstances it could not be entertained. By that I take it, they meant that it was not permissible to the plaintiff to sue for rent in respect of a portion of the holding only. If he sued at all he must sue for rent for the whole holding. The defendants in a latter part of their written statement give certain measurements and point out that according to the proportionate rate, Rs. 31-5-6 should be the rent of the lands whereof rent is demanded and they contend that the plaintiff was not entitled to get any more. They further entered a plea of payment which however, they failed to sustain. Similar pleas were also raised in the case of the other suit.

When the matter came before the Munsif he came to the conclusion that the plaintiff in the circumstances which had arisen was entitled only to the smaller rent, that is to say, the rent proportionate to the smaller area which still remained within *Mauza* Dumri and he arrived at this conclusion upon the finding that there had, in fact, been a splitting up of these holdings at or about the time of the settlement. He says after stating certain facts: 'It is, therefore, clear that portions of the holdings as they stood just before Survey were cut away in *Mauza* Sheopur Diara and were formed into a separate holding having no connection with the present holdings. In these circumstances, he awarded the plantiff Rs. 31-5-6 in the one case and Rs. 25-1-6 in the other which in the first case was the sum admitted as the proportionate sum by the defendant and in the other case, was a sum which he found to be the proper sum proportionate to the area of the holding.

From that decision the plaintiff appealed to the Subordinate Judge. The Subordinate Judge, after considering the facts, dismissed the appeal, but he went further although the defendants had not appealed from the decision of the Munsif which decreed that they were liable to pay rent at the smaller rate, found that the plaintiff had in fact no right to sue for rent in the circumstances which had been disclosed and he dismissed the case. The reason apparently why he

arrived at the conclusion that the plaintiff was not entitled to sue in the form in which he did sue was that it had been shown that at the time of the suit the plaintiff was in fact the sole proprietor, not only of *Mauza* Dumri but also of *Mauza* Sheopur Diara. He also found that the holdings had not in fact been split up into two. Therefore, it followed in his view that the plaintiff being the sole proprietor of the whole of the holdings ought to have brought his suit for rent in respect of the whole of each holding and not merely in respect of a part. He, therefore, considered that the suit was bad and he dismissed it.

The only question which we have to determine is whether, in the circumstances found, he was entitled under O. 41, r. 33 of the Civil Procedure Code to pass a decree in favour of the respondents who had not appealed dismissing the whole of the suit. In my opinion O. 41, r. 33 has no application to a case like this. The plaintiff succeeded in that suit in part, that is to say, although he claimed a higher rent, he in fact succeeded in obtaining the smaller rent. He obtained a part of that which he claimed and that was the result of certain findings of the Munsif that the holdings had in fact been split up and that the plaintiff was entitled to sue for rent in the one case in respect of a holding of 6·94 *acres*, and although he had claimed a greater rent than he was entitled to, he was certainly entitled to the rent proportionate to that area. The defendants, after that decision was given and the decree passed against them, were content and remained satisfied with that decree. They made no attempt to appeal and even when the plaintiff appealed, they entered no cross appeal or cross-objection and in my opinion, it was not competent to the learned Judge, when the only question before him was whether the plaintiff was entitled to the extra rent which had been refused him, to enter into the question whether or not he was entitled to any rent. This matter was not before the learned Judge and although the wording of O 41, r. 33 may be very wide and give a large discretion to the Court, it is in my view clearly not meant to apply to a case like the present. The object of that Order is, speaking generally, to enable the Appellate Court where its decision interferes with, or modifies, or extends the decision of the lower Court to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from the decision of the trial Court. Unless it is necessary in the interests of justice to give effect to the Appellate Court's decision by interfering in some way or other with the rights of those parties which are not the subject of appeal before us, then it seems to me that the Appellate Court has no right whatever to interfere. The illustration given to that rule is a very good instance of the cases in which a Court may well interfere. Again in the case of *Rangam Lal* v. *Jhandu* (1) the very question which arises in the present case had to be considered and it was decided by the Allahabad High Court that the Court in such circumstances had no right to interfere under O. 41, r. 33. The headnote is this: "The plaintiff sued the defendant for rent and obtained a decree for a portion of his claim. The plaintiff then appealed against the disallowance of the balance of the amount claimed (exactly as here) but the defendants submitted to the decree" (again exactly as here) "and neither filed a cross-appeal nor took objections under O. 41, r. 22 of the Code of Civil Procedure, 1908: *Held*, that it was not competent to the Appellate Court, acting under O. 41, r. 33 to interfere with the decree obtained by the plaintiff, in so far as it had not been challenged by the defendants" and in support of that decision the Court, consisting of the Chief Justice, Mr. Justice Banerji and Mr. Justice Tudball referred to the case of the *Attorney-General* v. *Simpson* (2) which points out certain principles which ought to govern the Court in acting under powers conferred by rule 33. In my opinion that case was perfectly properly decided and it seems to me to govern the present case. I think, therefore, that this appeal should be decreed with costs, the decision of the learned Subordinate Judge will be set aside and the decree of the Munsif will be restored.

Foster, J.—I agree.

Appeal accepted.

(1) (1911) 34 All. 32=11 I. C. 640=3 A. L. J. 1111.

(2) (1901) 2 Ch. D. 671=70 L. J. Ch. 823=17 T. L. R. 768=85 L. T. 325.

*1925 Patna 288.

DAWSON MILLER, C. J. AND KULWANT SAHAY, J.

Nand Lal—Defendant—Appellant

v

Dharamdeo Singh and others—Plaintiffs —Respondents.

S. A. No. 1445 of 1921, decreed on 31st July 1923, from a decision of Offig. District Judge, Shahabad, dated 2nd June 1921.

* *T. P. Act, S.* 58—*Hypothecation to secure contingent liability is mortgage.*

The hypothecation of property for the purpose of securing a future liability to pay the mortgage money in case the mortgagee should be deprived of possession of the mortgaged property, amounts to a mortgage, because a mortgage can be created for the discharge of a contingent liability.

T. N. Sahai—for Appellant.

Parmeshwar Dayal—for Respondents.

Dawson Miller, C. J.—This is an appeal on behalf of Nand Lal Mukhtar, the first defendant in the suit, against a decision of the officiating District Judge of Shahabad, affirming a decree of the Subordinate Judge of Arrah.

The suit out of which the appeal arises was instituted before the Subordinate Judge in 1918 to enforce a mortgage of a 4-pies share in *mauzas* Dharauli and Gosainpur, which villages together constitued mahal Dharauli, executed by Rajaram Singh in favour of Jasodanand Singh in the year 1891 to secure a loan of Rs. 1,900 together with interest, advanced by the mortgagee.

The plaintiffs are the sons and other members of the family of Jasodanand, the mortgagee, who died before the suit was instituted. They are joint in estate and now represent the interest of Jasodanand. The defendants, who are also members of a joint family, are successors in interest of Rajaram, the mortgagor, by purchase. The mortgaged property, by reason of a Collectorate partition effected in the year 1917, is now represented by the new estate then formed and entered in the roll of the Collector of Arrah under *tauzi* No. 11674, and it is against that estate that the plaintiffs seek to enforce their mortgage under the provisions of section 99 of the Estates Partition Act of 1897.

The defendants in their pleadings raised several pleas in defence to the suit. Some of these were subsequently abandoned and four issues were eventually framed for decision at the trial as follows :—

(1) Whether the plaintiffs are entitled to get a mortgage-decree or a simple money decree against the defendants ?

(2) Is the suit bad for defect of parties ?

(3) Is the plaintiffs' suit barred by limitation ?

(4) What reliefs, if any, are the plaintiffs entitled to ?

The Subordinate Judge decided all the issues in favour of the plaintiffs and granted them a mortgage-decree for sale of the property if the decretal amount should not be paid within six months.

The defendants appealed to the District Judge who dismissed the appeal with costs and affirmed the decision of the trial Court. From that decision the defendant No. 1 has appealed to this Court. The appellant contends, (1) that the instrument relied on as a mortgage created no valid mortgage over the property, and (2) that the suit is barred by limitation. Other points were raised during the argument dealing with the right of the plaintiffs to proceed against the substituted property but these were admitted to be without substance and were abandoned during the hearing.

The argument on the first point was the same as that urged before the District Judge in the lower Court, namely that the deed created no present transfer of an interest in the mortgaged property at the time of execution but only a contingent interest which might not arise. The case of *Madho Misser* v. *Sidh Binaik Upadhya* (1) was relied on in support of the argument.

Before considering the authority relied on, it will be convenient to refer to the terms of the deed. It is of a somewhat unusual description and appears to be designed to comprise the features both of a usufructuary and a simple mortgage. It is dated the 18th Falgun 1298 F. (February 1891). It recites the mortgagor's need for raising money and the receipt of a loan of Rs. 1,900 from the mortgagee bearing interest at the "usual rate" which is admitted to be

(1) (1887) 14 Cal. 687.

one per cent. per mensem. The mortgagor then agrees to repay the principal sum and interest at the end of Jeyth of the current year, that is, about three months later when the next agricultural year begins. It then proceeds "should the aforesaid due date expire, I shall pay the interest for the period ending on the due date separately in exchange for the interest remaining on the principal, I give in writing and mortgage 4-pies (English) proprietary right inherited and purchased out of *patti* Cheharum out of 16 annas in *mauza* Dharauli, original with dependencies, appertaining to *Mahal* Dharauli, Pargana Bhojpur, proprietary interest with *zirait* rights together with sayer of mango and mahua trees, etc, etc., and all *zemindari* rights in the mortgaged property. The said creditor shall enter upon possession of the mortgaged property from the agricultural year 1299 F. He may either cultivate the same as his *zirait* or settle it with tenants. He shall, after payment of the Government Revenue, Road Cess, Public Works cesses, etc., appropriate the profit and produce thereof in lieu of interest. He shall continue in possession of the mortgaged property until repayment of the principal amount as specified above. I shall neither claim mesne profits nor shall he claim interest. When I shall pay the principal in one lump sum at the end of Jeyth of any year I shall take back the mortgaged property and this deed. Until, repayment of the principal, neither I nor my heirs shall, directly or indirectly, interfere with the mortgaged property." So far the instrument creates a usufructuary mortgage only. It then proceeds as follows :—"If perchance he be thrown out of possession in any way, I also give in writing mortgage and hypothecate my property, *viz.*, 4 pies share proprietary interest in *mauza* Gossinpur and 4-pies share in *mauza* Dharauli in lieu of the principal and the produce and I do declare that until repayment of the money I shall not execute any deed of sale, *hiba*, *Bakshishnama*, or *rekan* in favour of any one. Should I do so, the same shall be treated as null and void. Therefore I have executed this mortgage deed that it may be of use when required."

There can be little doubt as to the intention of the deed. The share in *mauza* Dharauli was to be mortgaged to secure payment of the interest accruing after H. Jeyth 1298 F. As to the interest for the short period between the 18th Falgun and the end of Jeyth 1298 F. the mortgagor's liability was a personal one only and the property was not charged with that, nor is it claimed in the present suit. To secure the interest after that date the property was hypothecated and the mortgagee is to be put in possession and to appropriate the proceeds after paying the Government demands, and as long as he is in possession no interest is payable on the principal beyond the proceeds. In the second part of the deed, the mortgagor hypothecates not only the share in *mauza* Dharauli but also the share in *mauza* Gossainpur, that is the whole of his 4-pies share in the *Mahal*, which was comprised of these two villages, to secure repayment of the principal as well as interest, or, as the deed put it, "in lieu of the principal and the produce" if the mortgagee should be dispossessed. The meaning of this clause appears to me to be that the property there mentioned is hypothecated to secure repayment of the principal together with interest in the event of the mortgagee being dispossessed and that the obligation to repay the principal shall only arise, if and when the mortgagee shall be dispossessed. There is a present charge to meet a future contingency. What happened was that the debt remained unpaid at the due date and the mortgagee was put in possession under the terms of the deed and remained in possession receiving the proceeds in lieu of interest up to the year 1906 when he was for a time dispossessed by Nand Lal, the defendant No. 1, who had in the meantime purchased the mortgagor's interest in the *mahal*. Shortly afterwards, Nand Lal, by bringing about certain fraudulent and collusive certificate proceedings under the Public Demands Recovery Act, succeeded in bringing the plaintiffs' interest also to sale and himself purchased it. The plaintiffs then instituted a suit, numbered 43 of 1907, against Nand Lal and others to set aside the sale and recover possession. In that suit they were successful and recovered possession in 1908. In that suit, the validity of the mortgage as a mortgage was in issue and was decided in favour of the plaintiffs. The plaintiffs remained in possession until the year 1917. In that year there was a Collectorate partition of the *mahal* and the defendant's 4-pies share, the subject of the plaintiff's mortgage, was formed into a separate estate bearing *tauzi* No. 11674. After partition

and the formation of the new estates out of the old *mahal*, the plaintiffs were deprived of their possession as the old *mahal* no longer existed. They consequently instituted the present suit against the substituted property allotted to Nand Lal as representing the old 4-pies share. It is no longer disputed that if the mortgage is a valid and subsisting instrument it is available against the substituted property.

The appellant contends that the case is governed by the decision in *Madho Misser* v. *Sidh Binaik Upadhya* (1). In the document in question in that case, no words of hypothecation appear. It begins with an acknowledgment by Sidh Binaik that he has borrowed Rs. 99 from Madho Misser and he undertakes to pay interest at a certain rate. It then stipulated that the borrower should pay the entire principal with interest in the following year, and if he did not do so he was to lose his right to a plot of land situated in *mauza* Kutha and the lender was to take possession of the land, after which no interest on the money was to be paid by the borrower. The Court held, without giving any detailed reasons, that the document in question was not a mortgage and indeed the point was not seriously pressed on behalf of the lender. The Court further held that the instrument did not create a present charge upon the property within the meaning of section 100 of the Transfer of Property Act. The reason for the latter part of the decision was that the document did not, in the opinion of the Court, create an immediate charge but merely the possibility of a charge depending upon a future contingency. No doubt there is a difference between a charge within the meaning of section 100 of the Transfer of Property Act and the mere possibility of a charge or a promise to create a charge in the future and the question for determination in that case was merely one of construction. The decision however has been criticised on more than one occasion in subsequent cases. See *Imbichi* v. *Achampat Avukoya Haji* (2) and *Narayanasamy Rao* v. *Ramasamy Naicken* (3). In the former case, Coutts-Trotter, J., commenting on the decision in *Madho Misser's case* and a somewhat similar decision in *Harjas Rai* v. *Naurang* (4) pointed out that these decisions were capable of two constructions, but if they were supposed to enunciate the proposition that whenever you have a charge to secure a liability which will arise only, if at all, in the future, that cannot be a present charge within the meaning of the Transfer of Property Act, he refused to follow them. In my opinion the view so expressed is correct. It is, moreover, the view of the late Sir Rash Behari Ghose, an undoubted authority on the Law of Mortgage, who states in dealing with this subject that a charge may undoubtedly be created as well as a mortgage for the discharge of a contingent liability, and he cites the decision of the Madras Court above referred to as well as the decision of the Allahabad High Court in *Maina* v. *Bachchi* (5) : See the Law of Mortgage in India, 5th Ed., Vol. I, p. 158, note.

In my opinion, the instrument in this case created a mortgage of the share in *mauza* Dharauli to secure by way of usufruct the interest on the loan and the subsequent possession of the mortgagee completed the transaction. It also created a simple mortgage of the share in both villages of the *mahal* to secure repayment of the principal sum advanced, including subsequent interest, if the mortgagee should be deprived of possession. It seems to me that this was a present hypothecation to secure a future liability to repay the mortgage-money if the mortgagee should be deprived of possession. Although the due date of repayment was the end of Jeyth 1293 F. the charge created on the property to secure repayment of the principal sum could only be enforced in the event of the mortgagee being deprived of possession but, nevertheless, in my opinion, the property was hypothecated from the outset to secure repayment of the loan in the event which has in fact happened, and the mortgage is not bad upon the ground urged by the appellant. There is also, I think, another reason why the appellant cannot now question the validity of the mortgage bond. In the suit to recover possession brought by the plaintiffs against Nand Lal in 1907, the decision partly turned upon the validity of the mortgage which was the basis of the plaintiffs' title and which was challenged by the defendants in that suit. The plaintiffs' title under the mortgage as a valid and binding instrument was declared, and as between

(2) (1917) 93 M. L. J. 58=6 L. W. 115=39 I. C. 867 = (1917) M. W. N. 533.
(3) (1921) 12 L. W 674=60 I. C. 611.
(4) (1906) 3 A. L. J. 220=(1906) A. W. N. 82
(5) (1906) 28 All. 655=3 A. L. J. 551=(1906)A. W. N. 165.

the same parties, the matter would appear now to be *res judicata*.

The second point relating to limitation can be shortly dealt with. Although the date of repayment of the mortgage-bond was Jeyth 1298 F. the right to enforce payment by sale of the security did not arise until dispossession which took place in 1917, the year before the suit was instituted. Up to that time, this right had not accrued and the only claim the mortgagees had against the property was the right to receive the usufruct in lieu of interest. The claim is, therefore, not barred by limitation. In my opinion the appeal should be dismissed with costs.

Kulwant Sahay, J.—I agree.

Appeal dismissed.

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*1925 Patna 291 (1).

DAS AND ROSS, JJ.

Jotirmoyee Debi—Appellant

v.

Raghunath Pathak—Respondent.

Appeal from original Order No. 222 of 1923, decided on 30th May 1924, from an order of the Sub. Judge, Rajmahal, dated 6th July 1923.

**Civ. Pro. Code, O. 38, r. 6—Mortgage suit—Properties other than the mortgaged ones may be attached before judgment where mortgaged property is likely to prove insufficient security for the loan.*

Provided that circumstances exist which satisfy the Court as to the desirability of an attachment of properties other than the mortgaged ones, before judgment, in a mortgage suit, such attachment must be ordered when it is apparent that the mortgaged property does not provide a sufficient security for the loan and that the mortgagee will eventually have to claim a personal decree, 46 Cal. 245. *Foll.* [P. 291, C. 1.]

Noresh Chandra Sinha and *Nitai Charan Ghosh*—for Appellant.

Sivanandan Ray—for Respondent.

Ross, J.—This is an appeal against an order passed by the learned Subordinate Judge of Rajmahal, refusing an application by the plaintiff-appellant to issue attachment before judgment against certain properties other than the mortgaged properties belonging to the defendant, plaintiff's mortgagor. Although no cause was shown against the attachment before judgment, the learned Subordinate Judge was of opinion that in mortgage suit there can be no attachment before judgment of any property other than the mortgaged property. This opinion is undoubtedly wrong [see, for example, the decision in *Jogemaya Dassi* v. *Baidyanath Pramanick* (1)]. There is no reason why, if the mortgaged property is not a sufficient security and the mortgagee will have to claim a personal decree eventually, he should not have attachment before judgment of properties other than the mortgaged properties, if he satisfies the Court that circumstances entitling him to such an attachment exist. In the present case, it must be taken that he did satisfy the Court, because no cause was shown by the mortgagor.

I would, therefore, allow this appeal and remand the case to the learned Subordinate Judge with a direction that he should issue an attachment of the properties specified in the plaintiff's petition, or such portions thereof, as appear to him sufficient to satisfy any decree which may be passed in the suit. The appellant is entitled to the costs of the appeal. The application in revision is dismissed.

A question has arisen as to the representation of the respondents Nos. 6 and 7 who are minors. It appears that Mr. Bindheshwari Prasad, a Vakil of this Court, was appointed guardian on the 12th of May 1924. Subsequently, the respondents entered appearance under the guardianship of the *karta* of their family, *viz.*, respondent No. 2. But respondent No. 2 was never appointed guardian of these minors and they must be taken to be represented by Mr. Bindheshwari Prasad, Vakil, the guardian appointed by the Court.

Das, J.—I agree.

Appeal accepted.

(1) (1919) 46 Cal. 245=50 I. C. 924.

1925 Patna 291 (2).

JWALA PRASAD AND FOSTER, JJ.

Kishundeo Singh and others—Appellants

v.

Jaglal Sahu—Respondent.

Appeal from original Order No. 45 of 1923, decided on 16th November 1923, from the order of the Sub-Judge, Patna, dated 3rd February 1923.

(a) *Decree—Interpretation—Clear and unambiguous decree need not be interpreted.*

It is not necessary to interpret a decree in the light of the pleading and the judgment when it is not ambiguous and is clear in its terms. [P. 293, C. 2.]

(b) *T. P. Act, S.* 68—*Mortgage decree—Construction—Decree.*

One of the reliefs in a mortgage suit was to make the amount under the mortgage bond a charge upon the surplus of the sale proceeds of one of the mortgaged properties sold. At the end of the relief claimed, it was asked that the balance of the decretal amount should be realised from the property and the person of the defendant or defendants. The Court passed a decree under S. 68 as under: "The suit for Rs. 5,877-10-0 with proportionate costs to be decreed in terms of relief five of the claim. He is further declared to have a charge on the surplus sale proceeds which is in deposit in the Collectorate" and refused a mortgage decree. *Held*: that the decree did not include a direction that the balance of the decretal amount could be recovered from the defendants personally and from their personal property by implication, as they were purchasers of the mortgaged property and under the decree were not expressly made liable. The decree granted only that portion of relief No. 5 which related to the creation of the charge on the surplus sale proceeds regarding the amount due under the mortgage deed. [P. 292, C. 2; P. 293, C. 1.]

Sundar Lal—for Appellants.

L. M. Ganguli—for Respondent.

Jwala Prasad, J.—The only question that arises in this appeal is the construction of the decree passed by the Subordinate Judge of Patna in Suit No. 68 of 1920. The decree-holders, who are appellants before us, in execution of that decree, sought to proceed against defendants Nos 1 to 3 praying for attachment and sale of their properties and for their arrest. Defendant No. 2, Jaglal Sahu, objected to the execution on the ground that in terms thereof, he or his properties could not be proceeded against. Jaglal was a purchaser from defendant No. 3, he having purchased the property from one who was an auction-purchaser at a revenue-sale of the mortgaged properties, Deokali. The decree-holder brought this suit to recover the money due under an usufructuary mortgage-bond under section 68 of the Transfer of Property Act and asked for a mortgage-decree. He also, in the alternative, prayed for a money-decree, upon the ground that he was dispossessed of the properties given to him under the *zurpeshgi* deed of the 5th April, 1898. Deokali, one of the mortgaged properties, was sold for arrears of cesses and Government revenue and purchased by Deonandan, defendant No. 3, who in his turn sold it to Jaglal, defendant, No. 2. Bajidpur, the other mortgaged property was sold to defendant No. 4 by the Receiver appointed in an insolvency proceeding by the Calcutta High Court with respect to the properties of Khalilur Rahman, son of defendant No. 1, the mortgagor.

The suit was resisted by defendants Nos. 2 and 4. The Court refused to grant a mortgage-decree but held that the mortgagee-decree-holder was entitled to have a charge upon the surplus sale proceeds in the hands of the Collector under the revenue-sale in respect of the money due under the *zurpeshgi* deed. In the result, the Court gave a money decree to the mortgagee-decree-holder. That decree apparently was under section 68 of the Transfer of Property Act, as is expressly mentioned by the Court in its judgment. The decree, therefore, could not be against defendants Nos. 2 and 4 who were only purchasers of the mortgaged properties, it could only be passed against the mortgagor upon his personal covenant to pay the mortgage-money. Defendants Nos. 2 and 4 never entered into any agreement or contract to personally pay the mortgage-debt to the mortgagee. There is no direction in the decree itself making the respondent (defendant No. 2) personally liable for the decree-debt. The learned Vakil for the appellant wants me to read into the decree the words which are not there and this he wants to do in the light of relief No. 5 in the plaint quoted in the recital portion of the decree. In that paragraph 5, the appellant asked for a direction to make the amount due under the mortgage bond a charge upon the surplus sale proceeds of *Mauza* Deokali and for attachment of the same by means of an injunction. Towards the end of the paragraph he states that "the balance of the decretal amount may be ordered to be realised from the person and the property of the defendants or defendant who may be liable." The decree states as follows:

"It is ordered and decreed that a modified decree be passed for Rs. 5,877-10-0 with proportionate costs as prayed for in para. 5 of the plaint and that the balance left after the payment of the Government Revenue out of the proceeds of the sale, by the Collectorate of a portion of the *Ijara* properties lying in deposit under *Chalans* Nos 251 and 9 dated the 26th March 1919 and 22nd April 1919, respectively, be made liable for the satisfaction of the decree and that the interest on the decretal amount be charged at the rate of 6 per cent. per annum from the date of decree till the date of realisation, decretal amount Rs. 5,877.10-0 and that the sum of Rs. 651-8-0

be paid by the defendants to the plaintiffs on account of the costs of this suit, with interest thereon at the rate of 6 per cent. per annum from this date to the date of realisation."

The learned Vakil contends that, as mention is made in the decree to the relief in para. 5 quoted above, the true interpretation of the decree is that the concluding prayer of that paragraph asking for an order to realise the decretal amount from the person and property of the defendants must be held to have been granted. It appears that the reference to paragraph 5 is in relation to the prayer about the direction of the Court for making the decretal amount a charge upon the surplus sale proceeds of *Mauza* Deokali. It in no way refers to the concluding portion of paragraph 5, for in that case, it would have specified which of the defendants were personally liable for the decree, for the prayer of the plaintiffs was that the decree be passed against the defendants or such of them as may be liable. The Court did not apparently grant this prayer for a personal decree against the defendants. It is conspicuous that the direction portion of the decree with respect to the amount of Rs. 5,877 does not make any mention of the defendants. This omission can only mean that the prayer for the personal liability of the defendants was disallowed and unless there was express direction making the defendants personally liable, the decree cannot be executed against them or their property. This interpretation of the decree is in accordance with the judgment. It has already been shown that the Court in its decision held that the plaintiffs were entitled only to a money decree under section 68 of the Transfer of Property Act. The order portion of the decree runs as follows :

"The suit for Rs 588-10-0 with proportionate costs be decreed in terms of relief 5 of the plaint. He is further declared to have a charge on the surplus sale proceeds which is in deposit in the Collectorate. I allow interest on the sum decreed at Rs. 6 per cent. per annum from the date of the decree till realisation of the same."

Therefore, only that portion of the relief No. 5 of the plaint was granted which related to the creation of a charge on the surplus sale proceeds with respect to the amount due under the mortgage-bond. No doubt, defendant No. 1 being the executant of the bond and the decree having been passed under section 68 must be deemed to have been made personally liable under the decree.

Defendants Nos. 2 to 4 could not under the law be personally made liable and unless there was an express direction in the decree, it cannot be construed by reference to relief No. 5 of the plaint or the judgment as having made those defendants personally liable. Therefore, the view taken by the Court below seems to be correct. No doubt, the defendants were made liable for the costs of Rs. 651-8-0 under the express direction of the decree. Mr. Ganguli, on behalf of the respondent, contends that the direction in the decree about costs read with the judgment and the pleadings would show that all the defendants could not be made liable for the costs. He cites *Baijnath Sahai* v. *Gajadher Prasad* (1) in order to interpret the decree in the light of the pleadings and the judgment. That case does not in the least help him. The decree here is clear in its terms. It is not in any way ambiguous ; it makes the defendants (in the plural) liable for Rs. 651-8 specifically mentioned. Therefore, the order by the Court below is modified to this extent that all the defendants are liable for the costs mentioned in the decree of Rs. 651-8-0 and for this the appellant is entitled to proceed against the personal properties of all the defendants.

The appeal is dismissed. In the circumstances of the case, there will be no order as to costs.

Foster, J.—I agree.

Appeal dismissed.

(1) (1920) 1 Pat. L. T. 471=58 I. C. 276.

1925 Patna 293.

DOSS AND ROSS, JJ.

Bhagwan Das—Appellant

v.

Sheonandan Prasad Sahu—Respondent.

Appeal from Original Order No. 81 of 1924, decided on 29th May 1924, from an order of the Addl. Sub. Judge, Monghyr, dated 25th April 1924.

Civ. Pro. Code, O. 40, R. 1—Even in partition or partnership cases party must not be appointed Receiver without opponent's consent where Court cannot rely on his honest and disinterested management.

Except in special cases, a party shall not be appointed Receiver without the consent of the

opponent. But in cases of partnership and partition, exception is made to the general rule. But the exception does not apply where the Court cannot rely on honest and disinterested management on the part of the party seeking to be appointed. 18 C. W. N. 533 *Dist. Allen* v. *Lloyd* 12 Ch. D 447, *Ref.* to. [P. 294, C. 1.]

Sultan Ahmed—for Appellant.
K. P. Jayaswal—for Respondent.

Judgment:—This is an appeal against an order of the Additional Subordinate Judge of Monghyr appointing Babu Mahesh Narain, Pleader, as Receiver until partition is completely effected, or until the further orders of the Court. The appellant is defendant No. 1. The suit is a suit for partition brought at the instance of the plaintiff, a minor, through his next friend, his mother. In *Allen* v. *Lloyd* (1) Jessel, M. R., pointed out that "It is a settled rule that one of the parties to the cause shall not be appointed Receiver without the consent of the other party unless a very special case is made out." This rule is undoubtedly subject to exception in partnership and partition cases. But in partnership cases the exception is limited in this way :

> "If the partner actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the Court sometimes appoints him Receiver and manager without a salary" (Kerr on Receivers, 7th edition, page 143).

Reference was made on behalf of the appellant to the decision in *Suprasanna Roy* v. *Upendra Narain Roy* (2) where the defendant, in a partition suit, actually in possession of the property, was appointed Receiver. Now, so far as the judgment in that case goes, there were no charges of misconduct against the defendant. But in the present case, we must be bound by the findings in the judgment delivered by the learned Subordinate Judge in making the preliminary decree for partition ; and there is also a report by a Commissioner. In view of the findings of the learned Subordinate Judge and of the Commissioner's report, it is, in our opinion, not reasonable to expect honest and disinterested management from the defendant ; and it is to be remembered that the plaintiff is a minor under the guardianship of a *pardanashin* lady and therefore peculiarly entitled to the protection of the Court. The learned Subordinate Judge has, in the exercise of his discretion, decided the case against the defendant and has appointed a third party as Receiver. We do not think that it would be right in the circumstances of this case to interfere with the exercise of his discretion.

It has been objected, however, that the remuneration of 7 *per cent.* on the collection imposes too severe a burden on the estate. We think that 7 *per cent.* is too high and the Subordinate Judge should reconsider it. Five *per cent.* ought to be sufficient and the Subordinate Judge will see whether he cannot obtain a suitable person to act as Receiver on this remuneration. The name of Jamuna Prasad has been mentioned on behalf of the appellant. Without in any way, fettering the discretion of the learned Subordinate Judge, we think that this name might be considered along with others. It has also been contended on behalf of the appellant that the cost of the Receiver should be charged to the plaintiff ; but, in our opinion, there is no justification for such a course.

With these observations, the appeal is dismissed with costs and the application in revision is also dismissed with costs.

Appeal rejected.

(1) (1879) 12 Ch. D. 447.
(2) (1914) 18 C. W. N. 533=22 I. C. 601=18 C. L. J. 638.

1925 Patna 294.

DAWSON-MILLER, C. J. AND MULLICK, J.

Rameshwar Singh—Plaintiff—Appellant
v.
Sheikh Wazul Haque—Defendants—Respondent.

L. P. A. No. 81 of 1923, decided on 28th November 1923.

(a) *Landlord and Tenant—Custom entitling landlord to rent for fruit trees besides ordinary rent is legal—Custom.*

A custom, whereby a landlord is entitled to a certain rent for fruit trees in addition to the ordinary rent payable in respect of the land, is not illegal. [P. 296, C. 2.]

(b) *Landlord and Tenant—Though* Abwabs *have been abolished under the regulations, right to* Bankar, Jalkar, *and* Phulkar *continues where agreement or custom can be proved.*

The right to *Bankar*, *Jhalkar* and *Phulkar* was always an exception from the abolitions made by the regulations which have abolished *Abwabs* Rent in respect of fruit trees or other classes of trees may well be charged in addition to the ordinary rent for the land, either under an agreement between the landlord and tenant, or if any custom to that effect can be made out. [P. 296, C. 1.]

(c) *Civil Pro. Code*, S. 100—*Question as to rent payable can be allowed in second appeal.*

Where, in defence to a suit for rent, it is pleaded by the tenant that the rent claimed by a landlord in respect of fruit trees is not payable, the question is one relating to the amount of rent payable and second appeal is allowable. [P. 296, C. 2.]

K. P. Jayaswal and *M. Prasad*—for Appellant.

L. K. Jha—for Respondent.

Dawson-Miller, C. J.—The suit, out of which this appeal arises, was instituted by the plaintiff as landlord against the defendant as tenant claiming rent of a certain holding which had been purchased by the defendant from the previous tenant. The area of the holding was 5 *bighas* 7 *cottahs* 18 *dhurs* and the *jama* recorded in the Record-of-Rights was Rs. 16 and some odd annas. In addition to the *jama* so recorded, the plaintiff claimed certain rental under a custom of the village in respect of palm trees from the time when they became juice-yielding at certain rates. The plaintiff alleged with regard to this part of the claim, that under the custom of the village a *raiyat* who has palm trees pays to the *malik* for each tree which becomes *Shirbar* (yielding juice) 4 annas per tree for the *Baishaki* saason, 4 annas for the *Ghaur* season and 2 annas for the *Basanti* or *Aghani* season and further alleged that he had been realising this all along.

The defendant in his written statement did not, in terms, traverse the allegation about custom. The written statement is not very sufficiently worded but his contention was that he was not responsible for anything more than Rs. 16 odd which was recorded in the Record of Rights.

Both the learned Munsif before whom the case came and the Subordinate Judge in appeal disallowed that part of the plaintiff's claim which related to the palm trees. It appears that there was no entry in the Record-of-Rights with regard to any such custom as that which was relied upon by the plaintiff. The rent recorded there was Rs. 16-1-1½ and that was the rent which the defendant admitted to be due. The learned Munsif considered that anything over and above that rental in respect of the palm trees was something in the nature of *Abwab* and was, therefore, not recoverable according to law.

The learned Subordinate Judge, when the case went before him on appeal, pointed out that, according to the plaintiff, the tenants pay *sairat* for palm trees under a custom which had existed for a long time. He then refers in detail to the evidence of the various witnesses who had deposed to this custom. He points out that the witnesses could not say when the *sairat* had first of all been recovered, which is hardly surprising if indeed the custom had existed for a long time and he adds that,

> "It is clear from the evidence of the plaintiff's witnesses Nos 4 and 6 that the *sairat* for palmyra palms is realised by the Raj as customary dues of the Raj. It is not realised as part of the rent of the holding. According to the plaintiff's witness No 2 the *sairat* is claimed in addition to the *khatian jama*."

The issue, therefore, which had to be determined was, whether or not the plaintiff had made out the custom which he set up under which he claimed this *sairat*. The learned Judge does not in terms come to a clear finding as to whether such a custom had been made out or not but he drew attention to the fact that the *sairat* for palms was not shown in the rent receipts granted to the defendant. He found as a fact, however, that papers were kept in the Raj *sheristá* some of which had been filed from the year 1311 to prove the realisation of *sairat* for the palmyra palms and he accepted these entries as genuine and did not consider, as had been suggested, that they were forged. In this state of affairs, it seems to me that the learned Judge ought to have come to a clear finding one way or the other, whether this custom whereby the landlord collected this additional rent for the palm trees had been proved or not, but all he says upon that point is:

> "I do not think that a landlord can claim anything more than the legal rent under any such custom."

By the legal rent, it is clear that the learned Subordinate Judge meant the rent recorded in the Record-of-Rights which did not include the rent said to be payable in respect of the trees. He then adds:

> "A few years payment by the defendant will not give any legal right to the plaintiff to such impositions."

And that is all he said about it. It seems to me that the learned Judge did not think it necessary to determine one way or the other whether the custom had been made out because he considered that even if such a custom did exist, it was a custom regarding certain illegal impositions which even a custom could not legalise. In my opinion, if that was his view, it was not justified. It is true that *abwabs* have been abolished under the Regulations for many years but the right to *Bankar*, *Jhalkar* and *Phulkar* was always an exception from the abolitions made by the Regulations and rent in respect of fruit trees or other classes of trees may well be charged in addition to the ordinary rent, either under an agreement between the landlord and tenant, or if any custom to that effect can be made out.

From the decision of the Subordinate Judge an appeal was preferred to this Court. The learned Judge before whom the case came considered that the decision of the lower Court could not be disturbed. His view was that the settlement of the land with the tenant included not merely the settlement of the land for agricultural purposes but also for the purposes of collecting and using the fruits of the trees and that, therefore, the tenant being entitled to the use and occupation of the land was entitled without the payment of any further rent to the fruits of the trees. He, further was of opinion that, if by any custom there was a *sair* for palm trees it must come under the term rent as defined in the Bengal Tenancy Act where those palm trees stand on the holdings. "So I take it that the question in this case is, what is the rent payable by the defendant for his land." That question the learned Judge considered was answered conclusively by the Survey *khaiian* which stated the rent to be Rs. 16-1-1½. He, therefore, dismissed the appeal.

In my opinion, with great respect to the learned Judge, he failed to appreciate that a custom such as that set up by the plaintiff in this case might be a perfectly legal custom and that, if it could be proved to the satisfaction of the Court, the plaintiff would be entitled in addition to the rent to the *sair* or rent for the use of the palm trees. As, in my opinion, the learned Subordinate Judge did not come to any definite conclusion upon this question of custom, I think that this case should go back to the Court of the Subordinate Judge for him to arrive at a finding as to whether or not the custom alleged by the plaintiff in his plaint has been made out to his satisfaction. The custom there alleged is:

"Under the custom of the village a *raiyat* who has palm trees pays to the *malik* for each tree which becomes *shirbar* (yielding juice) 4 annas per tree for the *Baishaki* season, 4 annas for the *Ghaur* season and 2 annas for the *Basanti* or *Aghani* season."

If, in fact, that custom can be made out, it is not an illegal custom but a perfectly valid one and one which ought to be given effect to. In arriving at a conclusion upon this point the learned Judge will, of course, bear in mind the facts which it is necessary to prove in order to establish a custom.

The only other point which was taken in this appeal was that no second appeal was permissible under section 153 to the Bengal Tenancy Act. In my opinion, the question which arises in this case is clearly one relating to the amount of the rent payable. It is, therefore, a case which is excepted from the provisions of the section and a second appeal is permissible.

The case will remain upon the file of this Court and the learned Judge will return his finding upon the issue stated within two months of this date. I do not think any additional evidence ought to be called in this case. The learned Subordinate Judge will determine the issue upon the evidence already upon the record.

Mullick, J.—I agree. I have only to add with regard to the preliminary objection that the case upon which the learned Vakil for the respondent relies, namely, *Kanai Mahaldar* v. *Madhu Sudan Ghose* (1) does not show what were the facts of that case. On the other hand, the facts in the present case are similar to those in second appeal No. 815 of 1901 before the Calcutta High Court in the case of *Nabu Sheikh* v. *Jogendra Nath Bhadra*. There the plaintiff claimed at a certain *jama* and the defendant pleaded that the *jama* was included in a larger *jama* and, therefore, asserted that the *jama* claimed was not due. It was held that the decision was a decision as to the amount of rent and a second appeal lay.

Case remanded.

(1) (1907) 6 C. L. J. 669.

1925 Patna 297.

ROSS AND SEN, JJ.

Bhola Nath Majhi—Defendant-Appellant

v.

Shiva Prasad Sinha—Plaintiff-Respondent.

S. A. No. 1463 of 1921, decided on the 7th August 1924, against the decision of the Dist. Judge, Manbhum, dated 17th May 1921.

(a) *Chota Nagpur Tenancy Act, S. 26—The section does not invalidate agreements which were valid at their inception—Chota Nagpur Landlord and Tenant Procedure Act, S. 21.*

S. 26 of the Chota Nagpur Tenancy Act was not contemplated to invalidate agreements which were valid in their inception but to validate agreements in special cases out of such agreements as would otherwise have been invalid owing to the provisions of S. 21 of the Chota Nagpur Landlord and Tenant Procedure Act. (P. 298, C. 1.)

(b) *Chota Nagpur Tenancy Act, S. 74—The section has no retrospective effect.*

S. 74 of the Chota Nagpur Tenancy Act apparently cannot possibly have retrospective effect inasmuch as it affects the substantive rights of parties. Therefore, all agreements entered into prior to the date when the Chota Nagpur Tenancy Act came into operation would obviously be beyond the scope of the section. The section contemplates only the case of a lease executed "with a view to the continuance of such occupation." (P. 298, C. 1.)

A. B. Mukherjee—for Appellant.

N. C. Sinha and *B. B. Ghose*—for Respondent.

Sen, J.—This appeal arises out of a suit for realization of rent by the plaintiff landlord against the defendant-appellant for the years 1323 to 1325 and three-quarters of 1326. The first Court disallowed the claim for rent for 1323 and passed a decree for rent for the remaining period. This decree has been affirmed by the Appellate Court.

The case of the plaintiff is that the father of the defendant Ramdhan Majhi executed a *kabuliyat* in favour of the plaintiff agreeing to an annual rental of Rs. 75 and 33½ seers of paddy worth Rs. 1-10-9 and also to pay road-cess at Rs. 2-5-6.

The case for the defence is that the tenancy in question was acquired by Ramdhan Majhi, father of the defendant and one Mohit Majhi, father of Jahlu Majhi in 1892 (1298 to 1299 B. S.) when they obtained the land in two instalments by two documents, namely, a registered sale deed (Ex. D) and a registered *mokurrari patta* (Ex. E) : that since then Ramdhan and Mohit jointly cultivated the holding and paid rent to the *ijaradar* Gangu Majhi and after their death their sons Bhola (the defendant) and Jahlu, as well as their cousins Kartik and Tiku, are cultivating the lands. As regards the *kabuliyat* (Ex. I) executed by the father of the defendant, the defendant denies all knowledge of it and contends that, even if executed, it was never operative. The plaintiff was unable to produce before the Court the original registered *kabuliyat* executed by Ramdhen Majhi. He alleged that the original had been lost and the question arose whether secondary evidence of the *kabuliyat* could be admitted. The Court of first instance as well as the Court of appeal after going into the evidence came to the conclusion that the *kabuliyat* had been in the Record Room of the plaintiff up to 1911 when it was taken out and filed in a criminal case in the Dhanbad Court and that owing to the negligence of the clerks concerned, the document was never taken back from the Court and returned to the Record Room. The execution of the *kabuliyat* was proved by the writer of it, Jagabandhu Sarcar. It appears that the *kabuliyat* was also proved by means of an admission by Ramdhan himself made in his deposition in a civil suit in the Munsif's Court in 1910; this deposition is Ex. 7 in this case. On these grounds, both the Courts found as a fact that Ramdhan, the father of the defendant, did execute the *kabuliyat* as alleged and admitted the secondary evidence offered for proving it.

On the question as to whether Mohit had anything to do with the tenancy in question, both the Courts have come to a finding that neither Mohit nor Mohit's descendants had anything to do with it and that they were not necessary parties to the suit. Moreover, according to their case, they had taken the holdings from the *ijaradar*, Gangu Majhi. The Courts have held that there is no evidence that Mohit was ever recognized by the present plaintiff, who is the zemindar, as tenant; that all along since the *kabuliyat*, the plaintiff had been dealing with Ramdhan and his son the defendant in respect of the tenancy in suit and that the defendant himself had been describing the lands as "his" lands and depositing the rent in his own name.

This appeal seems to be concluded by those findings of fact, but the learned Vakil

for the appellant contends that the Court below erred in not considering the effect of section 74 of the Chota Nagpur Tenancy Act on the decision of this case. Section 74 of the Chota Nagpur Tenancy Act apparently cannot possibly have retrospective effect inasmuch as it affects the substantive rights of parties. The *kabuliyat* in this case was executed before the Chota Nagpur Tenancy Act came into force. Therefore, all agreements entered into prior to the date when the Chota Nagpur Tenancy Act came into operation would obviously be beyond the scope of section 74. The *kabuliyat* in question was executed in 1905. The objection, therefore, that is now urged, that in view of the provisions of section 74 of the Chota Nagpur Tenancy Act the *kabuliyat* would be void and of no effect, has no force whatsoever. Moreover on the findings of the Courts below this case does not come within the scope of section 74, inasmuch as the section contemplates the case of a lease executed "with a view to the continuance of such occupation;" whereas in the present case there is no question of continuance, the previous tenancy having been under the *ijaradar* which was not subsequently recognised by the landlord and, therefore, the lease must be regarded as marking the very inception of the tenancy.

It is next urged that in view of the provisions of section 26 (*a*) of the Chota Nagpur Tenancy Act the *kabuliyat* in question does not satisfy the requirements of law and hence must be deemed to be inoperative. Now it has been held that section 26 of Act VI of 1908 was not contemplated to invalidate agreements which were valid in their inception, as in the present case, but to validate agreements in special cases out of such agreements as would otherwise have been invalid owing to the provisions of section 21 of the Chota Nagpur Landlord and Tenant Procedure Act (Act I of 1879). The observations of Mookerjee, J., in the case of *Gajoo Mahato* v. *G. P. Cooke* (1) are in support of this view. The contentions of law urged by the learned Vakil for the appellant are therefore without any substance.

The appeal is dismissed with costs.

Ross, J. – I agree.

Appeal dismissed.

(1) (1912) 16 C. L J. 422=16 I. C. 929=17 C. W. N. 480.

1925 Patna 298.

DAS AND ROSS, JJ.

Lal Pasi and others—Judgment-debtors-Appellants

v.

Ramsaran Lal Chowdhry and others—Decree-holders-Respondents.

Appeal from Appellate Order No. 132 of 1923, decided on 17th January 1923, from an order of the Dist. Judge, Patna, dated 16th April 1923.

Limitation Act, S. 15, Arts. 181 and 182 (5)—Application more than three years from last application excluding period of injunction restraining execution is barred.

On 7th July 1917, the execution of a mortgage decree for a sale of a house was first taken out. On September 12th, 1917, injunction was granted restraining the sale of half the house. On 19th November 1917 an application was made to take a step-in-aid of execution with respect to the other half of the house. That half of the house was sold. The injunction was dissolved on 8th November 1918. Application for execution with respect to the other half was made on January 10th, 1922.

Held that the last application was made on 19th November 1917, and limitation began to run from that date. The only period which the decree-holder was entitled to exclude on account of the injunction was from 19th November 1917, the date on which limitation began to run, to 8th November 1918, the date on which the injunction was dissolved. Therefore, the application made on 10th January 1922 having been made more than 3 years after the date of the last application, after deducting the period covered by the injunction the application was time barred. (P. 299, C. 1.)

Manohar Lal—for Appellants.

N. C. Sinha—for Respondents.

Ross, J.—This appeal raises a question of limitation. The relevant dates are these: On 9th June 1916 a final decree for sale of a house was passed in favour of the mortgagee-respondent. On 7th July 1917 execution was taken out (Execution case No. 203 of 1917). On 6th August 1917 sale proclamation was issued and 17th September 1917 was the date fixed for sale. On 3rd September 1917 a third party instituted a suit claiming title to one half of the house and an injunction restraining the respondent from selling it. On 12th September 1917 an injunction was granted. On 19th November 1917 the other half of the house was sold and the sale was confirmed on 22nd December 1917. On 8th November 1918 the suit of the third party was dismissed for default and the injunction was thus dissolved.

There was an application for re-hearing which was dismissed and an appeal against the dismissal was rejected on 25th February 1919. The present application for execution was made on 10th January 1922 and the question is, whether it is within time, or, in other words, within three years of the last application to the Court to take some step-in-aid of execution. Now, the last application to the Court to take some step-in-aid of execution was on the 19th November 1917. Three years from that date expired on 19th November 1920. To this must be added, under section 15 of the Limitation Act, the time of the continuance of the injunction staying the execution. Between 19th November 1917 and 19th November 1920 the injunction was in force for 11 months and 20 days, (*viz.*, from 19th November 1917 to 8th November 1918). If this period be added, the respondent was entitled to apply, for execution up till 8th November 1921. The learned District Judge has allowed the decree-holder to calculate the period of limitation from 19th November 1917 and also to deduct the period from 12th September 1917, till 8th November 1918. But it is impossible to deduct time which had already elapsed before limitation began to run.

It is argued for the respondent that the present application should be treated as a continuation of the previous application. I doubt whether this argument has any relevancy since section 15 of the Limitation Act was amended so as to include execution proceedings. But, in any view, there must be some limitation to the continuation of execution proceedings and the limitation would appear to be imposed by Art. 181. The result, therefore, is the same. The right to apply accrued when the injunction was dissolved and three years from this date expired on 8th November 1921.

The result is that the present application must be held to be out of time. The appeal is allowed with costs and the order of the Court below is set aside and the execution is dismissed.

Das, J.—I agree.

Appeal accepted.

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* 1925 Patna 299.

DAWSON-MILLER, C. J.
AND MULLICK, J.

Raghunandan Sahay and others—Defendants-Appellants

v.

Ram Sunder Prasad—Plaintiff-Respondent.

S. A. No. 1523 of 1921, decided on 12th November 1924, against a decision of the Sub-Judge, Arrah, dated 8th August 1921.

(a) Civil Pro. Code, S. 148—Accepting deficit Court-fee after time fixed is equal to extending time—Civ. Pro. Code, S 149.

Where a Court accepts deficit Court-fee after the time fixed for its payment and the plaint is registered, it may be inferred that the Court condones the delay and grants extension, as it has discretion to do under S. 148 or S 149 of the Civ. Pro. Code for, if it wanted, the Court might have rejected the plaint under O. 7, r. 11. [P. 303, C. 1.]

(b) *Land Tenures*—Manhunda *rent.*

Manhunda rent is a fixed amount independent of the total outturn of crops grown [P. 300, C. 1]

(c) *Appeal—Court should not interfere save in extreme cases in cases of discretion exercised under S 148 or S. 149—Civ. Pro. Code, Ss. 148 and 149.*

Questions like the exercise of discretion under S. 148 or 149, Civ. Pro. Code, should be left to the discretion of the Trial Court and in the absence of a very strong case, the Appellate Court must not interfere with the trial Court's discretion. [P. 302, C. 1.]

Sambhu Saran and *Mahabir Prasad*—for Appellants

Shiveswar Dayal—for Respondent.

Dawson-Miller, C. J.—This is an appeal from a decree of the Subordinate Judge of Arrah modifying the decree of the trial Court. It arises out of a suit for recovery of arrears of *manhunda* rent for the years 1323 to 1326 F. The first three defendants in the suit are the appellants. There is also a cross-appeal by the plaintiff.

The plaintiff claimed rent for the years in suit at 38 maunds 2 seers of grain per annum in respect to the holding which measures 15 bighas 6 cottahs of land. Damages were also claimed.

The plaintiff's case was that the market rate of the crop was 20 *kutcha* seers to the rupee for the year 1323 to 1325 and 10 *kutcha* seers to the rupee for the year 1326. The defence was that the rent was a money rent of Rs. 2-11-0 per bigha and not a *raibundi manhunda* rent as claimed. The market rate and the kinds of crops grown were also disputed and it was pleaded that the claim was time-barred in respect to the year 1323.

The Munsif found that the rent was a produce rent and not a money rent but that it was 35 maunds 15 seers as recorded in the survey *khatian*, which was rather less than the plaintiff claimed and that the plaintiff was not entitled to more although the area of the holding had slightly increased. It was found that certain crops were grown on the holding and as the market rate claimed was the rate of the cheapest crop, the Munsif allowed the claim at that rate amounting to Rs. 424-2-6 together with damages at 12½ per cent. He also decided the issue of limitation in the plaintiff's favour.

On appeal by the defendants, the Subordinate Judge affirmed the decision of the Munsif except on the question of limitation. He was of opinion that the claim was time-barred for the year 1323. He accordingly varied the decree of the trial Court by disallowing the claim for the first year's rent. From this decision, the defendants Nos. 1 to 3 have appealed and the plaintiff has entered a cross-appeal against that part of the decree which disallowed the claim for the year 1323.

In so far as the appeal is concerned, there is very little to be said. The matter would appear to be concluded by the findings of fact of the lower appellate Court. It was contended that there was no evidence adduced by the plaintiff to show the nature and quantity of the crops grown in each year and that he was therefore not entitled to any rent, as there was no basis of calculation possible and, secondly, that the Subordinate Judge erred in failing to consider the Commissioner's report which showed that no crops could grow on about 9 bighas of the land in suit. It must be remembered, however, that *manhunda* rent, as the Subordinate Judge points out, is a fixed amount not depending upon the total outturn of the crop grown. Further, the plaint alleged that five kinds of crops were grown and the evidence of the defendants' own witnesses as well as the Commissioner's report shows that such crops were in fact grown. There was therefore a basis upon which a money equivalent of the produce rent could be calculated and as the money equivalent claimed is based upon the market rate of the cheapest crop grown, it cannot be contended either that there was no basis of calculation or that the amount allowed was excessive. There appears to me to be no ground whatever for interfering with the decision of the lower Courts upon this part of the case and the appeal therefore fails and is dismissed with costs.

With regard to the cross-appeal the matter stands thus :—The plaint was filed on the 11th September 1919. This was admittedly in time to save limitation even for the first year's suit. The court-fee paid with the plaint was however, deficient and grossly deficient. On the 19th September, upon an application to the Court, the Munsif allowed one week's time to pay the deficiency in the court-fee. On the 23rd September, before the week expired, the Court closed for the vacation and re-opened again on the 27th October when the deficiency ought to have been made good. It was not, however, tendered in Court until the 29th October. It appears that it was accepted on that day without further order and subsequently, in November, the plaint was ordered to be registered. Sometime between the 11th September and the date when the deficit fee was paid, the claim to the first year's rent became barred and the question for determination is whether in the circumstances stated, section 149 of the Civil Procedure Code applies so as to give the plaint the same force and effect as if the fee had been paid in the first instance. Section 149 reads as follows :—

> "Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee, and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

In connection with this may be read section 148 which provides :

> "Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

Section 148 deals with the extension of the time granted by the Court for doing any act prescribed or allowed by the Code, whereas section 149 deals with cases of non-payment of fees prescribed for documents by the Court Fees Act and would apply to the fee payable on the plaint. In the former case, the Court may extend the time originally granted by its own order ; in the latter case the Court may allow the

fee to be paid at any stage with the result that the defect in the plaint or other document shall upon payment be cured. It was urged that under section 149, the Court had no power to extend the period for payment beyond the time fixed by its original order. I cannot, however, accept this proposition. The Court may allow the fee to be paid at any stage and even if the argument should hold good with regard to that section, I think section 148 would authorise the Court to enlarge the period originally fixed by its own order. The Court in the present case, acting under section 149, exercised its discretion and passed an order allowing the plaintiff to pay the Court-fee within a week. That order was not complied with. In these circumstances, assuming that the Court, in its discretion, refused to extend the time for carrying out the order, then O. 7, r. 11 of the Civil Procedure Code would clearly apply. That rule provides that the plaint shall be rejected in certain cases, including the case where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped and the plaintiff on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court fails to do so. Assuming that no further extension of time was granted and that the trial Court had done its duty, it would have rejected the plaint in accordance with the provisions of O. 7, r. 11. The Court, however, did not reject the plaint, but two days after the period for payment had expired, accepted the deficiency in the stamp fee when tendered and ordered the plaint to be registered. The question therefore which presents itself is whether the acceptance of the fee although tendered late and the subsequent registration of the plaint must be taken as an exercise of the Court's discretion to allow the deficiency to be paid on the day when it was tendered under section 149, or whether we must presume that the Court was unwilling to accept the fee but nevertheless failed to comply with its duty as prescribed by O. 7, r. 11. Now the rule of law applying to such cases appears to me to be embodied in the maxim *omnia præsumuntur rite esse acta*. We cannot by the application of this maxim presume without any evidence that the Court had allowed the plaintiff to pay the fee at a late date, but the fact that the Court accepted the fee and ordered the plaint to be registered is conclusive evidence that it did allow it and we may therefore presume, in the absence of any evidence to the contrary, that it acted regularly and in the exercise of its discretion. The learned Subordinate Judge was of opinion that the registration of the plaint could not be regarded as a condonation of the failure to comply with the original order because he thought that as part of the claim at least was not time-barred the Court had no option but to register the plaint. With respect to the learned Judge, this appears to me to be introducing an element which is extraneous to the question under consideration. It may well be that the Court, in exercising its discretion under section 149, ought to consider the question of limitation but O. 7, r. 11 directs the Court to reject the plaint in certain cases where a previous order has not been complied with and this direction should be carried out whether limitation has begun to run or not. If the order has not been carried out and no further extension of time has been granted the Court must reject the plaint even though the period of limitation has not begun to run. To hold otherwise would be to render O. 7, r. 11, cls. (*b*) and (*c*) nugatory in cases where limitation had not begun to run and there is nothing to limit the rule in this way. It cannot be said, therefore, that the Court was bound in the circumstances of this case to register the plaint if in fact the time for paying the deficiency in the stamp-fee had not been extended. The claim was for a certain amount and the stamp-fee was inadequate to cover that amount. The plaint was therefore insufficiently stamped within the meaning of O. 7, r. 11. The real question for determination is whether the Court in accepting the fee although paid after the period originally fixed for payment and in ordering the plaint to be registered was within the meaning of section 149, allowing the person by whom such fee is payable to pay the whole or part of such fee. If the Court was so acting, then the plaint must have the same force and effect as if the fee had been paid in the first instance. The learned Judge in arriving at his conclusion appears also to have been influenced by the consideration that the deficiency in the first instance was so large that the plaintiff must have been guilty of gross *laches*. This, however, was a matter for the trial Court to consider when the matter first came before it. On

that occasion, the trial Court, which must be presumed to have considered this question, undoubtedly extended the time for payment to another week and it does not appear to me that this question can be reagitated after the trial Court has exercised its discretion in the first instance. The learned Subordinate Judge relied upon two decisions of this Court in support of the view expressed by him. The first was that of *Ram Sahay Ram Pande* v. *Lachmi Narain Singh* (1), the second was *Mt. Dukhno* v. *Munshi Sahu* (2). I agree with every word that was said by Chamier, C. J., in the former case but the question there was, whether in the circumstances of that case, the Court should exercise its discretion under section 149 in favour of the appellant by allowing him to make good the deficiency in the stamp fee on his memorandum of appeal which was filed on the last day of limitation. The question was not, as here, whether in accepting a fee paid late and registering a plaint the Court had in fact acted under section 149. The learned Chief Justice laid down certain principles which should guide the Court in exercising its discretion and in the result, refused to extend the time and the memorandum of appeal was rejected. The wording of section 149 is significant. It provides that the Court may, in its discretion, at any stage, allow the deficiency to be made good. If this is done, then the document, whether a plaint or any other document covered by the section, becomes as effective as if the proper fee had been paid in the first instance. It is of the utmost importance that questions of this sort should be left to the discretion of the Court which has to determine them in the first instance and although I am not prepared to go to the length of saying that in no case can that discretion be interfered with by an Appellate Court it should require a very strong case to entitle an Appellate Court to interfere. In *Padmanand Singh* v. *Anant Lal Misser* (3) Maclean, C. J., in dealing with a case under the Code of 1882 where the facts were very similar to this case said :

"As a general rule I should hold that when once the Court has admitted and registered a plaint it cannot subsequently reject it. In the present case, by the course it adopted, the Court must be taken to have extended the time for paying the Court-fee up to the 9th July when it was actually paid and accepted and to have treated this as the time fixed for payment of the deficit. The Court cannot go behind this. To allow it to do so might lead to the gravest injustice."

The learned Chief Justice then points out the grave results which would follow from allowing the plaintiff to incur the expense of a trial and at a late stage, have the plaint rejected when possibly a fresh suit would be barred by limitation. This he says would be a grave injustice attributable to the action of the Court itself which lulled the plaintiff into a sense of false security by admitting and registering his plaint. In the result, in that case, notwithstanding the opinion of the Chief Justice which I have just referred to, the majority of the Bench thought the justice of the case would be met by treating the plaint as having been filed on the 9th July when the deficit was paid with the consequence which ensued as to limitation by so treating it. At that time however, section 149 was not on the Statute book and had not to be considered. The only corresponding section in the Code of 1882 was section 582-A, which was applicable only to a memorandum of appeal or an application for review and gave the Court power to allow the deficiency in the stamp to be made good only in cases where the deficiency was due to a mistake.

The second case relied on by the Subordinate Judge, namely, *Mt. Dukhno* v. *Munshi Sahu* (2) was a case where clearly no discretion was exercised at all in admitting an application under O. 9, r. 9 of the Civil Procedure Code which was defective in many respects and which had been returned to have the defects made good within a time fixed. Further extensions of time for this purpose were granted but still the defects were not cured. More than two months after the first order was made, although the defects had not been cured, the Munsif without giving notice to the Opposite Party and in spite of the fact that the defects were called to his attention by the office, ordered the application to be admitted and eventually allowed the application and restored the case to the list without once considering whether the application had been filed in time. It was argued that the Court had power to extend the time under section 148 and must be deemed to have done so. The Court, in the circumstances of that case, did not accede

(1) (1917) 3 Pat. L. J. 74=42 I. C. 675=3 Pat. L. W. 18.
(2) (1919) 4 Pat. L. J. 428=52 I. C. 439.
(3) (1906) 34 Cal. 20=4 C. L. J. 421=11 C. W. N. 38=1 M. L. T. 355 (F. B.)

to this argument and indeed a more grossly arbitrary exercise of discretion, if any discretion was exercised at all, could hardly be conceived, for even when the application was admitted, the defects had not been cured and the Court consisting of Atkinson and Manuk, JJ., very properly, if I may be permitted to say so, set aside the Munsif's order. That case does not appear to me to bear any analogy to the present where the facts are entirely different. In the present case the defect was cured within two days after the period allowed originally and the plaint was admitted and registered. I think a strong presumption arises that if the Court did not intend to extend the time further it would have rejected the plaint as it was bound to do under O. 7, r. 11, unless the time was extended. The only reasonable inference, until the contrary is shown, is that the Court intended to act according to law and that in accepting the deficiency and registering the plaint it did in fact, in its discretion, extend the time. I have referred somewhat at length to the question for determination because under the earlier Code and before section 149 was introduced into the Code of 1908, there were many conflicting decisions dealing with questions of this nature and although section 149 was doubtless meant to set at rest the previous conflict, there appears still to arise occasionally some doubt as to the effect of the provisions contained in the present Code. It would, however, be sufficient for the purposes of this case to say that so far as this Court is concerned the question now under discussion arose and was determined in the case of *Pawan Kumar Chand* v. *Musammat Dulari Kuar* (4). There the facts were very similar to the facts of this case. The plaint was filed on the 27th May 1916 but there was a deficit in the Court-fee. An order was passed to pay the deficiency within a week. It was not paid and on the 6th June the time was extended for three days more. Still the deficit was not paid by the 9th June. It was, however, paid about a week later and on the 17th June, the fee having been accepted, the plaint was registered. In these circumstances the Court assumed that the trial Court had extended the time from the 9th to the 17th June, for if it had not done so, it would have rejected the plaint but this was not done, and they held that by accepting the Court-fee on the 17th June it had in fact extended the time for payment up to that date. In my opinion the cross appeal must succeed and the plaintiff is entitled to his costs here and in the Court below.

Mullick, J.—The plaintiff sued for *manhunda* rent for the years 1323 to 1326 F. S. at the rate of 38 mds. 2 paseris per year. The Munsif relying upon the survey record found the rent to be 35 mds. 15 seers and gave the plaintiff a decree for the whole period in suit. He declined to accept the defendants' contention that rent was payable at a *nakdi* rate of Rs. 2-2-11 per bigha. It is not disputed that the area of the holding is 15 bighas 6 kathas.

The defendant appealed on the ground that the rate decreed was excessive. He also contended that the Court should have found what quantity of each kind of crop was grown upon the land and what was the market price of that crop. The Subordinate Judge dismissed the appeal as regards the years 1334, 1325 and 1326. With regard to theyear 1323, he found that the plaint filed on the 11th September 1919 was insufficiently stamped and that the full court-fee upon it was not paid till the 29th October 1919 and that it was not registered till the 13th November 1919. As by that time the claim for 1323 had become barred by limitation, the Subordinate Judge dismissed the claim for that year.

It is to be observed that the Munsif who tried the suit was not the Munsif who ordered the plaint to be registered.

Against the Subordinate Judge's decree the defendant appeals and the plaintiff cross-appeals.

As regards the appeal, there is no substance in it. The Munsif's judgment shows that the land grows barley, gram, peas, linseed and mustard and one or two other winter crops. He found that the cheapest of these crops sold at an average of 20 *kacha* seers to the rupee during the years in suit and at this rate the price of 35 mds. 10 seers would be Rs. 84 13-6. The Subordinate Judge accepted this rate and the defendant has no ground whatsoever for complaint If each crop had been separately valued the annual rate would have been higher. The appeal is therefore dismissed with costs.

(4) (1920) 1 Pat. L. T. 541=58 I. C. 216=5 Pat. L. J. 544.

With regard to the cross appeal, it appears that on the 11th September 1919 the plaint bore a court-fee stamp of only Rs. 1-2-0 and the balance of Rs. 40-2-0 was not paid till the Court re-assembled after the Civil Court vacation. On the 19th September 1919 the Munsif ordered that the deficit court-fee should be paid within a week. The Court closed for the long vacation before the expiry of the time thus allowed and reopened on the 27th October 1919. The deficit court-fee appears to have been received on the 29th October 1919 although no extension of the time of payment was expressly recorded and the presiding officer ordered the plaint to be registered on the 13th November 1919.

The learned Subordinate Judge does not find definitely that the Munsif did not extend the time. On the other hand, the learned Vakil for the cross-appellant relying on *Budhan Sha* v. *Sita Nath Sha* (5) contends that as no express order extending the time was recorded, the payment of the deficit court-fee on the 29th October and the registration of the plaint on the 13th November cannot serve to validate the plaint with effect from the 11th September. In my opinion the acceptance of the deficit court-fee after the time fixed for its payment and the registration of the plaint are facts from which it is open to a Court to draw the inference that the presiding officer did condone the delay and grant the extension ; and it was so held in *Pawan Kumar Chand* v. *Musammat Dulari Kuar* (4), an authority which is binding upon this Court. I think therefore, that there was evidence in the present case upon which the Munsif was competent to come to a finding that an extension oftime was granted under sections 148 and 149 of the Code of Civil Procedure. The learned Subordinate Judge has not in clear terms displaced that finding. He seems rather to be of the opinion that the Munsif did grant an extension but that in doing so, he exercised his jurisdiction wrongly. Now the learned Subordinate Judge would certainly have been competent to interfere if the Munsif who accepted the plaint had failed to exercise his discretion judicially, *i.e.*, if he had exercised his discretion arbitrarily or had misdirected himself on any question of law or fact [*Brij Indar Singh* v. *Kanshi Ram* (6)]. Here no such error being disclosed, it was not open to any Court to reopen the question of the legality of the plaint.

The result is that the cross-appeal succeeds and is decreed with costs in this Court and the Court below.

Appeal dismissed ; cross-appeal allowed.

(5) (1910) 13 C. L. J. 78=7 I C. 578.

(6) (1917) 45 Cal. 94=44 I A. 218=33 M. L. J. 486=22 M. L. T. 362=6 L. W 592=1 6 P. W. R. 1917 15 A. L. J. 777=19 Bom. L R. 866=3 Pat. L. W. 313=26 C. L. J. 572=42 I C. 43=104 P. R. 1917=(1917) M. W. N. 811=2 C. W. N. 169=127 P. L. R 1917 (P.C.).

1925 Patna 304.

MACPHERSON, J.

Sri Newas Sitaram—Plaintiff-Petitioner

v.

E. I. Ry. Co. and another—Opposite Party.

Civil Rev. No. 189 of 1923, decided on 9th August 1923, from an order of the Small Cause Court Judge, Patna, dated 19th February 1923.

Railways Act, S. 72—Risk Note, Form B—Suit for compensation for non-delivery of goods—Plea of loss is enough—Defence and proof of non-possession is unnecessary—Allegation by Railway of theft does not prove wilful neglect.

Wilful neglect on the part of a Railway Company or its servants is not established merely by the fact that the Company alleged that the wagon wherein the goods were being carried was broken into by thieves. [P. 305, C. 2.]

It is not necessary for the defendant Railway Company in a suit for compensation for non-delivery of goods consigned under risk-note form B. to call evidence to satisfy the Court that the goods are not still in its possession. It is sufficient to plead loss as contemplated by the risk-note. [P. 305, C. 1.]

S. Dayal and *Brij Kishore Prasad*—for Petitioner.

S. N. Bose—for Opposite Party.

Judgment.—This is an application under section 25 of the Provincial Small Cause Courts Act against the decree of the Small Cause Court of Patna dismissing, except in respect of an item immaterial for the present purpose, the suit of the petitioner for compensation for non-delivery of one bale of goods consigned from Bombay on the Great Indian Peninsular Railway to the petitioner at Patna City and not delivered to him by the East Indian Railway. The value of the bale was put at Rs. 393-12-0

and the rest of the claim of Rs. 472 was made up of expenses, railway freight, interest and loss of profit.

The goods had been sent under Risk Note B and the Court held that the plaintiff had failed to prove that the loss of the bale was due to the wilful neglect of the defendant Railway Company and further that the Company was under that Risk Note absolved from liability for the loss of the bale.

On behalf of the petitioner, it is contended by Mr. Shiveshwar Dayal, that the contract being admitted and also the breach thereof, the plaintiff's suit can only be defeated by Risk Note B, that for the Risk Note to avail, the plea of loss must be expressly taken and that as that plea was not taken, evidence of loss was not admissible. He would base this contention upon two rulings of this Court, *G. I. P. Railway Company* v. *Jitanram Nirmal Ram* (1), decided by a Division Bench and the *East Indian Railway Co.* v. *Sukleo Das* (2), decided by a Single Judge. To my mind, the contention is not sound since loss has been distinctly pleaded in paragraph 4 of the written statement presented on behalf of the defendant Company and that was also the interpretation put upon the paragraph by the plaintiff himself when leading evidence. Indeed, having regard to the fact that he filed Exhibit 5, a letter, wherein the Railway Company alleged loss and disclaimed negligence, no other position was possible to him. Accordingly, the second case cited is distinguishable since therein the defendant had not pleaded even by implication that the goods had been lost, while the plea of loss as contemplated by the Risk Note having been advanced on behalf of the defence, the first mentioned case far from being in favour of the present contention is against it, since it has been held therein that it is sufficient for the defendant Company to plead loss as contemplated by the Risk Note and it need not call evidence to satisfy the Court that the goods are still not in the Company's possession. The evidence on the record as to loss was thus not inadmissible. This plea fails.

It is next contended by the learned Vakil that the petitioner is at least entitled to a remand for further consideration of the effect of the exception to the protection accorded by the Risk Note. He argues (1) that Exhibit 5, the letter of the Railway Company to the petitioner, states that the consignment which included the bale lost, proceeded in a wagon as far as Dildarnagar correctly, but there the wagon was found to have been broken into by thieves and no clue to the stolen property had been discovered by the Police; (2) that under the exception, read with the proviso thereto, theft (not being robbery from a running train) is not necessarily excluded from "the wilful neglect of the Railway Administration or . . . . the wilful neglect of its servants" in respect of which the Railway Company under the Risk Note still continues liable when a complete package of a consignment is lost; (3) that Exhibit 5 was not considered by the Judge in this connection, and (4) that if the Judge had directed his mind to the matter, he might have held, as other Courts have been known to hold, that the theft was due to the wilful neglect either of the Railway Administration or of its servants.

To my mind it cannot be inferred that Exhibit 5 was not considered in this connection. Moreover, though the second proposition is unexceptionable, it was for the plaintiff to prove that he came within the exception. It is not enough to say that theft may in law evidence "wilful neglect on the part of the Railway Administration . . . or of its servants." The real question is whether any Court would be justified in holding, merely on the expression used in Exhibit 5, namely, "broken into by thieves" and in the absence of further evidence, such as that the wagon which was *ex hypothesi* closed, and may even be taken to have been fastened or locked was negligently closed or fastened or was left altogether exposed and unguarded that wilful neglect was established. In my opinion such a finding would be unjustifiable. There is in the present case no such further evidence. The finding of the learned Judge is thus the only possible finding and a remand is contraindicated.

The application is dismissed with costs.

Application rejected.

(1) (1923) Patna 285=2 Pat. 442=4 Pat. L. T. 179=(1923) P. H. C. C. 82=1 Pat. L. R 169.

(2) (1924) Patna 25=4 Pat. L. T. 443.

* 1925 Patna 306.

ROSS AND SEN, JJ.

Lal Singh Bhumij—Defendant-Appellant

v.

Krishto Khutya—Plaintiff-Respondent.

S. A. No. 1756 of 1921, decided on 7th August 1924, against a decision of the Sub-Judge, Manbhum, dated 27th June 1921.

*(a) *Land tenure*—Ghatwali *tenure*—*Any custom regarding* ghatwali *lands must be clearly pleaded and proved*—*Acquisition of occupancy rights in* ghatwali *lands is inconsistent with incidents of* ghatwali *tenure.*

The incidents of a *ghatwali* tenure widely differ in different parts of the country in the case of all service tenures, they generally differ and before coming to a conclusion as to whether occupancy rights have accrued in respect of *ghatwali* lands by reason of a custom or usage to that effect, such custom or usage must be pleaded and evidence led as incidents of a ghatwali tenure are inconsistent with a right of occupancy rights in land subject to such *ghatwali* tenure. On principle, the lands given to the ghatwal should be returned to the landlord free from any incumbrance or rights in favour of any other person. [P. 307, Cs. 1 and 2.]

(b) *Chota Nagpur Tenancy Act (VI of* 1908), *S.* 77—*Chota Nagpur Landlord and Tenant Procedure Act* (I *of* 1879), *S* 6—*Acquisition of occupancy rights* in ghatwali *lands.*

A person in possession of *ghatwali* lands for only ten years prior to the Chota Nagpur Tenancy Act of 1908 is not entitled to occupancy right under Act I of 1879 when Act VI of 1908 came into force. S. 77 of Act VI of 1908 prevented the occupancy rights being acquired in respect of *ghatwali* land as soon as the Act came into force. [P. 307, C. 2.]

S. N. Bose—for Appellant.

B. C. Mitter and *S. N. Banerjee*—for Respondent.

Sen, J.—This appeal arises out of a suit for recovery of *khas* possession of certain lands after ejecting the defendant therefrom and for declaration of plaintiff's raiyati right thereto. The plaintiff-respondent's case was that he had possession of the land all along by payment of rent to the superior landlord, that the lands had been recorded in the last District Settlement as plaintiff's raiyati lands but that the defendant-appellant had forcibly dispossessed the plaintiff from the lands on the 30th October 1919.

The defence was that the lands in dispute form part of a *ghatwali* service tenure, that the defendant being a Paik *ghatwal* under Government was entitled to those lands in lieu of services rendered by him as such *ghatwal* and that no right of occupancy could accrue in respect of such lands. The Court of first instance mainly relied upon the Record-of-Rights in which the plaintiff-respondent had been recorded in the settlement *khatian* (Ex. 1) as the "*dakhalkar.*" The Court on this basis declared the raiyati right of the plaintiff to the land and passed a decree for *khas* possession. On appeal before the learned Subordinate Judge, the judgment and the decree of the first Court was upheld.

Four points fall to be considered, first whether occupancy rights are consistent with the incidents of *ghatwali* tenures in general; secondly, whether, even if inconsistent with *ghatwali* tenure in general, in this particular case occupancy right might be said to have accrued by virtue of custom or usage; thirdly if, as has been contended before us, by virtue of section 6 of Chota Nagpur Landlord and Tenant Procedure Act (I of 1879) occupancy rights could be acquired under the law in force prior to the introduction of the Chota Nagpur Tenancy Act (Act VI of 1908) and could such rights created be affected by section 77 of the latter Act; fourthly, whether in the case before us occupancy right did come into existence prior to the passing of the Chota Nagpur Tenancy Act (Act VI of 1908); if not what was the legal position of the tenant who had not completed his tenancy before the introduction of the Act.

On principle it appears that the incidents of *ghatwali* tenures are inconsistent with the acquisition of a right of occupancy in land subject to such tenure. As has been observed by Mitter, J., in the case of *Mohesh Majhi* v. *Pran Krishna Mondal* (1): "If it be once conceded that a successor of a *ghatwal* takes possession of *ghatwali* lands free from all encumbrances created by his predecessor, that is, he is entitled to the possession of the land in the same condition as it was at the time of the first creation of the tenure, subject to any rights imposed upon it by the Government, it is difficult to say that the land may be encumbered by statutory rights such as rights of occupancy or non-occupancy. The growth of such rights would seem to be inconsistent with the nature of service tenure." This was also the opinion expressed by Fletcher, J., in the case of *Jafaruddin* v. *Jamani Ballav* (2). There appears to have been a different view expressed

(1) (1904) 1 C. L. J. 128.

(2) (1918) 23 C. W. N. 136=46 I. C. 341=28 C. L. J. 249.

in the case of *Sitikanta Ray* v. *Bipra Das Charan* (3) which is relied upon in this case by the Court below. That case was in respect of *ghatwali* land in the District of Bankura. But it appears that in that case there was a finding of fact to the effect that the tenant was in possession as cultivating raiyat under the *ghatwal* for more than 12 years before the Bengal Tenancy Act came into operation and it was held that section 181 of the Bengal Tenancy Act could not have the effect of depriving the raiyat of a right which had already accrued to him before the passing of the Act. The next case cited is the case of *Ram Kumar Bhattacharji* v. *Ram Newaj Rajguru* (4). In that case it was held that right of occupancy could be acquired by a tenant in Chowkidari Chakran lands under section 6 of Act X of 1859. On the other hand, in the case of *Upendra Nath Hazra* v. *Ram Nath Chowdhuri* (5) Maclean, C. J., held that occupancy rights could not be acquired in *ghatwali* lands, following the decision of Mitter, J., in *Mahesh Majhi* v. *Pran Krishna Mondal* (1). In view of the rulings on the subject of *ghatwali* tenure it seems clear that the better opinion is that occupancy rights are inconsistent with such tenures inasmuch as on principle the landlord is entitled to have the land that was given to the *ghatwal* in lieu of performance of his duty returned to him in the same condition free from any encumbrance or rights of any other person imposed upon it.

In the present case, however, the learned Subordinate Judge seems to have proceeded upon the observation of Mr. Reid appearing at p. 15 of his work on the Chota Nagpur Tenancy Act. He observes: "In the District of Singhbhum such a raiyat with whom land was settled on cash rent acquired by custom right of occupancy since it was settled. It follows from the above that if the land was settled on cash rent with the plaintiff by the previous *ghatwal* before the passing of the Chota Nagpur Tenancy Act, he acquired right of occupancy in it and section 77 (which corresponds to section 181 of the Bengal Tenancy Act) cannot affect the right of the plaintiff." This brings us to the second point; if the case has to rest upon usage or custom it must necessarily depend upon evidence of such custom and usage. The incidents of *ghatwali* tenures, in fact of service tenures in general, differ widely in different parts of the country and the question of custom or usage in relation to *ghatwali* lands must be pleaded, and evidence must be gone into in order to come to a conclusion as to whether by virtue of such custom or usage occupancy rights might be regarded as having accrued in respect of such lands. No such thing was done in the present case; it seems to us that the whole case has been made to rest upon the observation of Mr. Reid, in his commentary to the Chota Nagpur Tenancy Act. This position is utterly untenable. Thirdly, it has been contended that by virtue of section 6 of the Chota Nagpur Landlord and Tenant Procedure Act (Act I of 1879) it must be held that occupancy rights could accrue in respect of all lands without any distinction. If this was the effect of statutory provisions prior to the introduction of Act VI of 1908, then section 77 of the Chota Nagpur Tenancy Act could not be deemed to affect such rights already accrued. This argument is advanced on the analogy of arguments put forward in some of the cases cited above in which reliance was placed upon section 6 of Act X of 1859 and it was urged that by virtue of the provisions of that section, section 181 of the Bengal Tenancy Act could not be deemed to preclude the accrual of occupancy rights in land subject to service tenures. It is true that the terms of section 6 of Act I of 1879 are similar to those of section 6 of Act X of 1859 but judging from the preamble of Act I of 1879 which purports to amend the procedure in suits between landlord and tenant in Chota Nagpur I have some doubts in my mind whether a statute relating to procedure could purport to create substantive rights of occupancy. I do not think, however, that it is necessary to express an opinion on the point in the present case; for in the present case admittedly the plaintiff was in possession of the land for only 10 years prior to the passing of the Chota Nagpur Tenancy Act. The occupancy right, therefore, had not accrued to him at the time when Act VI of 1908 came into force and it must be held that directly the Act came into operation. Section 77 of that Act would effectively prevent the occupancy right from accruing in respect of *ghatwali* land. In view of this considera-

(3) (1918) 22 C. W. N. 765=46 I. C. 485=27 C. L. J. 556.
(4) (1904) 31 Cal. 1021=8 C. W. N. 860.
(5) (1906) 33 Cal. 630.

tion we think that it cannot be declared that the plaintiff-respondent has raiyati right to the land in question.

The result is that the appeal is allowed, the judgment and decrees of the Courts below are reversed and the suit of the plaintiff-respondent is dismissed. The appellant is awarded his costs in all the Courts.

Ross, J.—I agree.

Appeal allowed.

1925 Patna 308.

FOSTER, J.

Hukum Mahto and others—Plaintiffs-Appellants.

v.

Sant Saho and another—Defendants-Respondents.

Civil Appeal No. 1008 of 1921, decided on 7th June 1923, from a decision of the Offg. Sub-Judge of Muzaffurpur, dated 21st March 1921.

(a) *Civil Pro. Code, S. 11—Suit by Hindu father for recovery of joint family land binds all co-parceners—Hindu Law—Joint family.*

All Hindu co-parceners are bound by the result of a suit brought by a Hindu father for recovery of possession of joint family land. Such suit must be deemed to be a representative suit on behalf of all the co-parceners. [P. 310, C. 2.]

(b) *Hindu Law—Joint family—Suit by father being representative or not depends on circumstances of each case—Suit on contract differs from suit about immoveable property—Civ. Pro. Code, S. 11.*

The prosecution or the defence of a suit in which the interest of a joint family is in issue, by one member of the family may have the effect of making the decree passed in the suit afterwards, bind all the co-parceners, it being assumed that their interest was sufficiently represented by the party in the original suit.

But there is a great distinction between cases in which a Hindu father sues in respect of a contract which he is empowered under the Mitakshara Law, as manager to make on behalf of the family and cases in which a father sues in respect of rights in immoveable property, rights which he can only hold in an equal measure with other co-parceners.

The question as to whether a Hindu father sufficiently represents all the co-parceners in a given litigation is a question which has to be decided with reference to the circumstances of the case. [P. 310, C. 2.]

T. N. Sahai and *Anand Prasad*—for Appellants.

Syed Mohammad Tahir and *Rogho Prasad*—for Respondents.

Foster, J.—The facts of this case are as follows:—Hukum Mahto is the father of four sons and they form a joint Mitakshara family. In the course of a revisional record-of-rights in their village the defendants were recorded as the *raiyats* in possession of 10 *kathas*, 2 *dhurs*, the property now in dispute. That property had admittedly once belonged to the uncle of Hukum Mahto and it is the defendants' case that they acquired the same by purchase. In the course of the Settlement operations a larger area, including this 10 *kathas*, 2 *dhurs*, had been at first recorded in the name of Hukum Mahto's son, Makhoo Mahto. When the ultimate decision of the Settlement authorities was against the plaintiff, Hukum Mahto and his son, Makhoo Mahto, brought a suit for the following reliefs, stated briefly:—

A declaration that the record-of-rights is incorrect, recovery of possession and mesne profits.

The plaint is not on the record of this present case but it appears to be agreed between the parties that this is a correct statement of what happened. For some reason or other, in the course of that suit Hukum Mahto and Makhoo Mahto as plaintiffs applied for leave to withdraw the suit with permission to bring a fresh suit. The order on this application was passed on the 1st November 1919 to the following effect:—

> "The plaintiffs are to pay the defendant his costs within one month from this date. On failure, the suit will stand dismissed."

The plaintiffs did not deposit the costs in Court within the appointed period, nor were the costs in fact paid till about eight months subsequently. On the 10th November 1919, that is nine days after the order I have quoted, the present suit was instituted for the same reliefs as those of the previous suit and on the same cause of action; the only distinction in the form of the suit being that the plaintiffs were no longer only Hukum Mahto and his eldest son, but were Hukum Mahto and all his four sons. The defendant resisted the suit on the ground that the costs not having been paid within one month in the previous suit and that suit having in consequence been dismissed, the plaintiffs were debarred from bringing a fresh suit on the same cause of action. On the other hand, the plaintiffs stated that whatever may be the effect of the order as against Hukum Mahto and Makhoo Mahto, the right of the other plaintiffs who sued remained unaffected by the dismissal of the

previous suit. The Munsif dismissed the present suit. In appeal to the Subordinate Judge, this decision was upheld on the ground that in the previous suit Hukum Mahto sued not only for himself but in a representative capacity as manager on behalf of his three younger sons. This is the decision upon the correctness of which I have to pass judgment.

The provisions of the Civil Procedure Code that are pertinent to the question are sections 10 to 12 and Order XXIII, rule 1, Section 10 has only an unimportant bearing upon the question because it only affects the position of Hukum Mahto during the period between the 10th November 1919 when he filed the present suit and the 1st December 1919 when his suit became dismissed ; during that period the previous suit must be considered to have been pending. Under clause (3) of Order XXIII, rule 1 it is provided that, "where the plaintiff withdraws from a suit, without permission to bring a fresh suit, he shall.....be precluded from instituting any fresh suit in respect of such subject-matter." Section 11 provides that "no Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties.....htigating under the same title, in a Court competent to try such subsequent suit and has been heard and finally decided by such Court" ; and section 12 provides that, "where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which the Code applies."

The principal question in deciding this appeal appears to me to be whether Hukum Mahto in the previous suit represented his three younger sons. If he did represent them, then they would undoubtedly have reaped the benefit of any decree obtained by him and it would be irrational to suppose that in those circumstances, they would not also suffer the ill effects of the representative's failure in the suit. So, if Hukum Mahto was their representative and if he was precluded by the order of the Court from bringing a fresh suit, that order must debar the three younger sons just as much as their father. Against the contention that he was a representative, it may be argued that there is nothing on the record that expressly shows that he sued as a representative and it may be argued that if he was suing as manager of the joint family, where was the necessity to join Makhoo, the eldest son, as co-plaintiff ? In respect of the latter contention, a ready answer suggests itself, namely, that Makhoo s name stood in the record-of-rights before the dispute in the course of Settlement which resulted in the present cause of action. The question whether a Hindu father represents his co-parceners is a question to be decided with reference to the circumstance of each case. There is a great difference between the case of a Hindu father suing in respect of contracts which the Mitakshara Law empowers him as manager to make on behalf of the family and a father suing in respect of rights in immoveable property, rights which he can only hold equally with his co-parceners. At the same time, the right of the father and of the manager to represent the joint family in the latter class of suits has been recognised traditionally in the Courts. Where the interest of a joint undivided family is in issue and one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit, that decree may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit. This practice of the Courts has been referred to in *Jogendro Deb Roy* v. *Funindro Deb Roy* (1). The question whether a manager of a joint Hindu family is competent to bring a suit under the Bengal Tenancy Act was raised in the case of *Muhammad Sadiq* v. *Khedan Lal* (2), but not decided. It was, however, decided that there was nothing to prevent such a manager from bringing a suit to recover possession of proprietor's private land. The present suit in regard to this first relief is obviously one which the plaintiff is empowered to make by virtue of section 111-A of the Bengal Tenancy Act. Such a relief can, of course, be claimed by any member of a joint Mitakshara family. But the second relief is for recovery of possession of land alleged to belong to the joint family and it follows that any co-parcener who sues for such a relief as that, must be taken to be claiming to

(1) (1872) 14 M. I. A 367=17 W. R. 104=11 B. L. R. 244=3 Sar. 32=2 Suther 517 (P. C.).

(2) (1916) 1 Pat. L. J. 154=36 I. C. 197=2 Pat. L. W. 865.

recover possession on behalf of the other members of the joint family. Therefore, from the very nature of the suit it appears to me that Hukum Mahto in the previous suit must be deemed to have been suing in a representative capacity ; for, otherwise, I do not see how he could claim recovery of land from a person who alleges that he has purchased from a deceased member of the plaintiffs' family. Where a manager or the head of a family sued for such a relief as this, it is always open to the defendant under Order I, rule 13 of the Code to raise a plea of defect of parties, but if the plea is not raised at the earliest opportunity it will not affect the progress of the suit. I do not see how I can hold otherwise than that Hukum Mahto in the previous suit not only sued on his own behalf but also on behalf of those members of the joint family who had a title coincident with his own. It is noticeable that in the plaint of the present suit there is no repudiation by the younger sons of the acts done on their behalf by their father.

It is urged that the dismissal in the previous suit should be taken to be valid only against Hukum Mahto and his son Makhoo and that the three younger sons should be allowed to proceed with the suit after making Hukum Mahto and Makhoo Mahto defendants, for such relief as they are entitled to. In support of this the learned Vakil for the appellants has cited the case *Gopi Lal* v. *Lala Naggu Lal* (3). In my opinion there is no real resemblance between that case and this. In that case Gopi Lal first sued alone for a debt. It does not appear that he was a manager of the joint family to which he belonged. The other members of the joint family did not appear to have been his sons or even his younger brothers, so far as we can see from the judgment. In the first suit, the defendant raised a plea of non-joinder of plaintiffs and Gopi Lal obtained permission to withdraw the suit on condition that he must pay the defendants' costs before bringing a fresh suit, or else the suit would stand dismissed with costs. Gopi Lal joined these other two persons as plaintiffs, namely, Mewa Lal and Shamraj, and filed a fresh suit before paying the costs. It was held that Gopi Lal could no longer sue and should be joined as defendant, but the rights of the other two plaintiffs were not affected by the previous decision.

There was no question of representation in the case.

For these reasons I hold that Hukum Mahto and Makhoo Mahto are precluded from bringing the present suit and that the three younger sons are equally precluded inasmuch as their father and their representative is debarred. For these reasons I dismiss the appeal with costs.

Appeal rejected.

(3) (1911) 15 C. W. N. 998=10 I. C. 6=14 Cr. L. J. 105.

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* 1925 Patna 310.

DAWSON MILLER, C. J. AND FOSTER, J.

Sheo Gobind Singh—Plaintiff-Appellant

v.

Gouri Prasad and others—Defendants-Respondents.

S. A. No. 15 of 1922, decided on 1st July 1924, from a decision of the District Judge, Gaya, dated 11th June 1921.

* (a) *T. P. Act, S. 3—Arrears of rent.*

Arrears of rent after accrual constitute a debt within S. 3, T. P. Act. (P. 312, C. 1.).

* (b) *T. P. Act, S. 136—Transfer of right to recover arrears of rent by a Magistrate to a Muktar is void.*

The right to recover arrears of rent is an actionable claim and therefore a transfer of such claim by a Magistrate to a Mukhtar is barred by S. 136. (P. 312, C. 2.)

L. N. Singh and *S. N. Rai*—for Appellants.

Parmeshwar Dayal—for Respondents.

Foster, J.—The parties in this second appeal are the persons interested in an 8 annas *takhta* of *Mauza* Fatehpur which was created by Civil Court partition. In this 8-annas *takhta*, Kulsum Bibi has 1-anna 12 *dams* share and she is the plaintiff No. 1. The defendants Nos. 8 and 9 have 3-annas 4 *dams* share, Kulsum Bibi's brother, Malik Mukhtar Ahmad, had a share of 3-annas 4 *dams*. Malik Mukhtar Ahmad conveyed his share to Sheo Gobind Singh before the institution of the present suit on the 28th June 1918 corresponding to *Jeyth* or *Assarh* 1325-F. There has been apparently some misapprehension as to the

effect of this conveyance, for in the original Court the learned Munsif has stated that though the document was executed in June 1918, it did not come into operation until February 1920. We have before us a translation of the conveyance which has not been impugned, and in it we see that Malik Mukhtar Ahmad transferred to Sheo Gobind Singh all his interest in this *takhta* of Fatehpur, together with arrears of *mukarrari* rent due to him from the *mukarraridars* up to 1325-*F*. At the end of the document it is recited "I have executed this sale-deed to safeguard our interest in future and this deed will come into force from the date of registration and the day my signature is affixed on the deed." The registration in fact took place shortly afterwards. There is no provision in the deed for it to take effect in 1920.

On the 16th September 1918, Kulsum Bibi brought a suit in the Munsif's Court against the *mukarraridars*, the defendants Nos. 1 to 6, in respect of rent due for the years 1322 to 1325 to the extent of her share, amounting to something more than Rs. 900 out of a total rent of Rs. 1092 including cesses. On the 12th December, her brother Malik Mukhtar Ahmad who had been made defendant No. 7 was, on his own application, made a co-plaintiff and thereupon the plaint was amended so as to include the amount of rent due to both the plaintiffs. This increased the claim to something over Rs. 3,000, and the suit was beyond the competence of the Munsif. The plaint was returned and was presented in the Subordinate Judge's Court on the 11th January 1919. On the 21st February 1920, Sheo Gobind Singh, the transferee from Malik Mukhtar Ahmad, with the consent of his transferor obtained substitution of his name as plaintiff. Now, although the entire body of landlords were impleaded, the suit is for part only of the rent. It is a suit that falls neither under section 148-A, nor section 158-B of the Bengal Tenancy Act and it is manifestly not a "rent suit." The preliminary question that has arisen in this suit has been whether Sheo Gobind Singh who is a *Mukhtar* is barred by section 136 of the Transfer of Property Act from joining in the present suit on the ground that he has purchased from Malik Mukhtar Ahmad who is an Honorary Magistrate. These facts are admitted; the only question is whether the section is applicable to the case.

Looking at section 136 of the Transfer of Property Act we see that its terms are : "No Judge, legal practitioner, or officer connected with any Court of Justice shall buy, or traffic in, or stipulate for, or agree to receive, any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by, or through him, any actionable claim so dealt with by him as aforesaid." The words "actionable claim" are defined in section 3 as meaning a "claim to any debt, other than a debt secured by mortgage of immoveable property, or by hypothecation, or pledge of moveable property, or to any beneficial interest in moveable property, not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt, or beneficial interest, be existent, accruing, conditional, or contingent."

In the Court of the Subordinate Judge the suit was decreed, it being held that the suit was a "rent suit" and that the decree would create a charge and, therefore, the arrears of *mukarrari* rent did not constitute an actionable claim ; and also on the ground that the plaintiffs' case had been proved on the merits.

In the Court of Appeal, this preliminary point under section 136 of the Transfer of Property Act was the only matter dealt with, and it held that the claim of Sheo Gobind Singh, plaintiff No. 2, was barred by that section. It is to be noted that the suit is for the arrears of rent from 1322 to 1325-*F*, and that these very arrears of rent were assigned by Malik Mukhtar Ahmad to the plaintiff, Sheo Gobind Singh, along with the conveyance of the share in the 8-annas *takhtas*, being arrears of rent due to the vendor.

Now the first question is whether the arrears of rent constitute an actionable claim within the meaning of section 3 of the Transfer of Property Act. The definition of rent in the Bengal Tenancy Act as being "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant" indicates, in my opinion, that arrears of rent are moveable property. It also appears to me that arrears of rent must, on this definition

be taken, after accrual due, to be a debt within the meaning of section 3 of the Transfer of Property Act. The point on which the controversy between the parties has taken a definite form is as to the meaning of the words "other than a debt secured by mortgage of immoveable property." Admittedly these are the only words in the section that have to be considered in connection with the exceptions that are set out therein. We know what is meant by a mortgage : it is defined in section 58 of the Transfer of Property Act as being "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability." It is manifest that the arrears of rent in this case are not secured by a mortgage within this definition. It appears to me, therefore, that the arrears of rent after accrual constitute a debt and that that debt was not secured by a mortgage. The learned Vakil for the respondents has put before us a case which appears to me to be in point, *Hiralal Singha* v. *Tripura Charan Ray* (1). In that case the plaintiff sued both for arrears of rent that had accrued prior to his purchase of a house and for current rent, which had accrued after his purchase. There was a grave matter involved as to the plaintiff's title which was put before a Full Bench, but the Divisional Bench had before it the question whether the purchase by the plaintiff, who was a pleader, was barred by section 136 of the Transfer of Property Act, in so far as the arrears of rent were concerned. It was held that the claim for the amount of arrears of rent was barred by that section. When the whole case came up again before the Full Bench, it was conceded that the claim for arrears of rent was so barred and there was no further discussion of that matter. In such a case as that, section 55 of the Transfer of Property Act would make the arrears of rent which had accrued prior to the transfer, a property that did not necessarily pass with a transfer and had to be specially mentioned, as was done in the present case. So, it is clear that here there is an actionable claim.

It has been urged on the other side that the words "other than a debt secured by mortgage of immoveable property" should be taken to be equivalent in their application to this case, to "other than a debt secured by the charge created in section 65 of the Bengal Tenancy Act." It is perfectly clear that although they have points of similarity, charges and mortgages are not the same thing. As I have pointed out, the definition of the word mortgage in the Transfer of Property Act itself is inapplicable to the case of arrears of rent, whereas, on the other hand, there is nothing that is repugnant to the meaning of the words in speaking of rent being a charge on the holding or tenure, and in fact the expression is so applied in section 65. If we find, therefore, as I do, that here there has been a transfer between a Magistrate and a *Mukhtar* of an actionable claim, it is unnecessary to go into the question whether the arrears of rent carry a charge or not. In my opinion this appeal fails and should be dismissed with costs.

Miller, C. J.—I agree. I merely wish to add that I doubt very much whether the Legislature in passing section 136 of the Transfer of Property Act had in view a case such as the present, where a purchaser of a proprietary interest in land acquires at the same time and under the same instrument, a right to recover the rent in arrear at the time of the purchase. At the same time, we are bound to construe the section in its ordinary and natural meaning and regarded in this light, I entirely agree with the decision just pronounced by my learned brother and for the same reasons as he gives.

Appeal dismissed.

(1) (1913) 40 Cal. 650 =17 C. L. J. 438=19 I. C. 129=17 C. W. N. 679.

1925 PATNA 313

DAWSON MILLER, C. J. AND FOSTER, J.

Maharaj Dhiraj of Dharbhanga — Appellant.

v.

Commissioner of Income-Tax—Respondent.

Mis. Judicial Case No. 53 of 1923, Decided on 2nd December, 1924.

(v) *Permanent Settlement—Jalkar — Right to, is included in assets of permanent settlement.*

Jalkar was included in the assets of the Permanent Settlement and in the rules for the resumption of *sayer* passed in 1790 which are referred to in Regulation XXVII of 1793. The rights of *phalkar*, *bankar* and *Jalkar*, were exempted from the resumption and remained vested in the landholders. [P. 313, C. 1]

(b) *Permanent Settlement — Hat — Right to receive ground rent of existing and future hats vested in proprietors at the time of Permanent Settlement.*

In resuming the *sayer* the Government did not intend to divest the landholders of collections made by them as consideration for the use of grounds, shops or other buildings belonging to them and ground rents whether in markets or in other parts of the zemindari were the exclusive property of the zemindar, and therefore the Commissioner of Income-tax is not entitled to deprive the assessee of his right to exemption of income received by him in the markets. Whether the *hats* existed at the time of permanent settlement or spring up subsequently these ground rents were included in the assets as the property of the zemindar at the time of settlement and the mere fact that the lessee may in some instances abuse his rights and enforce illegal exactions from those using the markets, is not by itself any ground for depriving the zemindar of his legal rights. The rents from markets are just as much *mal* rents as the rent from agricultural or any other species of land.

[P. 314, C. 1 & 2; P. 315, C. 1]

(c) *Words*—Sewa—*Meaning depends upon context.*

The word "*Sewa*" may mean "in addition to" or "apart from". Its meaning depends upon the context. [P. 316, C. 1]

(d) *Permanent Settlement—Income Tax—Settlement of* ghats *includes right to collect mooring dues—Words.*

Settlement of *ghats* not only means the right to collect tolls or ferry dues but also includes the right to mooring dues. [P. 316, C. 2]

K. P. Jayaswal and *M. Prasad*—for Appellant.

Govt. Advocate—for Respondent.

Dawson Miller, C. J.—This matter came before the Court in January last upon a reference by the Income Tax Commissioner for determination of certain questions of law, one of which was whether income derived from *jalkar*, *hat* and *ghatlaggi* was liable to income tax. The decision of the Court on that occasion was that if these items were included in the assets when the *jama* was assessed at the time of the Permanent Settlement the Income Tax Act was not sufficiently specific to indicate that it was the intention of the Legislature to vary the bargain made at the time of the Permanent Settlement and that income from such sources was not chargeable to income tax. As there was some doubt, however, whether *jalkar*, *hat* and *ghatlaggi* rights had been taken into account as part of the assets of the assessee's zemindari in assessing the *jama* at the time of the Settlement the case was remitted to the Income tax Commissioner to determine the question of fact whether the *jalkar*, *hat* and *ghatlaggi* rights in respect of which the exemption was claimed did form a part of the assets taken into consideration in settling the *jama* at the date of the settlement with predecessors in title of the assessee. The Commissioner of Income Tax has considered the question submitted to him and has made a report containing his findings. These findings, however, have been qualified in certain respects and the assessee now challenges the qualifications upon various grounds. With regard to the *Jalkar* or fishery rights no serious question arises. The Commissioner finds that *jalkar* was included in the assets of the Permanent Settlement and points out that in the rules for the resumption of *sayer* passed in 1790 which are referred to in Regulation XXVII of 1793 the rights of *phalkar*, *bankar* and *jalkar*, were exempted from the resumption and remained vested in the landholders. He has submitted an opinion, however, at the end of his report that under Art. 2 of Regulation I of 1793 it was only the *jama* assessed upon the lands which was fixed for ever and that there was no undertaking not to enhance the assessment upon incorporeal rights, whether or no, the assets of such rights were included in the Permanent Settlement. In offering this opinion the Commissioner appears to me to be travelling

outside his province. This question was determined by the Court on the previous occasion and after consideration of the Regulation relating to the subject.

With regard to *hat* or markets his general finding is that in so far as *hats* or *gunjes* are concerned, the general Regulations leave the *zemindar* the right to take ground rents and if the assessee is now being taxed only in respect of ground rents it is not necessary to consider his claims based on specific documents. There can be no doubt from a perusal of Regulation XXVII of 1793 that in resuming the *sayer* the Government did not intend to divest the landholders of collections made by them as consideration for the use of grounds, shops or other buildings belonging to them and that ground rents whether in markets or in other parts of the *zemindari* were the exclusive property of the *zemindar*. The Regulation states. "In the adoption of the above arrangements, the Governor-General-in-Council had no intention to divest the landholders of any collection they had made, under the denomination of *sayer*, not in reality a duty but a consideration for the use of grounds, shops, or other buildings belonging to them. As however, the rent of warenouses (*golah*) and shops (*dokans*) had in general been received by the officers employed to collect the *gunje*, *hat*, and *bazar* duties, and had frequently been let in farm with them, and as the the rent paid for orchards, pasture ground and fisheries had been sometimes included in the *sayer* under the denominations of *phulkar*, *bankar*, and *jalkar*, the Governor-General in-Council thought it necessary to declare expressly, that it was by no means his intention to include in the resumption of the *sayer* then ordered, the monthly or annual rents paid for grounds, or buildings erected thereon, of whatever description or the *phulkar*, *bankar* and *jalkar*, such rents being properly the private right of the proprietors, and in no respect a tax or duty on commodities, the exclusive right of Government." The exemptions claimed in respect of *hats* in the present case are claimed as income derived from ground rents of the land or house in the *hats*. The Commissioner, however, is apparently not satisfied that the rent so received by the assessee did not include some illegal exactions in the nature of internal duties or tolls which were reserved by the Permanent Settlement as the exclusive property of Government. He says. "It is common knowledge that wherever *bazar* dues are realised not only ground rent is collected but also other duties, which may be levied either on every person who brings goods into the *bazar* or from both purchaser and seller in every transaction or in other ways. No doubt, the *zemindar* who lets out a *bazar* in *thicca* does not himself collect internal duties but I think it is safe to say that the *thiccadar* invariably does. In so far as this question is one of fact no evidence whatever has been offered that the *zemindar's* receipts for *bazar* settlement are really ground rents. If they are not ground rents the assessee has to prove that these internal duties were included in the assets of the permanent settlement. In my opinion he has failed to do this" Whether by this finding the learned Commissioner intends to exclude from exemption the whole of the income derived from *hats* or only a portion thereof is by no means clear, but in his summary of his findings at the end of his report it would appear that he intended to find that the ground rent of the *gunjes* or markets specifically mentioned in the Schedule prepared at the time of the settlement were included in the assets although it would seem that his view is that such ground rents as were not specifically mentioned were not included. Nor does he arrive at any definite findings as to how much of the exemptions claimed may be justified as ground rents or how much he regards as payment in respect of internal duties. It seems to me, however, that the Commissioner is not entitled to deprive the assessee of his right to exemption of income received by him as ground rent payable by the lessee for the land and houses in the markets. It is quite clear from the Regulation that these ground rents were included in the assets as the property of the *zemindar* at the time of settlement and the mere fact that the

lessee may in some instances abuse his rights and enforce illegal exactions from those using the markets, is not itself any ground for depriving the *zemindar* of his legal rights. The rents from markets are I think just as much *mal* rents as the rent from agricultural or any other species of land. The exemptions are claimed as being ground rents from markets, ferries and fisheries and if the Commissioner is not satisfied that the income received is in fact ground rent he has ample power to call upon the assessee to produce his books or other documents relating to the collections and to enforce the attendance of witnesses to give evidence upon a question about which he has any doubt (See Ss. 22 (4) and 37 to 39 of the Income Tax Act, 1922). The Commissioner may if he thinks fit, investigate further into the matter by calling for the production of evidence or documents to show the exact nature of the collections made under the head of ground rents for which exemption is claimed but he is not entitled on mere suspicion to assume that that which was received in the name of ground rent is not in fact that which it purports to be. It does not appear that the assessee has been called on to produce his collection papers or his contracts with the *thiccadars* which would show the nature of the income derived from the sources named.

The next question which arises on these findings is that the Commissioner would apparently exclude from exemption the ground rents in respect of all existing *hats* except those specifically mentioned in the settlement papers as then existing. It is not contended that the ground rents of markets which came into existence subsequently to the permanent settlement would not be part of the *zemindar's* assets, but the Commissioner points out that in the settlement documents relating to the different parganas of the assessees' *zemindari* only a few *hats* or *gunjes* are specifically mentioned and argues from this that there may have been others then existing, and still subsisting about which nothing is said and which were therefore not included. It is probably correct to say that there are *hats* now existing within the Dharbhanga Raj about which no specific mention is found in the settlement papers, but Regulation XXVII of 1793 is so clear and emphatic in stating that such rents were to be retained by the proprietors that it cannot reasonably be presumed that any markets then existing were intended to be excluded without specific mention of the fact in the settlement papers. I do not think that any inference can be drawn that any markets now existing in fact existed at the time of the permanent settlement although they were not mentioned in the settlement papers. The natural and only proper inference appears to me to be the exact opposite, for we find in the rules for the resumption of *sayer* passed on the 17th June 1790 and set out in Regulation XXVII of 1793 the following article :—

"2nd, no monthly or annual payments now made or which may be hereafter made for the use of the land or houses, shops or other buildings erected thereon, being clearly of the nature of rents and not duties or taxes, are to be understood to be within this prohibition but all such rents are to be enjoyed by the proprietors entitled thereto as heretofore".

The irresistible inference therefore is that the settlement left to the *zemindar* the ground rents of land, shops etc., in all the then existing *hats* except such, if any, as were specifically excluded and if more *hats* are now shown to exist than appear in the settlement papers it must be presumed, in the absence of evidence to the contrary, that they have sprung up since the settlement. If they existed at the time of settlement they were left under the general regulation to the *zemindar* in the absence of any specific exclusion. The *onus* is not on the assessee to prove inclusion but upon the Crown to prove exclusion.

The learned Commissioner appears also to have had some doubt as to the proper rendering in idiomatic English of the word "*sewa*" where it appears in the application of the assessee's ancestor for settlement of pargana Hati, a part of the Darbhanga Raj. According to his view the proper translation

of the word was "with the exception of". If this be accepted as accurate he thought that the application excluded settlement of *gunjes* or markets although he states he had been shown a dictionary dated 1802 prepared under the orders of the East India Company which says that the word may also mean "in addition to". The truth is that the meaning of this word appears to depend upon the context in which it is found and it may be in many cases rendered into English either by the words "in addition to" or by the words "apart from." A simple example may be given where either rendering would be accurate in English. The sentence "apart from this house I have many others" might equally well be expressed by saying, "in addition to this house I have many others". The matter, however, is not one of much importance as it is clear from the settlement papers that ground rents for markets as distinguished from tolls or other internal duties in connection therewith were included in the schedule of the assets settled with the *zemindar*. In fact the Commissioner states, "I agree that the *gunjes* mentioned in the schedule must apparently be included."

With regard to Pargana Haveli Kharagpur which was settled for 20 years in 1844 and permanently settled in 1866 the Commissioner has pointed out that although the markets were included in the settlement, the Income Tax Act of 1860. was then in force and he states, "It is clear that non-agricultural income of this Pargana must have been assessed or at least assessable to income tax under the Act of 1860 and there is nothing in the *rubakar* of 1866 to indicate that such income would in future be exempted from income-tax". With respect to the Commissioner, the exemption is claimed under the permanent settlement regulations which apply as much to subsequently settled lands as to lands settled in 1793. Moreover this question is one which was disposed of by this Court at the previous hearing and it is not open to the Commissioner to re-open that decision

With regard to *ghatlaggi* it is agreed that the *ghats* were settled with the assessee's ancestors. The Commissioner takes the view, however, that settlement of *ghats* ordinarily means the right to collect tolls or ferry dues and not the right to mooring dues. In my opinion this is giving much too narrow a construction to the rights incident to the settlement of *ghats*. The proprietor is just as much "entitled to be" paid for the use of the *ghats* for purposes of mooring as he is to take dues from those using the *ghats* for other purposes.

The case must be remanded to the Commissioner of Income Tax to be dealt with according to our ruling upon the questions dealt with in this judgment. He is at liberty, however, if he should think fit, to call for further evidence as to the exact nature of the exemptions claimed by the assessee under the head of ground rents for *hats*.

It is necessary to deal with the costs of the hearing originally as well as the hearing after remand. We think that the petitioner, having substantially succeeded both in the original petition upon the case stated and in the application to us after remand, is entitled to his costs and we assess the hearing fee in respect of both the applications together at a sum of Rs. 500.

Foster, J.—I concur.

Case remanded.

1925 PATNA 316

MULLICK, AND BUCKNILL, JJ.

Debi Lal—Plaintiff—Petitioner.

v.

Jai Prakash Narain Singh and another—Defendants—Opposite Parties.

Civil Rev. No. 162 of 1923, Decided on 2nd July 1923, to revise an order of the Sub. J., Gaya, D/- 28th March 1923.

Civil P. C., O. 17, R. 3- Dismissal of suit for failure to supply defendant with copies in a specific language is illegal.

An order directing Plaintiff to supply the defendant with copies of entries in the plaintiff's accounts book in a specific language is without jurisdiction, and the dismissal of the suit under R. 3 of Order 17 for non-compliance with such order is illegal. [P. 317, C. 1 & 2]

S. M. Mullick and *N. N. Sen*—for Petitioner.

Kailaspati, S. Dyal, Brij Kishore Prasad and *Raghunandan Prasad*—for Opposite Parties.

Mullick, J.—The suit was instituted on the 23rd August 1922. The plaintiff filed his account-books which were in the Mahajani character and applied for their return on condition that a true copy was kept upon the record. The Court ordered that the books should be returned after inspection by the defendants and adjourned the case till the 9th January 1923 On the 9th January the Court directed that the plaintiff should make over a Hindi copy of the entries to the defendants and he adjourned the case for hearing till the 27th January. Instead of supplying Hindi copies it appears that the plaintiff supplied copies, in Devanagari both to the Court and to the defendants. On the 27th January the defendants applied for an adjournment and for issue of warrant of arrest on Rai Sahib Surajmal, who is the brother of the plaintiff. The Court thereupon recorded the following order :—"Plaintiff to make over a Hindi copy of the entries of *rokar* and *khata* to the defendants' Pleader. The plaintiff's Vakil, Babu Deep Narain Lal, undertakes to make Rai Sahib Surajmal appear in person on the date fixed. Both parties to come ready on the date fixed. Plaintiff's witnessess to come over on the said date." It seems that when this order was presented for counter-signature to the Pleader of the plaintiff, he recorded the following note : "I have undertaken to only inform him."

Nothing further appears to have been done by the learned Subordinate Judge in the matter and on the 28th March, when the case came up for hearing, the plaintiff put in a petition for the issue of a commission for the examination of Rai Saheb Surajmal on the ground that he was ill. The Court thereupon recorded the following order : "The plaintiff has not yet complied with the Court's order of 9th January 1923 and 27th January 1923. The suit is, therefore, dismissed. Defendants will get costs on *ex-parte* scale." It is not clear under what provision of law this order was passed. To begin with, there is no statutory provision compelling the plaintiff to furnish the defendants with a copy of his documents either in Devanagari or Hindi or in any other language. The Court's direction upon the plaintiff to furnish a copy of the account-books in the Hindi character was wholly without jurisdiction. In point of fact, the plaintiff did make an attempt to comply with the Court's order by furnishing the defendant with a copy in the Devanagari character which is the alternative Court language for the Gaya District and in any event the learned Judge's order dismissing the suit on this ground was, in my opinion, wrong.

Then, with regard to the non-compliance in the matter of the production of Rai Saheb Surajmal, the note recorded by Babu D. N. Lal seems to indicate that he never agreed on behalf of his clients to produce Rai Saheb Surajmal in person. Indeed, it is difficult to see how he could be made to produce a witness in person if that witness either by reason of illness or for any other cause was unable to appear in Court; much less was it possible for the Subordinate Judge to dismiss the suit because the plaintiff had not been able to bring the defendant's witness to Court on the 28th March.

It is contended that the learned Subordinate Judge acted under O. 17, r. 3, Civil Procedure Code and that as the plaintiff had failed to carry out an order which precluded him from continuing the trial he was justified in dismissing the suit under r. 3 of O. 17. Now, in both the above matters the learned Subordinate Judge acted without authority ; but apart from the fact that there was no statutory provision the orders were in themselves so unreasonable that it was impossible to expect the plaintiff to carry them out. His proper course was either to issue a warrant for the attendance of Rai Saheb Surajmal or to issue a commission for his examination as requested by the plaintiff and in any event he should have called upon the plaintiff to proceed with his case ; and if he was unwilling to grant any further adjournment he should have made a decree upon the evidence adduced before him.

In my opinion the order of the 28th March was not a decree, for there was no adjudication. I agree also that it was wholly without jurisdiction.

The result is, that the order of the Subordinate Judge will be set aside with costs hearing fee Rs. 32.

The Subordinate Judge is directed to proceed with the trial according to law.

Bucknill, J.—I agree.

Order set aside.

1925 PATNA 318

DAWSON MILLER, C. J. AND MULLICK, J.

Tulaman Baid—Defendant — Petitioner.

v.

Prayag Sahu and others—Plaintiffs—Opposite Party.

Civil Rev. No. 291 of 1924, Decided on 7th November 1924, against an order of the Munsif, Palamau, D/- 16th April, 1924.

Civil P. C., S. 115—Court can construe its own order—No revision lies if no irregularity occurred in exercising this power.

A Court has jurisdiction to construe its own decision and the High Court would not interfere if there is no irregularity in the exercise of that jurisdiction. [P 319 C 2]

Murari Prasad and *A. B. Saran*—for Petitioner.

Saran—for Opposite Party.

Dawson-Miller, C. J.—This is an application in revision from an order passed by the Munsif of Palamau on the 16th April 1924, in a partition suit in which the present Petitioner was one of the Defendants and the Opposite Party were the Plaintiffs. Although the matter was strenuously argued by Mr. Murari Prasad on behalf of the Petitioner, the case really presents no features of difficulty. The Plaintiffs in the partition suit were the proprietors of 2 annas 8 pies share in mauza Gurtur which they purchased from one Parbhuram Baid who before the purchase held 5 annas 4 pies in the village. The Petitioner also held 5 annas 4 pies share and the remaining third share was held by other parties. It appears also that the balance of Parbhuram's share had also been sold to another party. In the year 1919 it appears that a previous partition suit was instituted by the Plaintiffs and in that suit the Petitioner put in a defence alleging that a previous private partition had taken place many years ago in which the cultivated and culturable lands of the village had been partitioned into three separate *pattis* of 5 annas 4 pies, one of these shares being at that time allotted to Parbhuram or his predecessors, and that it was only the *jungle* and waste lands of the village that still remained *ijmal*. He contended therefore that the whole village could not be partitioned and that the Plaintiffs could only get a share of the cultivated lands held by Parbhuram. This contention prevailed and a preliminary decree was passed in that suit for partition of the *jungle* and waste lands as existing at present of the entire village among all the parties and for the division of the entire lands forming the 5 annas 4 pies *takhta* of Parbhuram Baid between the Plaintiffs and the Defendant No. 4 only, the Defendant No. 4 being the purchaser of the other portion of Parbhuram's interest. This decree was affirmed on appeal to the High Court and a Commissioner was duly appointed. The Plaintiffs, however, did not proceed with the partition and on the 26th February 1921, the Plaintiffs having failed to pay the Commissioner's fee the proceedings terminated. What the exact order made was we have not seen. We have been told that the case was struck off, whatever the effect of that may be. At all events the proceedings then terminated and no further action was taken under that decree.

In 1923 the Plaintiffs again brought a suit for partition making the Petitioner and the other proprietors Defendants. The claim in the present case was twofold. They prayed for a partition in respect of the Plaintiff's 2 annas 8 pies share in the manner directed in the judgment in the previous suit and that the Plaintiffs be put in separate possession, that is to say, they sought for partition of the Plaintiffs' share out of the share of Parbhuram. Alternatively they sought for partition of the Plaintiffs'

share out of the whole village upon the assumption and after declaring that the village was joint. Nobody appeared to defend that suit. Evidence was given on behalf of the Plaintiffs that no previous partition had taken place and in the result the learned Munsif passed an order in these words :—"That a preliminary decree for partition be passed. The Plaintiffs shall get a separate *takhta* and separate possession over 2 annas 8 pies share." I pause here for a moment to point out that had the Defendants appeared in that suit and urged a plea of *res judicata* they might possibly have succeeded. The learned Munsif however, before whom the case came in the absence of any appearance on behalf of the Defendants passed a decree in the general terms which I have already referred to. He may have been right or he may have been wrong as a matter of law in arriving at that decision but we are not concerned with that now. A decree was passed in Plaintiffs' favour and it could only be set aside on appeal or by way of review or by some other proper procedure. No such proceedings, however, were taken. A Commissioner was appointed to effect the partition by metes and bounds and subsequently an application was made for re-hearing on behalf of the Petitioner who, as I stated, had offered no defence when the suit came on for trial. In that proceeding two points were argued, first, that the matter was *res judicata* and, secondly, that the order in the decree was consistent with a decree for partition out of Parbhuram's share only and that it should be so construed. With regard to the first point it was not open to the Petitioner at that stage to rely upon the defence of *res judicata*. It might or might not have been a good defence to the suit ; I offer no opinion about it ; but it could not be urged in an application for re-hearing under Or. 9, r 9 of the Civil Procedure Code and the Munsif rejected it. With regard to the second point the Munsif who made the order stated that it was a decree for partition of the whole village and gave reasons why he considered the previous suit was not *res judicata* and ordered partition to proceed. He certainly had jurisdiction to construe his own order and he had no doubt that it was an order for partition of the whole village. Moreover the language of the order was certainly wide enough to support that view. In these circumstances I can see no reason why we should interfere in revision with the order then passed that the partition should proceed. The Munsif had jurisdiction to make the order and there was no irregularity in the exercise of his jurisdiction. In my opinion this application should be dismissed with costs

Mullick, J—I agree.

Application dismissed.

1925 PATNA 319

DAWSON MILLER, C. J. AND FOSTER, J.

Mathura Pandey—Appellant.

v.

Chandrika Rai and others—Respondents.

S. A. No. 1792 of 1921, Decided on 13th June, 1924 from the decision of the Sub J., Shahabad, D/-28th May, 1921.

Deed—Construction—Debt being secured and transferor being entitled to redeem, transfer is mortgage, not lease.

The only test to find out whether a transfer is a lease or a mortgage is to examine whether the object of the transfer is to secure the repayment of a debt and secondly whether there is either expressly or by implication, reserved to the transferor a power of redemption of the property. [P 320 C 2]

Sivanandan Rai—for Appellant.

Parmeshwar Dayal and *Jadubans Sahai*—for Respondents.

Dawson Miller, C. J.—The only question for decision in these appeals is whether certain documents which have been referred to as *rehan* deeds and which are so described therein are mortgages or leases. The predecessor-in-interest of the plaintiffs appears to have executed three such

documerts in favour of the predecessor-in-interest of the defendants whereby certain land was put into thei possession in consideration of a certain advance, the conditions being, generally, that the proceeds of the property should be taken by the lender in lieu of interest, that a certain rent should also be paid to the borrower, that the property should be redeemed at a date roughly about eighteen months after the execution of the deed with power to redeem in *Jeth* of any following year upon payment of the principal sum advanced. There was a further stipulation that in the event of the rent not being paid it should carry interest at 2 per cent. per mensem and should be set off against the debt when the final settlement came to be made at the end of *Jeth* in any year. There was a further provision as to what was to happen in the case of dispossession of the *rehandars*, it being provided that in such a case the lender should be competent to realise the entire amount with interest at 2 per cent. from the date of dispossession. Finally the deed contains a provision to this effect. "In security of this debt we mortgaged the *rehan* property and we shall not encumber it until re-payment of the *rehan* money; we have, therefore, executed this *rehan* deed so that it may be of use when required." Both the Trial Court and the learned Subordinate Judge on appeal decided that this document was a mortgage and not a mere lease and that therefore, the mortgagors were entitled to redeem, as they claimed in the plaint in the suit, upon a deposit of the amount advanced.

From this decision of the Subordinate Judge the present appeals have been brought. It is contended as was contended in the Court below that the document is really a lease and not a mortgage. I do not think that any general rules can be laid down covering all such cases. Each of these documents must be looked at and construed according to the tenor of the document. There are, however, certain priciples which govern the Court in determining cases of this sort and these principles have, in my opinion, been accurately stated by the learned Subordinate Judge who in a very careful and lucid judgment has referred to the salient features of the document and then laid down the principles which ought to be followed in construing documents of this sort. He says and I cannot do better than quote from his judgment. "It is clear that every case has to be dealt with on its own facts. A mortgage sometimes bears much closer affinity to certain forms of leases from which it is not often easily distinguishable. The sole criterion for distinguishing a lease from a mortgage, is, I think, to see whether the transfer is made to secure the re-payment of a debt and whether there is a power of redemption reserved to the lessor either expressly or impliedly so that it distinctly appears that the parties themselves in fact intended the transaction to be in the nature of a mortgage." And applying those principles, he came to the conclusion that the documents in these cases were purely mortgages and not leases. The learned Judge has also pointed out the salient features of the documents; they are in the same tenor. The documents, he says, recite that the creditors were to cultivate the areas and appropriate the produce in lieu of interest, that they were to pay annually to the executants a certain specified amount as rent, that on non-payment of the stipulated rent the executants would be entitled to get interest at 2 per cent. per mensem and when they paid the principal sum at the end of *Jeth* they were to get possession of the *rehan* lands, and that if any portion of the annual rent remained unpaid by the creditors, the executants would be entitled to deduct that sum from the principal amount at the time of re-payment, and if the principal amount was not re-paid on the due date the executants would be at liberty to re-pay the same at the end of *Jeth* any year following and to enter into possession, in case the creditors were dispossessed from the land by the acts of the executants the former would be entitled to realise the whole money with interest at 2 per cent. per mensem from the date of dispossession till the realisation of their dues, and finally as security the

lands specified were hypothecated to the defendants

It seems to me that upon the facts stated and having regard to the stipulations in the documents in question, these lands were clearly hypothecated to the lenders for the purpose not only of securing the interest on their loan but also for the purpose of securing the re-payment of the principal sum advanced. In fact they could remain in possession of this property for ever provided the loan was not re-paid. The mere fact that if they did not pay their rent this might be taken into account when the reckoning came does not appear to me to make any difference to the nature of the transaction. It was clearly not one of those cases where only an advance is made and by the end of a specified number of years the land shall be taken back by the borrower, the loan being treated as having been paid off principal and interest, by the profits. Such cases are regarded merely as case of payment of rent in advance and are clearly not mortgages. In the present case those features are clearly absent. The land appears to me to have been mortgaged for a double purpose, both for securing the payment of interest, or rather, as it is put, in lieu of interest and also for securing the re-payment of the principal sum advanced.

I see no reason to differ from the judgment of the learned Subordinate Judge and I think that hese appeals should be dismissed with costs.

Foster, J.—I agree.

Appeal rejected.

1925 PATNA 321

ADAMI AND BUCKNILL, JJ.

Anant Singh—Petitioner.

v.

Hari Charan Chaukidar — Opposite Party.

Criminal Rev. No. 399 of 1924, Decided on 13th November 1924, from an order of the Dt. Mag. Chapra, D/-29th May 1924.

(a) *Criminal P. C. S. 439—Circumstances of assault not truly disclosed by complainant—Acquittal proper.*

Where the trying Magistrate thought that the accused has assaulted the complainant, but was quite satisfied that the circumstances under which the assault had taken place had not been truly laid before the Court and acquitted the accused giving him the benefit of doubt. [P. 322 C. 1]

Held: that in the circumstances it would not have been safe to have convicted the accused of any offence.

(b) *Criminal P. C. S. 417—Government alone has the right to appeal against acquittal (Obiter.)*

The practice in the Patna High Court is not to grant applications made by private persons for setting aside orders of acquittal. There is always a remedy in the hands of such a person who feels himself really aggrieved by an order of acquittal and that is to go to the Government legal advisers and if he could show them that he had good grounds for being aggrieved by an order of acquittal they would on his behalf take it up; and, in such circumstances, the position of the Crown, which, alone has the conduct of prosecutions is entirely different when applying to the High Court against an order of acquittal from the position which a private person has. [P. 322 C. 1 & 2]

Guru Saran Prasad and Anant Prasa—for Petitioner.

Jaffar Imam—for Opposite Party.

Bucknill, J.—This was an application in Criminal Revisional Jurisdiction made by a person called Anant Singh. The cricumstances under which this application comes before this Court are very simple. A certain Hari Charan Chaukidar was charged by the complainant with assault and he was tried by a Magistrate of the Second Class of Chapra on the 12th April 1924 for an offence said to have been committed against the provisions of Section 325 Indian Penal Code. For certain reasons which the Magistrate expresses at considerable length the accused man, was acquitted. It is important I think to observe that there is certainly in the Magistrate's decision one sentence which appears to indicate that he was satisfied that the accused person had in fact assaulted the complainant. This passage which occurs at the end of his judgment reads "There cannot be any manner of doubt that the complainant had been very badly assaulted by the accused. One may be sorry for him." I pause

here to mention that from this order of acquittal the applicant here appealed to the District Magistrate of Chapra who however refused to interfere by a short decision dated the 29th of May last and it is really in connection with this order of that date that the applicant is now applying to this Court.

The reasons which are given by the trying Magistrate for giving as he calls it, the benefit of the doubt to the accused in this case may very shortly be stated to be that although it would seem that the Magistrate thought that the accused man had assaulted the complainant, he was quite satisfied that the circumstances under which the assault had taken place had not been truly laid before the Court. In fact he definitely stated that he was unable to hold in any way that the occurrence took place in the manner as related by the complainant. This of course at once raises a very large question as to what might have been the circumstances under which the alleged assault took place. It indeed may have been that there was a fight in which the complainant had in fact been the aggressor, at any rate these circumstances according to the trying Magistrate and according to the view of the District Magistrate were not disclosed and in view of that fact it certainly would seem that it would not have been safe to have convicted the accused of any offence. I mention the circumstances in some detail because I think it is perhaps convenient that I should deal specifically with the facts in this case. But apart from these particular facts, there is, as has been many times pointed out in this Court, the greatest difficulty in the way of a private person coming to this Court in revision and asking successfully for the setting aside of a decision of acquittal. The practice in this Court is not to grant applications made by private persons for setting aside orders of acquittal. The reason for this practice is not far to seek, and indeed this Court has gone so far in at least one decision, as to state that a private person has no legal *locus standi* to make any application. I have not considered that point carefully and only draw attention to it as showing that it may be possible to justify the practice of this Court by a conclusion that there may be no *locus standi* on the part of a private person to make applications of this character. I should however like to say that, for reasons which I have already given, I do not think that in any case this would have been a matter in which we should have thought it fit or desirable to interfere. I am satisfied however that there is always a remedy in the hands of person who feels himself really aggrieved by an order of acquittal; he can always go to the Government legal advisers and I am confident that if he could show them that he had good grounds for being aggrieved by an order of acquittal they would on his behalf take it up: and, in such circumstances, of course, the position of the Crown which, as has been said, alone has the conduct of prosecutions is entirely different when applying to this Court against an order of acquittal from the position that a private person has. However, as I have said, in this case there is no reason for interference and the application must be rejected.

Adami J.—I agree.

Application rejected.

✱ 1925 PATNA 322

KULWANT SAHAY, J.

Pancham Sao—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Rev. No. 282 of 1924, Decided on 9th June 1924, from an order of the Addl. Dt. Mag., Patna.

✱ *Criminal Trial—Continuing offence—Daily fine for future offence is illegal.*

It is not permissible in law to enforce a daily fine in anticipation of a commission o an offence. [P 323 C 2]

S. N. Banerjee—for Petitioner.

Judgment—The petitioner was convicted by the Sub-Deputy Magistrate of Dinapore under S. 2, clause (2) of the By-laws framed by the District

Board of Patna which provides that whoever makes any encroachment or causes obstruction by means of a building wall, *chabutra* or fencing or by planting trees or cultivating crops, or in any other way on any road, shall on conviction, be liable to a fine not exceeding Rs. 20 and to further penalty not exceeding Rs. 2 each day after the imposition of the fine for the continuance of the encroachment, obstruction or nuisance. The offence with which the petitioner has been charged is that he has constructed a house on a portion of the District Board road. The learned Sub-Deputy Magistrate has found it as a fact and in fact it was admitted before him that there was a slight encroachment on the District Board road. He accordingly imposed a fine of Rs. 15 under S. 2, clause (2) of the By-laws. In so far as the fine of Rs. 15 is concerned, the petitioner has no grievance; but the learned Sub-Deputy Magistrate proceeded to impose a further fine of Rs. 2 per day till the encroachment continued. The petitioner objects to the fine of Rs. 2 per day for the period during which the encroachment continued. He contends that the Magistrate had not jurisdiction to impose a fine for an offence which had not been committed at the time the charge was laid against him and the sentence was passed. In other words, he says that the conviction in so far as it relates to a future offence of continuing the encroachment is bad in law.

To my mind the contention is sound. The learned Sub-Deputy Magistrate allowed the petitioner one month's time to remove the encroachment and he ordered that if the petitioner failed to remove the encroachment within a month, he would be liable to pay a fine of Rs. 2 per day till the encroachment continued. It has been stated on behalf of the petitioner that within the month allowed by the Sub-Deputy Magistrate, he approached the District Board authorities for a settlement of the portion of the road encroached upon and the District Board authorities, as a matter of fact, have settled this portion of the road with him on a certain rental per year. The letter of the District Board Engineer on the record supports this contention of the petitioner. As authority for the proposition that it is bad in law to impose a daily fine in anticipation of the commission of the offence, reference has been made to *Ram Krishna Bishwas* v. *Mohendra Nath Mozumdar* (1), *Nilmani Ghatak* v. *Emperor* (2) and *In re Limbaji Tulsiram* (3). These cases support the contention of the learned Vakil for the petitioner.

The sentence of fine of Rs. 2 per day imposed by the learned Sub-Deputy Magistrate for the continuation of the encroachment is, therefore, bad in law and must be set aside. The fine of Rs. 15 imposed by him under clause (2) of S. 2 for the encroachment will stand. The additional fine of Rs. 2 per day has already been realised. This will be refunded.

Order accordingly.

(1) [1900] 27 Cal. 565.
(2) [1910] 37 Cal. 671=11 Cr. L. J. 540=7 I. C. 931.
(3) [1898] 22 Bom. 766.

✱ 1925 PATNA 323

DAWSON MILLER, C. J. AND FOSTER, J.

Mrs. Ella Lavelette — Petitioner — Appellant

v.

E. A. Tabuni and others—Opposite Party—Respondents

F. A. No. 14 of 1923, Decided on 18th November, 1924, against an order of the Dt. J., Patna, D/- 15th January, 1923.

✱ *Succession Act, S. 189—Grant of letters to minors is illegal and liable to be set aside in revision—*

Under S. 189 letters of administration cannot be granted to any person who is a minor; where such a grant is made, the High Court would set it aside in revision.

[P 325 C 2]

P. C. Rai and N. C. Ghosh—for Appellant.

Girindra Nath Mukherjee for *Purnendu Kumar Mukherji*—for Respondents.

Dawson-Miller, C. J. — This case comes before us nominally as an

appeal from an order of the District Judge, dated the 15th January 1923, refusing an application of th present Appellant to review a previous order of the 16th December 1922 directing the grant of letters of administration to issue to certain minors through their guardian. The Appellant in this case is Mrs. Cassels, formerly Mrs. Lavelette. Her first husband Mr. J. A. Lavellette died intestate leaving as his heirs his widow the present appellant and certain minor grand-children, the children of a deceased daughter. The amount of the estate left by the testator is small and it is therefore essentially necessary to avoid as far as possible in the interests of all parties any unnecessary litigation in connection with the administration of this estate. Under the terms of the Indian Succession Act the widow takes a third of the property and the grand-children, two thirds. An application appears to have been made by the widow for a succession certificate for the purpose of collecting the debts of her deceased husband sometime shortly after his death. In that application unfortunately for her she neglected or at all events omitted to mention the fact that in addition to herself there were other members of the deceased man's family, namely, the grand-children to whom I have referred. There was then an application presented to the District Judge on behalf of the minor grand-children through their father and guardian Wilfred Edward Tabuni asking that a grant of letters of administration might be made to them. Notices were issued in those proceedings upon the near relations of the testator and upon the present Appellant. Her attitude with regard to that petition is to be found in a petition filed by her in those proceedings in which she states that she had no objection to the Petitioners, that is the minors, succeeding to their legal share of the estate but asked that the amount should be kept in fixed deposit till the attainment of the majority of the minors and as appears from a subsequent petition in those proceedings filed by Mrs. Cassels, the Appellant, her reason for this was that she knew or at all events she alleged,—it is not supported yet by any definite evidence,—that the father of the minors was heavily indebted and had no means of paying his debts; that his salary with overtime came to only Rs. 200, that he was a great spend-thrift and drank a lot and she felt that if the money came into his hands he would very soon get through it in drinking and otherwise. It appears also that until the death of her husband these grand-children whose mother was dead had been living with the appellant Mrs. Cassels.

When the application for grant of letters of administration came before the District Judge, he took the view that although Mrs. Cassels had applied for letters of administration she had put herself out of Court because in the application for a succession certificate she had failed to mention the fact of the existence of the grand-children. The learned Judge therefore presumably considered her not to be a proper person to be appointed. He goes on and says: "The only alternative is to appoint as administrator the father of the minors, Mr. Wilfred Edward Tabuni who is the applicant with whom we are here concerned," and he ordered letters of administration to issue to the applicant on his executing an administration bond. In pursuance of that order a grant of letters of administration was issued in fact to the applicants in the proceedings before the learned Judge. The applicants however were the minors and not their father and the grant is made to "Eugene Alexander Tabuni minor son, Edward James Tabuni minor son and others through their next friend and natural guardian Wilfred Edward Tabuni." It will be observed therefore that there was no grant of letters of administration to Wilfred Edward Tabuni. The grant was in fact to the minors through him as their next friend and natural guardian. Now under S. 189 of the Indian Succession Act, letters of administration cannot be granted to any person who is a minor. Therefore the grant in the present case was obviously illegal and beyond the powers of the learned Judge to make.

On the 15th January 1923 an application was presented to the learned Judge which has been treated as an application for review of the order dated the 16th December 1922. The application which purports to be made under various sections of the Indian Succession Act and of the Civil Procedure Code states that the applicant Mrs. Cassels, is willing to act as administratrix to the estate of the deceased and contends that she is the fittest person to act as such. She further says that the omission of the names of her grand-children in the proceedings for a succession certificate was due to the negligence of her *karpardaz*. She further alleges that the grand-children were absolutely neglected by their father, the present administrator, and that they are more dear to her than any one else as she had no other near relations. She therefore asks the Court to review the order, dated the 16th December 1922, and to revoke the administration order and appoint the Petitioner as administratrix, but if the Court should think that any other person should be joined with her then let it do so. It will be seen that that petition was an application for review of the previous order and also asked for revocation of letters of administration already made.

When the matter came before the learned District Judge he considered that as the lady had been sitting in Court at the time when the order was passed on the 16th December she could not come forward now and ask for a re-hearing on the ground that her Counsel was absent. He points out that her claims to administer the estate were in fact considered upon that occasion and he rejected the application. It does not appear to have been pointed out to the learned District Judge that the grant of letters of administration made was a grant to persons disqualified to hold that office. The matter, however, has been pointed out to us on appeal to this Court from the refusal to set aside the grant and the question is how we should deal with the present application. It is in form an appeal from an order refusing a review and it is pointed out to us that there are no grounds here for allowing a review. In the circumstances, I think, however, that we are entitled to and ought, having regard to the undoubted facts of this case—I refer to the fact that the grant is to persons who are not qualified to act as administrators—to treat the application as one under S. 115 of the Civil Procedure Code and treat the matter as one of revision. It is quite clear that in making the grant objected to in this case the learned Judge was acting altogether without jurisdiction and if proceedings were taken to set aside that grant under S. 234 of the Succession Act there can be no doubt that the grant would inevitably be set aside. Whatever the intention of the learned Judge may have been the grant was in fact made to certain minors. It would appear from the order made by the learned Judge upon which the grant was made that he treated the father of the minors as himself the Petitioner but looking at the record it appears that the father was not the Petitioner at all. The minors themselves were the Petitioners. Therefore the whole of the proceedings for grant of letters of administration was from first to last irregular and illegal. These minors had no power to be appointed and they were in fact appointed under the grant. In a case of this small magnitude, the total assets of the deceased being something in the neighbourhood of Rs. 8 000, I think it would be a disaster that this litigation should be prolonged unnecessarily and I consider therefore that we ought to act under the powers granted to the Court by S. 115 of the Civil Procedure Code and treat this as a matter of revision. The grant cannot possibly stand and therefore, in my opinion, must be set aside. The learned Judge will have to consider afresh and upon affidavits or evidence of the parties, who is the proper person to be appointed administrator in this case. Under S. 201 of the Succession Act the widow of the deceased is undoubtedly the proper person to be appointed administrator unless there is good cause for excluding her The learned Judge seems to have thought that her

omission to refer to the existence of the grand-children in her application for a succession certificate was in itself quite sufficient to debar her claim. Looking, however, at the attitude she has taken throughout this case I cannot help feeling that her only interest in the matter is to see that her grandchildren's rights are protected. This, however, will be a matter for the learned Judge to consider when the application for administration comes again before him. He will then also have to consider whether there was any truth in the suggestion made by Mrs. Cassels that the father of these children is a spend-thrift and addicted to drink. The whole matter, however, will be open to the District Judge and I do not wish anything I may say to prejudice him in favour of one party or the other. It is a matter which will have to be considered when he has the evidence before him but so far as the present application is concerned I think that the grant already made must be revoked. Let the sum paid into Court as Court fee upon the application for letters of administration remain pending further orders. I think that the costs of this case ought to be realised out of the estate when the administrator is appointed and the estate is administered.

Foster J.—I agree.

Appeal allowed as revisio

1925 PATNA 326

DAS AND ROSS, JJ.

Debi Bakchand and another—Appellants.

v.

Barakatunissa—Respondent.

F. A. No. 76 of 1921. Decided on 29th February 1924, from the decision of the Sub. J. Gaya, D/- 17th December 1920.

Contract Act, S. 16—Mere exorbitant rate of interest is no ground of relief in absence of proof of lender having been in a position to dominate the will of the borrower.

The facts that the borrower is under a pressing necessity for money does not of itself place the lender in a position to dominate the will of the borrower within the meaning of S. 16 of the Contract Act, (34 Cal. 150 Foll). No relief can be claimed by a borrower unless it is proved by him first that the lender was in a position to dominate his will and secondly that the bargain was unconscionable within the meaning of Cl. 3 of S. 16 of the Contract Act. Unless there is the concurrence of these two elements the borrower cannot be properly granted relief. The mere fact that the rate of interest is exorbitant is not a ground for relief unless it be shown that the lender was in a position to dominate the will of the borrower. [P 328 C 2 & P 329 C 1]

Sultan Ahmad and *Kailaspati*—for Appellants.

Ali Imam, *S. M. Mullick* and *Md. Hasan Jan*—for Respondent.

Das, J.—This appeal arises out of a suit instituted by the appellants to enforce payment by sale of the mortgaged properties of the sum of money owing on a mortgage-bond, dated the 11th November 1912, executed by the defendant in favour of plaintiff No. 1 in the *farzi* name of plaintiff No. 2. By this mortgage-bond, the principal sum secured was Rs. 7,500 with the rate of interest at Re. 1-4-0 per cent. per month with yearly rests. The learned Subordinate Judge has come to the conclusion that the mortgage-bond was not read and explained to the defendant who is a *pardanashin* lady of rank and position and that the transaction was induced by undue influence within the meaning of S. 16 of the Contract Act. He also held that the mortgage-deed was not attested in the manner required by S. 59 of the Transfer of Property Act He found, however, that full consideration was paid by the plaintiffs to the defendant; and, in that view, while refusing to give the plaintiffs a mortgage-decree, he has given them a decree for the principal sum advanced with interest at as. 12 per cent. per month. The main appeal in this Court is on behalf of the plaintiffs who contend that the learned Subordinate Judge should have given them a mortgage-decree in accordance with the mortgage bond of the 11th November 1912. The defendant has presented a cross-appeal and the point raised in the cross-appeal is that the learned Subordinate Judge erred in holding that consideration passed in respect of the transaction. The cross-appeal has, however, not been pressed before us and we are only concerned

with the main appeal filed on behalf of the plaintiffs.

I will first consider the question whether the mortgage-bond was attested in the manner required by S. 59 of Transfer of Property Act. That section lays down that, where the principal money secured is Rs. 100 or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. The learned Subordinate Judge has taken the view that as the defendant is a *pardanashin* lady of a rich Muhammadan family, it is improbable that the witnesses examined on behalf of the plaintiffs could have actually seen her executing the document. The plaintiffs have examined three witnesses on the point; Chhedi Ram, their Gomasta, Ram Lal, who was their Gomasta but who is now an independent trader, and Sudama Ram. Their evidence is to the effect that they knew the defendant as they had had occasion to sell cloth to her. It ought to be pointed out that the plaintiffs are cloth dealers and had occasion to sell cloth to the defendant, and that part of the claim in this suit arises out of transactions in cloth between the parties. The evidence of Chhedi Ram is as follows: "I know defendant for the last 15 or 20 years. She is not *pardanashin* woman to me. Since my childhood I went to sell cloth to her from Chainsukh's shop on her requisition and she always took cloth from me and spoke to me and appeared before me." It seems to me that this evidence is inherently probable. It is not disputed before us that Chainsukh Mull, the father of plaintiff No. 1, had a cloth business and that he did send cloth to the defendant for sale and that the defendant did purchase cloth from Chainsukh's shop from time to time. His evidence is perfectly clear that he was present when defendant put her seal on the document. He says that Baratu, the son of the defendant, signed her name in the mortgage-bond at her request and that the defendant herself put her seal to the mortgage-deed and he adds that these were done in his presence and in the presence of the other attesting witnesses. Ram Lal says that he was a *Munib* (gomasta) of the plaintiff's firm and that the defendant used to appear before him from behind a *parda* and that she could be seen behind the *parda* and that he knew her by sight. His evidence is that Baratu signed the name of the defendant at her request and that the defendant put her thumb-mark in his presence with her own hand. The evidence of Sudama Ram is to the same effect. It seems to me that the learned Subordinate Judge has rejected the evidence of these witnesses on grounds which appear to me to be speculative. Upon the finding that the consideration-money was actually paid to the defendant, there is no reason to assume that the plaintiffs who are men of business should not take care to have the mortgage-bond attested in accordance with law, and it seems to me that there is no reason to reject the testimony of these witnesses. The learned Subordinate Judge thinks that there are some contradictions in the evidence given by these witnesses. The mortgage-bond was executed so far back as 1912 and the case was heard in 1920. Such contradictions as there are in the evidence of these witnesses are only to be expected; but they do not, in my opinion, throw any doubt upon the question which is at issue between the parties, namely, whether the mortgage-bond was attested in accordance with law. I hold that the plaintiffs are entitled to succeed on this point.

The next question is, whether the mortgage-bond was procured by undue influence exerted by the plaintiffs on the defendant. In order to determine this question, it is necessary to deal with certain antecedent events. It appears that on the 7th November 1905 the defendant borrowed Rs. 2,760 from Chainsukh Mal, the father of plaintiff No. 1, and executed a *zerpeshgi* lease in his favour. Rs. 2,500 out of the total sum advanced carried interest at the rate of 12 per cent. per month; the balance did not carry any interest. The term was from 1315 to 1323. The evidence shows that upon the death of Chainsukh Mal the plaintiffs found it difficult to manage the properties of which they

were in possession under the *ticca patta* of the 7th November 1906. The defendant wanted a further loan, first, in order to satisfy a decree which had been obtained against her by one Gendan Singh; and secondly, for other purposes. The plaintiffs were willing to advance the further sum required provided the defendant agreed to take into her possession the properties covered by the *ticca patta* of 1906 and paid interest on the sum that was already due to the plaintiffs and the further sum to be advanced at the rate of Rs. 1-8 0 to 2 per cent per month. After certain negotiations it was settled that the properties which were the subject-matter of the *ticca patta* should be surrendered to the defendant and that she should pay interest to the plaintiffs at the rate of ¼ per cent. per month. The consideration-money in respect of the mortgage-bond is made up as follows;—

Rs. 2,478-15-0 already due to the plaintiffs in respect of the advance of 1906.

Rs. 2,374 paid to Gendan Singh in satisfaction of a decree obtained by him against the defendant.

Rs. 2,647-1-0 paid to the defendant at the time of the registration of the mortgage-bond.

The defendant raised a wholly false defence in so far as she denied that she ever received any money either from Chainsukh Mal or from the plaintiffs; but the learned Subordinate Judge has found that the full consideration-money was in fact paid to the defendant.

The question of undue influence arises in this way; it is suggested that the defendant was in need of money. There was a decree against her for the sum of Rs. 2,374 and she wanted money for other purposes, and it is contended that, taking advantage of her position, the plaintiffs induced her to execute a bond in their favour agreeing to pay interest at the rate of Re. 1-4-0 per cent. per month. The main objection is as to the rate of interest and compound interest provided by the mortgage-bond; but it must be remembered that Chainsukh Mal charged a very low rate of interest because he was to have possession of certain valuable properties. No doubt, after the death of Chainsukh Mal, plaintiff No. 1 who is a minor and plaintiff No. 2 who is a *parda nashin* woman found it impossible to manage the properties and it suited them to deliver up possession of those properties to the defendant. The matter was one of bargain between the parties and the question of undue influence must, in my opinion, be decided on the terms of S. 16 of the Indian Contract Act. The first paragraph of the section lays down the principle in general terms and runs as follows:—"A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other." The second and the third paragraphs of the section define the presumptions by which the Court is enabled to apply the principle. The second paragraph runs as follows:—

"In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another,

(*a*) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(*b*) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress."

The third paragraph runs as follows:—"Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it, or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other." It has been held by the Judicial Committee that urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of S. 16 of the Contract Act. See

Sundur Koer v. *Rai Sham Krishen* (1.) It has also been held that the mere fact that the rate of interest is exorbitant, (which it is not in this case) is no ground for relief unless it be shown that the lender was in a position to dominate the will of the borrower. It is unnecessary to discuss the various cases which have been decided under S. 16 of the Indian Contract Act. It is sufficient to point out that the borrower will not be entitled to any relief unless he proves, first, that the lender was in a position to dominate his will, and, secondly, that the bargain was unconscionable within the meaning of clause (3) of S. 16 and, as has been pointed out, that it is only the concurrence of these two elements that can justify the Court in granting relief to the borrower.

Now, were the plaintiffs in a position to dominate the will of the defendant? As I have pointed out, urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of S. 16 of the Contract Act. On what circumstances are we to hold in this case that the plaintiffs were in a position to dominate the will of the defendant? Obviously, there is no fiduciary relationship between them. It is not a case where they held a real or apparent authority over the defendant. It is not suggested that the mental capacity of the defendant was temporarily or permanently affected by reason of age, illness or mental or bodily distress. The only ground suggested is that the defendant was already indebted to the plaintiffs and that she wanted to borrow a further sum of money, and it is contended that upon these facts, it ought to be held that the plaintiffs were in a position to dominate the will of the defendants. Illustration (*c*) upon which reliance is placed is as follows:—"A. being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence". In order to make out a case under the illustration, it must be proved that the loan was contracted on terms which appear to be unconscionable.

[His Lordship held that the mortgage bond had not been procured by undue influence and after dealing with other matters not material to our report allowed the appeal.]

Ross, J.—[His Lordship concurred in the above judgment.]

Appeal accepted.

(1) [1907] 34 Cal. 150=34 I.A. 9=4 A.L.J. 109=5 C.L.J. 106=9 Bom L.R. 304=11 C.W.N. 249=17 M.L.J. 43=2 M.L.T. 75. (P.C.)

1925 PATNA 329

KULWANT SAHAY, J.

Bhuan Kahar—Petitioner.

v.

Emperor—Opposite Party.

Criminal Rev. No. 413 of 1924, Decided on 27th August 1924, from an order of the S. J., Gaya, D/- 26th May 1924.

Penal Code, S. 211—Failure to substantiate complaint—No offence under S. 211.

The fact that the complainant fails to prove his case is by itself not sufficient to sanction a prosecution under S. 211 of the Indian Penal Code. It must be established satisfactorily in the mind of the Judge or the Magistrate that the complaint was made with intent to cause injury or that it was a false complaint made with the knowledge that it was false. [P 330 C 1]

Hasan Imam—for Petitioner.

Judgment.—The petitioner Bhuan Kahar lodged a complaint before the Police to the effect that he was carrying certain articles of presents from his master Dwarka Singh to a relative of his when in the way he was waylaid by Shiva Gope and others who forcibly took away the articles from him. The police investigated into the matter and reported the case to be false. There was a protest petition on behalf of the petitioner upon which the Deputy Magistrate made an enquiry and examined certain witnesses. He was, however, not satisfied as regards the truth of the complaint and he dismissed the complaint under S. 203, Criminal Procedure Code, by his order dated the 26th March 1924. By the same order

he directed proceedings under S. 476, Criminal Procedure Code, to be drawn up sanctioning the prosecution of the petitioner under S. 211, Indian Penal Code. Against the order of the Deputy Magistrate the petitioner went in appeal before the learned Sessions Judge who has declined to interfere. Against this order of the learned Sessions Judge which is dated 26th May 1924 the petitioner comes up in revision to this Court.

The point taken on behalf of the petitioner is that all that the Deputy Magistrate found was that the complainant had failed to prove his case, and if the complainant had failed to prove his case that does not necessarily show that the complaint made by the petitioner was intentionally false and made with intent to cause injury to any person or with the intent of falsely charging any person with having committed an offence. The fact that the complainant fails to prove his case is by itself not sufficient to sanction a prosecution under S. 211 of the Indian Penal Code. It must be established satisfactorily in the mind of the Judge or the Magistrate that the complaint was made with intent to cause injury or that it was a false complaint made with the knowledge that it was false. In the present case all that has been found is that the evidence produced by the complainant does not establish a *prima facie* case against Shiva Gope and others. The facts appear to be that Shiva Gope was the servant of Dwarka Singh, who is the master of the present petitioner. There was an altercation in which the son of Dwarka Singh chastised Shiva Gope for neglecting in looking after the cattle. Shiva Gope appears to have retaliated and to have beaten the son of Dwarka Singh. Thereupon it appears that Shiva Gope with the members of his family was beaten and they had to leave the village. Shortly after that, Dwarka Singh had occasion to send some articles of presents to a relative of his through the petitioner and the petitioner's case is that while he was carrying those articles he was waylaid by Shiva Gope and some relatives of his and the articles were snatched away from him. Now it is possible that the complaint might have been made in the present case at the instance of Dwarka Singh in order to put Shiva Gope into trouble. It is also possible that having regard to the fact that Shiva Gope had to leave his home and had to go away from the village to another village, his intention was to retaliate and he might with that object have taken away the articles which he knew belonged to Dwarka Singh and which were being carried by the petitioner on behalf of Dwarka Singh to a relative of his.

Under these circumstances it cannot be said with any amount of certainty that the complaint lodged by the petitioner was a deliberately false complaint. No doubt, it has been found that the evidence adduced by the petitioner was not sufficient to make out any *prima facie* case against Shiva Gope and others but that by itself would not justify a Court in ordering a prosecution under S. 211 of the Indian Penal Code. Under the circumstances of the case I consider that no complaint for an offence under S. 211, Indian Penal Code, ought to be made in the present case.

The order of the Deputy Magistrate under S. 476, Criminal Procedure Code, is, therefore, set aside.

Order set aside.

✱✱ 1925 PATNA 330

ADAMI AND SEN, JJ.

Chamari Singh and others—Petitioners.

v.

Public Prosecutor of Gaya—Opposite Party.

Criminal Rev. No. 7 of 1924, decided on 18th June, 1924, from an order of the S. J., Gaya, D/- 6th March, 1924.

(a) *Criminal P. C. S. 476—Judge dealing with application under T. P. Act, S. 83 is Court.*

A Judge receiving and dealing with a petition under S. 83 of the T. P. Act, is a Court within the meaning of S. 476 of Criminal P. C. 13 Mad. 316 Dist. [P 333 C 1]

(b) *Criminal P. C. (1923) S. 476—Proceedings need not be judicial.*

Under the amended section it is not essential that the proceeding in respect of which action is taken should be of a judicial character. [P 333 C 1]

* * (c) *Criminal P. C. S. 403—Person proceeded against under S. 476 Criminal P. C. but proceeding dropped—Change in law making proceedings against him competent—Previous discharge is not bar to re-trial.*

Petitioner deposited a sum of money along with a mortgage deed, under S. 83 T. P Act praying for redemption of the mortgage. The deed was suspected to be forged and the opposite party applied to start proceedings under S. 476. The Court held that proceedings under S. 83 T.P Act were not of a judicial character and therefore dropped the proceedings. After the amended Code came into force under which the proceedings in respect of which the offence is alleged to have been committed need not be of a judicial character, the public prosecutor again moved the Court for taking the same action against the same person :

Held: that the petitioner could be proceeded against. [P 334 C 2]

(d) *Criminal P. C. S. 476—Court making complaint must hold preliminary enquiry and must make a written complaint.*

S. 476 contemplates that after making such inquiry as may be necessary, the Court should make a complaint in writing. It is for the Court acting under S. 476 to make any inquiry that is necessary and then to make a complaint against the person or persons who, he is satisfied, have committed an offence. The section does not contemplate that the Court should send the case to a Magistrate for inquiry whether the offence it suspects has been really committed and for prosecution, if the Magistrate is so satisfied. The Court must be satisfied that there is a *prima facie* case against each person sent to the Magistrate, and then it can lay a complaint under S. 476. [P 335 C 2]

Manohar Lal and *Kailasputti*— for Petitioner.

Govt. Advocate and *G. C. Pal*—for Opposite Party.

Adami, J. — This application is directed against an order of the Sessions Judge of Gaya, dated March 6th 1924, forwarding to the District Magistrate proceedings taken against the 40 petitioners under S. 476 Cr. P. Code, and requesting him to hold an inquiry with a view to the prosecution of the petitioners under S. 471 read with S. 467 of the Indian Penal Code.

On May 25th 1923, the petitioners 1–37 filed before the Subordinate Judge, Second Court, Gaya, a petition under S. 83 of the Transfer of Property Act, 1882, for permission to deposit the sum of Rs. 5350 on account of the amount due under a Usufructuary mortgage deed dated 13th February 1833, executed by the predecessor-in-interest of the petitioners in favour of Raja Modh Narain Singh of Tikari, the predecessor in interest of Rani Bhubneswari Koer, the present proprietress of the 7 annas Tikari Raj, and they also prayed for recovery of possession of the mokarrari properties mortgaged under the said deed consisting of about 26 villages. Together with the petition they filed three documents, (1) a Mokarrari Patta alleged to have been executed by Maharaja Sunder Singh on January 5th, 1811, in favour of Khirodhar Singh, ancestor of petitioners 25 to 36 and Deyali Singh ancestor of petitioners 1 to 24, ( ) a Usufructuary mortgage deed dated February 13th, 1833, alleged to have been executed by the sons of Khirodhar and Deyali in favour of Raja Modh Narain Singh son of Raja Miterjit Singh, in respect of the same properties at an annual Jama of Rs. 1900 in consideration of a loan of Rs. 5,000 sicca rupees, (3) a Darmokarrari Patta of a 12 annas share of the same property, dated April 30th 1923, in favour of Mt. Nageswar Koer, petitioner No. 37, in consideration of a payment of Rs. 7,000, out of which Rs. 5350, said to be the equivalent of Rs. 5,000 sicca rupees, was to be paid to the present holder of the 7 annas Tikari Estate in redemption of the mortgage of 1833. On the same date the petitioners asked that the documents they had filed might be returned to them and their request was granted. Notices were issued to Rani Bhubneswari Koer under S. 83 and on May 29th a chalan was filed showing deposit of Rs. 5350 by the petitioners.

On June 11th, the opposite party, Rani Bhubneswari Koer filed a petition denying that she held the property under mortgage from the petitioners. At her request the petitioners filed again the documents of 1811 and 1833.

On June 13th Amrit Singh on behalf of Rani Bhubneswari Koer prayed for an inquiry under S. 476, alleging that the documents filed by the petitioners were forgeries. In the alternative he prayed for sanction under S. 195 for the prosecution of the petitioners.

On June 15th the Subordinate Judge held that, since the deposit had been made and had been refused by the opposite party, his functions under S. 83 were ended and there was no occasion for him to enter into the question whether the petitioners were in fact in the position of mortgagors and had title to the property, nor could he put the petitioners into possession of the property under that section. He then considered whether he should take action under S. 476 Cr. P. Code, and decided that it was not open to him to do so, since he held that proceedings taken under S. 83 of the Transfer of Property Act were not judicial proceedings.

With regard to the accord of sanction under S. 195 Cr. P. Code, he ordered that an inquiry should be held, and called upon the petitioners to show cause why they should not be prosecuted for using forged documents.

It may be well to state here the grounds on which it was alleged that the two documents were forged. The Patta dated January 5th 1811, purported to be the grant of a mokarrari lease by Maharaja Sunder Singh in 1811, whereas Maharaja Sunder Singh had been murdered in 1759. The deed of 1833 purported to grant a mortgage to Raja Modh Narayan Singh in 1833, though the latter cannot have ascended the gadi till 1840 when his father Raja Mitarjit Singh died. Also the consideration for the mortgage was exceedingly low and threw the greatest doubt on the genuineness of the transaction.

On July 13th the Public Prosecutor appeared to watch the proceedings under the direction of the District Magistrate, since, as explained by the District Magistrate, the petitioners on the basis of their claim under the documents, were stirring up the tenantry of the 26 villages against Rani Bhubneswari Koer, and there was likelihood of a serious breach of the peace which would not be allayed until the genuineness of the claim could be established.

No further progress was made in the case till September 29th, except that the petitioners put in certain documents to support the genuineness of the two documents in question. On September 29th, 1923, the Subordinate Judge recorded the order "Heard Parties." "The Criminal Procedure Code S. 195 has now been amended. Under the amended section no sanction can be granted to a private party. Hence this proceeding cannot go on, and it is dropped" Then, considering a petition for the return of the documents, the Subordinate Judge remarked that it was the Vakil of the applicant for sanction who had suggested that under the amended Code the proceedings must be dropped and he was unwilling to proceed with the case then, wanting time. The Subordinate Judge refused to grant time and so the case was dropped. He thought however, that as S. 476 had been amended it might be intended to make a fresh application under that section, or the Public Prosecutor might want to take steps, so he refused to return the documents to the petitioners till October 5th. On October 5th the Public Prosecutor notified the Court that he was going to move the District and Sessions Judge on behalf of the Crown, so the documents were kept in custody. On that day the Public Prosecutor presented an appeal to the District and Sessions Judge against the orders of the Subordinate Judge refusing action under S. 476 or S. 195. He asked the District and Sessions Judge to take action under either S. 476-A or 476-B.

After hearing the parties, the Sessions Judge drew up proceedings against all the 40 petitioners and requested the District Magistrate to inquire into the case with a view to prosecution; and it is against that order that the present application is made.

Mr. Manohar Lal on behalf of the petitioners has attacked the jurisdiction of the learned Sessions Judge and the procedure followed on several grounds.

In the first place he argues that the Subordinate Judge, when he received and dealt with the petition under S. 83 of the Transfer of Property Act, 1882 was not a Court within the meaning of S. 476 Cr P. Code, and therefore action could not be taken against the petitioners under S. 476

as there was no proceeding before a Court. His argument is based on the fact that the Subordinate Judge under S. 83 was required merely to accept the petition and deposit and to issue notices to the alleged mortgagees. There was no *lis* pending and he was not required to decide any point under the Section; therefore he cannot be held to be a Court. If this contention were right S. 83 would be meaningless, for it states that the deposit must be made in the Court in which the mortgagor might have instituted a redemption suit; the Subordinate Judge must be a Court for the purpose of the deposit. The authorities on which Mr. Manohar Lal relies do not really help him. The decision in *Tatayya* v. *Pichayya* (1) lays down merely that proceedings under S. 83 are not proceedings in a regular suit, while the cases of *Mathura Prasad* v. *King Emperor* (2) and *Vijiaraghavalu Pillai* v. *Theagaroya Chetti* (3) decide that certain officers in performing certain functions are not acting judicially. In the present case it is only a Court that can perform the function; it would be absurd to hold that it is not a Court when performing it.

Whether the proceeding before the Court under S. 83 is or is not a judicial proceeding need not be decided here; nor whether the Subordinate Judge was right in finding in June, 1923, that he could not proceed under S. 476, Cr. P. Code; under the amended section it is not essential that the proceeding in respect of which action is taken should be of a judicial character.

It is contended that under S. 83 of the Transfer of Property Act it is unnecessary to adduce any evidence oral or documentary; a mere petition on the part of a mortgagor, without any affidavit is sufficient, and the Court is not required to inquire whether the person filing the petition is in fact a mortgagor as he alleges; therefore the documents filed by the petitioners with their petition, were filed absolutely gratuitously and the Court was not called upon even to look at them. On this ground it is argued that the documents in question were not really before the Court, and cannot be treated as being used for the purpose of evidence. Seeing that there was no fact in issue in the proceeding under S. 83, there was nothing to which they could be held to be relevant evidence. Now it is quite clear that the documents were filed by the petitioners to prove that they were in fact mortgagors of the property and to support their action in making the deposit. It may be that it was unnecessary to file them and it might be held that they were not used for the purposes of evidence, but the fact remains that the documents came to the notice of the Court in relation to a proceeding before it, and it appeared to the Court that they were not ganuine, and that an offence had been committed. Under the circumstances I hold that the Court was competent to take action under S. 476 in relation to them.

It is next argued that, so far as the proceedings under S. 476 Cr. P. Code are concerned, the Subordinate Judge had on June 15th refused to take action under that Section, and no appeal was made against his order, and so, that order still stands and it was not competent to the Court to pass an order directly contrary to the previous one. As a matter of fact no appeal was made and the decision that action could not be taken because there was no judicial proceeding stands so far as the old S 476 is concerned. The Court merely refused to take action under the section. The amendment of the Code has removed the obstacle to action under S. 476 in this case which existed under the old Code, and the fact that no action could be taken in June and so the proceeding had to be dropped before inquiry was made, will not preclude action being taken under the section as amended. What the Public Prosecutor and the opposite party have now done is to approach the Sessions Judge with a prayer to take action now under the new law which could not be taken before under the old law.

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(1) (1890) 13 Mad. 316.
(2) (1919) 4 P. L. J. 475=1919 P. H. C. C. 325=51 I. C. 769=20 Cr. L. J. 529.
(3) (1915) 38 Mad. 581=27 M. L. J. 227=25 I. C. 341=16 M. L. T. 128=15 Cr. L J. 593.

With regard to S. 195, Mr. Manohar Lal urges that the Subordinate Judge was wrong in dropping the proceedings, since under clause (e) of S. 6 of the General Clauses Act, 1897 (X of 1897) the inquiry under S. 195 ought to have been continued under the old law. That clause has to do with substantive rights and not with matters of procedure. Even if Mr. Manohar Lal's argument is correct, the fact remains that the proceedings were merely dropped as incompetent; that would not prevent fresh action being taken under the amended law. It is urged that, as no appeal was made against the order dropping the proceedings within 30 days, an appeal now is incompetent. I do not consider that the action taken by the Public Prosecutor in moving the Sessions Judge was an appeal against the order dropping proceedings under S. 195. He may have called his petition an appeal; it was really an application that action should be taken in accordance with the change in the law, the change having rendered previous proceedings abortive and in such case the period of limitation need not be noticed so long as there was no unreasonable delay in taking action.

The next question that arises is the question of the section under which the Sessions Judge proceeded. In my mind his proceeding was covered by S. 476A. That section permits a superior Court to take action similar to that described in S. 476 in any case in which the Subordinate Court has neither made a complaint under S. 476 in respect of the offence nor rejected an application for the making of such complaint. The present Ss. 476, 476A and 476B have taken the place of the old Ss. 195 and 476, and it is argued that S. 476A cannot apply to the present case because the Subordinate Judge did not grant the application for action under Ss. 195 and 476, and must therefore be said to have rejected the applications for making complaint. I cannot find that the Subordinate Judge can be said to have rejected applications for the making of complaints in the sense of S. 476A. An application for action under S. 476 was found to be incompetent because the alleged offence had not come before the Court in the course of judicial proceedings. The application was not considered on its merits and rejected. The previous application if it was to be entertained had to be a complaint of an offence which had come to the notice of the Court in the course of judicial proceedings; the present complaint is different, and can be entertained under S. 476 as now amended. The complaint under S. 195 cannot be said to have been rejected; further proceedings under the section were merely dropped, or, it may be said, withdrawn by the applicants. The petitioners are trying to take advantage of the change of the law in both ways; they claim that before the change they were safe against proceedings under S 476, and that after the change they should escape the provisions of S. 195 altogether, because the Court dropped the proceedings under the impression that S. 195 no longer could operate against them.

Instructed by the District Magistrate it was quite open to the Public Prosecutor to move the Sessions Court to take action under S. 476A, in view of the fact that the Subordinate Judge had allowed the proceedings under S. 195 to be dropped without passing any order of rejection. The fact that the Public Prosecutor called his petition an appeal and mentioned both Ss. 476A and 476B does not make much difference.

Mr. Manohar Lal contends that the Sessions Judge had no jurisdiction to interfere, because the amount of deposit was over Rs. 5,000, and therefore any appeal from the Subordinate Judge's decision lay to this Court and not to the District or Sessions Judge. S. 195 sub-section (3) read with S. 476B would dispose of this objection, even if it were held that the matter came up to the Sessions Judge by way of appeal under S 476B.

Mr. Manohar Lal has discussed before us the documents alleged to be forgeries and certain other documents filed in support of them. It is not my intention to consider these here further than to say that, unless such well known authorities as "Hunter's

Statistical Account of Bengal", the "Fifth Report". Boddam's "Account of Zamindars in Bengal", and other historians are mistaken in their dates, the two documents of 1811 and 1833 are on the face of them open to grave suspicion.

With regard to the other documents produced by the petitioners, Mr. Manohar Lal has pointed out that the learned Sessions Judge is mistaken in some of his remarks. The copy of the judgment in Case No. 26 of 1826 does in fact give the name of the Judge as Liladhar Pandit and of the Saristadar as Dost Muhammad. The certified copy of a decree gives 1811 and not 1810 as the date of the mokarrari deed. The learned Judge has evidently read the Urdu figures wrongly. The certified copy of an order in Execution case dated August 17th, 1866, bears a stamp dated 1867 and not 1861. The genuineness of these will be considered if the case comes to trial; it is unnecessary to discuss them here.

The last contention put forward on behalf of the petitioners is that the learned Sessions Judge has failed to consider the case of each of the petitioners and to decide whether complaint should be made against each individual, and I think this contention must succeed. There are altogether 40 petitioners. Of these Nos. 6, 7, 9, 11, 15, 17, 21, 22, 24, 32, 34 and 35 are minors, No. 37 is a Pardanashin lady of 85 years of age, and Nos. 38, 39 and 40 were not signatories of the petition under S. 83. As to the minors, we have no information as to their age, some of them may be mere infants, and in any case they would be represented by guardians in the petition. Without some inquiry it would be absolutely impossible to find that they were cognisant that the documents were forged, and that this should be included in the complaint. With regard to petitioners 38, 39, and 40 there is nothing before this Court to show that they were aware that the documents of 1811 and 1833 were forged, though the nazrana demanded in consideration of the darmokarrari patta of 1923 might have raised their suspicions. They were not parties to the filing of the petition under S. 83.

The learned Sessions Judge has, I thnk, misconceived the provisions of S. 476. He states:—

"Nor is it necessary to hold a preliminary inquiry under the law, if the Court is satisfied on the material before it that an inquiry is necessary. I am satisfied that such an inquiry is necessary on the grounds summarised above in the case of all the 40 persons mentioned in the list, and forward the proceedings to the District Magistrate, Gaya, with the request that an inquiry be made and that the said persons, if the case is established, may be prosecuted under S. 471 read with S. 467 of the Indian Penal Code or any other Section or sections that may be found to apply".

S 476 contemplates that after making such inquiry as may be necessary, the Court should make a complaint in writing. It is for the Court acting under S. 476 to make any inquiry that is necessary and then to make a complaint against the person or persons who, he is satisfied, have committed an offence. The section does not contemplate that the Court should send the case to a Magistrate for inquiry whether the offence it suspects has been really committed, and for prosecution, if the Magistrate is so satisfied. The Court must be satisfied that there is a *prima facie* case against each person sent to the Magistrate, and then can lay a complaint under S. 476.

It is not sufficient that the Magistrate to whom the complaint is made under S. 476 is entitled to hold an inquiry under S. 202. Generally he will consider that the fact that the Court has made the complaint is sufficient to justify issue of process against the accused at once. But even if under S. 202 an inquiry is held, the persons complained against have no opportunity to show their innocence till after they have been summoned.

The learned Sessions Judge should have satisfied himself by inquiry that there was a *prima facie* case against each one of the petitioners before laying a complaint against any one of them.

In the present case there were 37 signatories to the petition under S. 83 it is extremely likely that some of them knew nothing about the petition or the documents.

On the ground that the cases of the individual petitioners have not been considered, it will be necessary to set

aside the order passed by the learned Sessions Judge and to direct that further inquiry be made by him as to the complicity and knowledge of the individual petitioners. After such inquiry it will be open to the learned Sessions Judge to make a complaint under S 476 against such of the petitioners as he believes to have committed an offence.

Sen, J.—I agree.

Order set aside.

1925 PATNA 336

DAS AND ROSS, JJ.

Ram Rai and others—Appellants.

v.

Maheshwar Prasad Singh and others—Respondents.

Appeal from Appellate Decree No. 1849 of 192 , Decided on 16th January, 1924, from a decision of Addl. Dt. J., Saran, D/- 30th June, 1921.

(a) *T. P. Act, S. 63 — Tenancy lands after ejectment of tenant are accession.*

Tenancy land which are acquired by a mortgagee in possession by virtue of an ejectment decree form an accession to the mortgaged property, and the mortgagor is entitled to such lands on redemption, provided he pays to the mortgagee the expense of acquiring them.

(b) *Civil P.C., S. 151—Remand not appealed against—Court may investigate under S. 151.*

A Court can investigate the correctness of a remand order, though no appeal had been filed against it. [P. 336, C. 2]

C. C. Das and *B. N. Mitter*—for Appellants.

S. Sultan Ahmed and *Sivasaran Lal*—for Respondents.

Das, J.—I think there was a serious error in the order of remand to which I was a party. In dealing with the dispute in regard to the nine bighas of tenancy lands which were of Harakh, I said as follows in the order of remand: "so far as the tenancy lands of Harakh are concerned (and there is no dispute that the 9 bighas of Harakh were tenancy lands) the question is a little more difficult. It appears that the mortgagees in their suit for rent against Harakh got a decree for ejectment against him. The learned Judge on behalf of the respondents argued that as soon as ejectment takes place the raiyati interest is extinguished and the landlord gets into possession freed from the tenancy. That undoubtedly is so; but the question still remains whether the mortgagees treated these acquisitions as merged in the mortgage-security or not. The question is again one of intention and I am not satisfied that the learned District Judge has properly considered all the evidence in the case." The arguments of Mr C. C. Das have convinced me that the view expressed by me in the order of remand is wholly erroneous. I have no doubt whatever that tenancy lands which are acquired by a mortgagee in possession by virtue of an ejectment decree form an accession to the mortgaged property, and that the mortgagor is entitled to such lands on redemption, provided he pays to the mortgagee the expense of acquiring it. The learned Additional District Judge has very properly proceeded on the order of remand; and I wish to make it clear that if we are obliged to vary the decree passed by him, it is not because there is any error in his judgment, but because the order of remand, upon which he has proceeded, is itself wrong.

A question was raised before us whether it is open to the appellants to challenge the correctness of the order of remand. The remand was not under the provisions of O. 41, r. 23; and, there being no appeal from an order of remand, in the exercise of the inherent powers of the Court, this Court, in my opinion, has complete powers to investigate the correctness of the order.

In regard to the other question raised in this appeal, the finding of the learned Judge is a finding of fact, and is binding on us in second appeal.

I would vary the decree passed by the Court below by providing that, upon paying to the mortgagees defendants the expense of acquiring it, the plaintiffs do recover khas possession of (nominally) nine bighas of kasht land referred to as nine bighas of khast of Hardeo, Jagdeo and Nand, sons of Harakh, in the judgment of the learned Judge.

There will be no order as to costs incurrod in this Court.

Ross, J.—I agree to the order proposed.

Appeal allowed.

1925 PATNA 337

MULLICK AND BUCKNILL, JJ.

Rameshwar Singh Bahadur, G. C. I. E., K. B. E. of Darbhanga—Defendant—Appellant.

v.

Kumar Ganganand Singh and others—Plaintiff-*Kumar Kalika Nand Singh and others*—Defendants—Respondents.

Appeal No. 164 of 1922, Decided on 28th July 1923, from the Original Order of the Sub. J., Bhagalpur, D/- 29th April 1922.

(a) *Civil P. C. O, 39 R. 1—Execution sale—No state on ground of fraudulent decree unless reasonable prospect of proof of fraud exists.*

Where a suit was instituted for setting aside a decree on the ground that it had been obtained against the plaintiff when he had been a minor, by means of fraud.

Held: that a temporary injunction restraining the execution of the decree by the sale of the properties of the judgment-debtor must not be granted unless there was a reasonable prospect that the plaintiff would be able to prove the allegation that he had been a minor. [P 338 C 1]

(b) *Specific Relief Act, Ss. 52 to 57—Defendant residing outside jurisdiction but owning property inside—Injunction can be granted.*

The Court has jurisdiction to issue an injunction upon a defendant residing outside territorial limits where he has property in the Court's jurisdiction which could be proceeded against in the event of any contempt of Court. [P 339 C 2]

P. N. Sinha, Murari Prasad and *Hasan Imam*—for Appellant.

S. Sultan Ahmad, S. N. Patil and *N. N. Sen*—for Respondents.

Mullick, J.—Raja Sri Nandan Singh of Srinagar had three sons, Nitya Nand. Kamla Nand and Kalika Nand. Kamla Nand died in 1910 leaving him surviving three sons, Ganga Nand, plaintiff No. 1, Ambica Nand (now deceased) and Achyuta Nand, plaintiff No. 2 Kalika. Nand is still alive and has three sons, Abhaya Nand, plaintiff No. 3, Bijoy Nand, plaintiff No. 4; Ghana Nand, plaintiff No. 5. Nitya Nand died before 1896 in which year Kamla Nand attained majority and began to manage the two thirds share in the ancestral family estate of himself and Kalika Nand. Thereafter, on the 7th May 1900, Kamla Nand and Kalika Nand executed a mortgage for Rs. 3,50,000 in favour of the Maharaja of Darbhanga, the defendant 1st party. In 1916 the Maharaja instituted Suit No. 172 of that year in the Court of the Subordinate Judge of Darbhanga against Kalika Nand and his three sons and against Ganga Nand and Actyuta Nand for the enforcement of his mortgage and on the 14th January 1919 obtained a preliminary decree on compromise for a sum of Rs. 7,42,181-2-3. On the 22nd March 1921 this decree was made final, but as soon as the mortgagee applied for execution by the sale of the mortgaged properties some of which are situated in the District of Bhagalpur, Ganga Nand Singh, Achyuta Nand Singh, Abhaya Nand Singh, Bijoya Nand Singh and Ghana Nand Singh instituted Suit No. 741 of 1921 in the Court of the Subordinate Judge of Bhagalpur for a declaration that the compromise decree in Suit No. 172 of 1916 was fraudulent and void on the ground that the plaintiff No. 1 Ganga Nand was a minor and that he was falsely alleged in the suit to have attained majority, to have signed a written statement and to have engaged a Pleader to appear on his behalf. It is also alleged by the plaintiffs that the Pleader appointed for the plaintiff Achyuta Nand was in collusion with defendant No. 1, the Maharaja, and defendant No. 2 Kalika Nand Singh and had assented to the compromise in order to defraud the minor. In addition to the declaratory relief a permanent injunction restraining the Maharaja from executing his decree was also prayed for. On the 26th April 1922 the Maharaja filed a written statement denying the material allegation as to fraud and collusion and also questioning the jurisdiction of the Subordinate Judge of Bhagalpur to issue an injunction against him, a defendant who was resident in the District of Darbhanga and over whom he had no territorial jurisdiction. An application for *ad interim* injunction restraining the Maharaja from executing his decree by the sale of the properties was

also made and allowed by the Subordinate Judge on the 29th April 1922.

The present appeal is preferred against that order.

The first question is, whether there is a reasonable prospect that the plaintiffs will be able to prove the allegation that Ganga Nand Singh was, at the time of the compromise, a minor. Now it appears that after Kamla Nand's death Kalika Nand on the 9th July 1910 obtained a certificate of guardianship under Act VIII of 1890 from the District Judge of Purnea of the persons of Ganga Nand and Achyuta Nand, stating the dates of birth of the former to be 24th September 1898 and of the latter to be 31st March 1907. According to the dates given in this petition Ganga Nand would attain majority on the 23rd September 1919 and he was, therefore, 8½ months below age on the date of the compromise decree. On the other hand, there are certain facts which indicate that he was not then a minor, and which, in my opinion, are of prime importance when a question of discretion is involved. When Suit No. 172 of 1916 was first instituted the plaintiff Maharaja sued Ganga Nand and Achyuta Nand as being under the guardianship of their uncle Kalika Nand, but on the 18th July 1916, finding that the interests of Kalika Nand, who was defendant No. 2 in the suit, were adverse to those of his sons, the Court appointed a Pleader of the Court, named Babu Amrit Lal Mazumdar, as their guardian *ad litem*. As regards the other minor defendants, namely, Ganga Nand and Achyuta Nand, their mother Rani Satrama on the 4th August 1916 applied to be made guardian *ad litem* and on the 16th August that prayer was granted. On the 11th December 1916 Rani Satrama filed a petition stating that Ganga Nand had attained majority and suggesting that he should be made guardian *ad litem* for Achyuta Nand. The Court thereupon passed the following order: "It is ordered that defendant No. 5 be allowed to defend his case himself as major and to file written statement; that the prayer for appointing defendant No. 5 as guardian of his brother defendant No. 6 be disallowed and if Rani Satrama declines to act as guardian of defendant No. 6 steps be taken for the appointment of another guardian. On the 18th December the Court, finding that Rani Satrama was unwilling to act, appointed Babu Amrit Lal Mazumdar as the guardian *ad litem*. On the 5th April 1917, it being found that the interests of defendant No. 6 Achyuta Nand were adverse to those of the minor sons of Kalika Nand for whom Babu Amrit Lal was also guardian the Court appointed Babu Khetrapada Basu to be guardian of the minor Achyuta.

Now, a signature purporting to be that of Ganga Nand appears on the written statement which Ganga Nand filed after he was entered on the record as a major. Apparently, there was great delay in effecting service of summons upon him as he was engaged in his studies in Calcutta; but on the 11th July 1917 we find the following order recorded by the Subordinate Judge: "Defendant Kumar Ganga Nand Singh files vakalatnama and applies for time to file written statement. Guardian *ad litem* also applies for time to file written statement. Written statement on behalf of guardian *ad litem* of Kumar Achyuta Nand Singh put in. Adjourned to 24th July 1917." On the 24th July 1917 there is an order recording that a written statement on behalf of Ganga Nand Singh has been filed and after that date Ganga Nand Singh appears to have been represented throughout the proceedings by his Vakil and to have been thoroughly cognizant of the proceedings of the Court. It is alleged that no application was ever made by his mother declaring him to have attained majority, that the signature on the written statement is a forgery, that the Pleader who agreed to the compromise decree on his behalf and signed the compromise petition was never instructed by him, and that the whole scheme which ended in the final decree was a fraud from beginning to end contrived by the Maharaja in collu-

sion with Kalika Nand and the guardians *ad litem*. If Ganga Nand can prove this in Suit No. 741 of 1921 he will no doubt be entitled to get a decree, but it is impossible to say in the face of the evidence at present available that there is a *prima facie* case in his favour. It is certainly true that in the petition by which Kalika applied for the guardianship of Ganga Nand, Ganga Nand's date of birth is put down as 24th September 1898, but against this we have the statement of his mother that the was of age on the 11th December 1916 and his own conduct in the subsequent proceedings. It will be a matter of evidence whether Kalika's statement is to be preferred to the statement of his own mother and in the view of the publicity given to Suit No 172 of 1916 by the appointment of a Receiver and the litigation connected therewith, and of the fact that defendant Achyuta Nand and the minor sons of Kalika were represented in Suit No. 172 of 1916 by legal practitioners of apparently established reputation, it is difficult to imagine that the fact that Ganga Nand was a minor and incapable of making his defence could have remained concealed, Further, whatever the age of Ganga Nand may have been at the time of the preliminary decree he certainly, upon his own showing, was of age at the time of the final decree and the omission on his part to attack the preliminary decree is a circumstance which must be taken into account against him.

This disposes of the main point in the case and although the result of the sale of the mortgaged properties may be that the plaintiffs will be unable to recover those properties in spite of their success in Suit No. 741, I do not think the circumstances were such as to justify the Subordinate Judge in issuing a temporary injunction which had the effect of staying the sale. The delay on the part of the Maharaja to bring his mortgage suit in the first instance is not, in my opinion, an argument for delaying the execution.

On behalf of the respondents a point has been taken to the effect that the Court had no jursidiction to issue any injunction upon a defendant residing outside its territorial limits. In my opinion the contention is not well founded. Although the Maharaja denies the jurisdiction of the Court, it has been established that he has property in the Bhagalpur District against which the Court could proceed in the event of any contempt of the Court's authority. It is clear that the Court has means for enforcing any prohibitory order which it may think fit and proper to issue.

The result, therefore, is that the appeal must succeed and is decreed with costs.

Bucknill, J.—I agree.

Appeal accepted.

1925 PATNA 339

FOSTER, J.

Rabindra Nath Singh and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Mis. Case No. 52 of 1924, Decided on 4th July, 1924.

(a) *Criminal P. C., S. 526—Refusal to grant gun license after usual season for granting is no evidence of bias.*

Refusal to grant an application for a gun license put in after the expiration of the usual season for the granting of gun licenses is no evidence of bias. [P 340 C 1]

(b) *Criminal P. C., S. 162—Diaries received after written statement by Police as to absence of statement recorded under S. 162—Accused is not entitled to call or see the diaries.*

The Magistrate called for the diary after receiving a written statement from the Police that there was no statement recorded under S. 162 Criminal, P. C

Held: that if the diary was one of the kind described in S. 172 neither the accused nor his agent were entitled to call for them or to see them unless and until they were used by the Police or by the Court for the purposes described in the section. [P 340 C 2]

(c) *Criminal P, C., S. 526—Reasonable fear of outside influence interfering—Trial Court slurring over P. W's. uncertainty—Transfer should be granted.*

Where the accused had reason for apprehending that influences outside the Court might bear upon the course of their trial, and

where the Trying Magistrate recording the evidence of the identification witness slurred over the uncertainty and hesitation of the witness,

Held: that the case should be transferred. [P 342 C 1 & 2]

K. P. Jayaswal, *Monohar Lal* and *S. M. Gupta*—for Petitioners.

The Government Advocate—for the Crown.

Judgment—The principal applicant Rabindra Nath Singh is a son of a zamindar of Bagmundi in the District of Manbhum who appears to be locally styled as Raja. The other petitioners are servants of the first petitioner They are on their trial under charges of offences under Ss. 148 and 325 of the Indian Penal Code, in respect of an alleged riot on the 23rd February 1924. The trial has reached the stage at which the accused are to be called upon to open their defence. The burden of the petition is that these applicants have reason to apprehend that they will not be given a fair trial in the Manbhum District and, therefore, they pray for a transfer of the case to Ranchi. The petition mostly deals with the position of the first applicant and his father in their relations with the Deputy Commissioner and the Police. The petition as it was originally put before the Court contained a number of quite unjustifiable grounds, some of which have been, however, faintly put forward even by learned Counsel to day. The suggestion that the Deputy Commissioner's refusal to grant a gun license was evidence of bias has been maintained. [It appears that early in 1922 the license held by the zamindar of Bhagmundi was forfeited. Licenses are usually refused and re-granted by the calendar year, But on the 9th of May 1924 the petitioner's father, apparently remembering the case in *Ram Kishan Das* v. *Emperor* (1) put in an application for a license to the Deputy Commissioner which was, of course, rejected. That ground appears to me to be quite unsubstantial.

Another matter put forward is the refusal of copies of depositions alleged to have been made to the Police under S. 162. Until I looked at the actual record I had not been made aware of the fact that the Magistrate did actually call for the diary after receiving a written statement from the Police that there was no statement recorded under S. 162, Cr. P. C. From this it appears that the Police Officer committed himself to this statement in writing and that the Magistrate himself called for the diary and must, therefore, have tested the truth of the statement. In these circumstances, if the diary was one of the kind described in S. 172 neither the accused nor his agent were entitled to call for them or to see them unless and until they were used by the Police or by the Court for the purposes described in the section.

Another point taken was one which I would have expected the learned Counsel to have dropped when he actually came to argue in revision. It is actually suggested that the appointment of the Public Prosecutor by the Deputy Commissioner in this prosecution was a sign of bias or enmity. The matter does not deserve discussion.

I come now to the more weighty part of the petitioner's case. He has shown, and there is nothing suggesting any other story, that since the end of 1921 he has been constantly in trouble both with the Police and with the present Deputy Commissioner Mr. Deb. The date of the alleged occurrence was, as I have stated the 23rd February 1924. On the 18th March the first petitioner appeared in Court as the accused. The very next day the Magistrate issued a warning notice upon him threatening prosecution "under S. 110, Cr. P. C., for continuing habitual extortion." Now, the District Magistrate Mr. Deb had, on the 7th January, that is 2½ months before this, issued a warning notice in the same terms. So one would expect that there was an emergency demanding the reiteration of the notice. Now, looking at the Police report on which this order of the 19th March is written we see that the Sub-Inspector states that he made enquiries from several villagers of Ajodhya and that they did not corro-

(1) [1912] 35 All 5=10 A.L.J. 357=17 I.C. 567=13 Cr.L.J. 823.

borate the petition as to extortion but stated that they had paid the amount willingly, some even paying Rs. 32 to the zamindar of Bagmundi. He reported also that, on account of the service of notice, the Raja has reformed himself to some extent, and that he has changed his plan of extorting Rs. 21 from each house and now accepts even Rs. 5. Some of the raiyats of Ajodhya have not yet paid and they are not oppressed, "I was watching the situation. Through fear of the petition the Raja has not touched the rest of the villagers for *lagan*. He has also taken legal advice and this has made him timid. The case under Ss. 148, 149 and 326 brought by the villagers of Gobindapur has entirely stopped realisation of *lagan* by the Raja and he is waiting to see the result of the case. I shall submit my report on this after collecting more evidence." Besides this he mentions some confidential enquiries and also expressed his opinion that the villagers have been swindled and subjected to extortion and he expressed his apprehension that the end of the extortion has not yet been seen. But looking at the substantial part of the Sub-Inspector's report we see nothing to justify this sudden reiteration of the notice issued only 2½ months previously. Now, that reiteration came on the day following the date on which the first petitioner appeared in Court. It may, of course, be quite fortuitous, and I have no reason to make any suggestion to the contrary. At the same time I must point out that the notice appears to have been unnecessary and that its issue on that particular date was perhaps such as to rouse suspicion and apprehension in the mind of the first petitioner who, no doubt, has in his mind the fact that for some years he has been in difficulties with the District Magistrate and the Police. The Deputy Commissioner has written an explanation which in some places indicates strength of feeling. No doubt he had in the circumstances, to express himself emphatically and I am not inclined to weigh too nicely every strong expression in his note on the case. But there are two points that still remain in my mind as giving rise to a feeling that the first petitioner may reasonably be apprehensive in regard to the trial in the Manbhum District. In his petition para. 6 the applicant had stated that in the prosecution initiated in October 1921 Mr. Hiralal Banerjee, Sub-Divisional Magistrate of Purulia acquitted the petitioner and the other accused in both the cases holding that the case was false and either the Police knew of the concocted nature of the cases or indirectly connived at the concoction. Now, I have before me the certified copies of those two judgments and I see that these words as to concoction are the very words to be found in one of the judgments, and the whole paragraph is a fair description of the result of the cases. In the paragraph the date of the judgment was stated, so it was quite easy for the Deputy Commissioner to test the truth of this description of the judgment. But he does not appear to have done this. He fixes on the fact that the petitioner had not with his petition for transfer in this Court filed the certified copies of Mr. Hiralal Banerjee's judgments, and he does go so far as to make this comment on para. 6. "A copy of judgment has purposely been withheld. The matter is three years old. So far as I remember, some of the cases ended in conviction, some in acquittal." The unfairness of the suggestion of the word "purposely" is obvious and it is also clear that the Deputy Commissioner answered in this form without verifying the petitioner's statement by reference to the original document. So far from the copy of judgment having been purposely withheld it appears to me that they were withheld by an act of negligence.

Another point that is unsatisfactory in the explanation of the Deputy Commissioner is his remark to be found in his answer to para. 17. He commences with saying that the paragraph is false. It is not clear what he means. I have tested the matter myself, and I find that Harnu Munda was identifying an accused and first pointed out Ramapada Dhone and then he pointed out Raghu whereupon a petition was filed to the Deputy Magistrate to put that upon record

but the Magistrate did not do so. My own finding is that para. 17 is word for word substantiated by what I have seen on the record. The facts found are stated in the petition of the 31st March to be found in the B File. Now, the point is this, that the Magistrate in his record of evidence slurred over the uncertainty and the hesitation of the witness, matters which are of the utmost importance for the defence, and recorded that Harnu Munda identified Rama Prasad Singh Babu "after some discussion." He does not mention the important fact that the witness first pointed out Rampada Dhone. The omission of this important fact from the original record is to my mind gravely reprehensible; such conduct would give rise to a very reasonable apprehension in the mind of an accused that his trial will not be conducted fairly. When the petition was put in on the part of the accused for a correction of the record it was clearly the duty of the Magistrate to take this second opportunity of performing his duty, but up to this day the record has not been altered; and the Deputy Commissioner appears to be inclined to shield the Deputy Magistrate, judging by the tone of his reply to para. 17 of the application. For these reasons I shall allow the transfer.

There is one other matter that has been discussed in regard to the commitment of some accused in a case [*Nobabdi*, v. *Sripati*] recently before the Deputy Magistrate, Mr. Surendra Nath Chakraberty. The suggestion is that the commitment was made under the direct influence of the Deputy Commissioner and that the Deputy Magistrate performed the act under external pressure. As this matter concerns the personal and official honour of Mr. Deb and Mr. Surendra Nath Chakraberty, and as there are several papers which have not been put before Mr. Deb, (and in fact the original statement of the affair in para. 19 of the application was wrongly typed), I feel that I should not be justified in expressing any opinion which would be *ex parte* or premature. But, for the other reasons which I have stated, I consider that the applicants have some reason for apprehending that influence outside the Court may bear upon the course of their Trial, and also have a grievance against the Trying Magistrate for his method of recording the evidence of Harnu Munda. The case will be transferred to the Court of the Deputy Commissioner of Ranchi to be dealt with by himself or by any subordinate First Class Magistrate.

Case remanded.

✱ 1925 PATNA 342

KULWANT SAHAY, J.

Durga Ram and others—Accused—Petitioners.

v

Emperor—Opposite party.

Criminal Rev. No, 481 of 1924, Decided on 4th November 1924, against the order of the Dy. Mag. Dhanbad, D/- 7th July 1924.

✱ (a) *Criminal P. C., S. 342—Non-compliance—Trial illegal—Revision lies — Accused need not be prejudiced.*

Where the examination of the accused persons has not been made in compliance with the provisions of S. 342, it amounts to an illegality. It is immaterial whether the accused persons were or were not prejudiced by the non-compliance with the provisions of S. 342. The High Court will in such cases interfere in revision. [P 344, C. 1.]

✱ (b) *Criminal P. C., S. 342—Circumstances against accused—Court must ask specific questions—General questioning is not enough.*

Under S. 342 in order to enable the accused to know what are the circumstances appearing in the evidence against him and what the Court considers to be such circumstances, it is necessary for the Court to put those circumstances directly to the accused and to ask him to explain those circumstances if he can. It is not always possible for the accused to know as to what are the circumstances which to the Court may appear to be against him; and it is possible that the Court may consider one circumstance appearing from the evidence as being against the accused while the accused may not consider that circumstance to be against him. The object of S. 342 Criminal P. C. is to enable the accused to know what in the opinion of the Court are the circumstances which from the evidence appear to be against him.

To merely question the accused after the cross-examination of the prosecution witnesses whether they had anything to say then, is not a sufficient compliance with the provisions of the law. 1924 Patna 791 Foll.

[P. 344, C, 2 & P. 345, C. 1.]

K. B. Dutt, *B. P. Jamoar*, *Anand Prasad* and *Raghunandan Prasad*—for Petitioners.

S. B. Varma—for the Crown.

Kulwant Sahay, J.—All the five petitioners have been convicted under S. 147 of the Indian Penal Code and the petitioners Ramlakhan and Sitraram have been further convicted under S 325 of the Indian Penal Code. Ramlakhan has been sentenced to one year's rigorous imprisonment under S. 147 and nine months' rigorous imprisonment under S. 325. Sitaram has been sentenced to nine months' rigorous imprisonment under S. 147 and nine months rigorous imprisonment under S. 325, the sentences in both cases being concurrent. They have also been sentenced to pay a fine of Rs. 100/- each under S. 147 of the Indian Penal Code. The petitioners Durga Ram and Manilal have been sentenced to six months' rigorous imprisonment under S. 147 and Ramkhelawan has been sentenced to three months' rigorous imprisonment under S. 147. All the petitioners have been further bound down to keep the peace for one year under S. 106 of the Criminal Procedure Code in the sum of Rs. 500/- each with one surety of like amount. The convictions and sentences have been upheld by the Sessions udge.

The principal point taken by the learned counsel for the petitioners in this revision case is that the provisions of S. 342 of the Code of Criminal Procedure have not been complied with. It appears that before the cross-examination of the prosecution witnesses the accused persons were asked as to what was their defence, and subsequently after the cross-examination of the prosecution witnesses and before the accused were called upon to enter on their defence they were asked by the Trying Magistrate that they had heard the cross-examination of the prosecution witnessess, whether they had anything further to say, to which they replied that they did not wish to say anything further. It is argued that this sort of examination of the accused is not a sufficient compliance with the provisions of S. 342 of the Criminal Procedure Code. The objection was taken before the learned Sessions Judge and he dealt with this point as follows :—

"On this point the learned counsel's contention is that though the examination of the accused was recorded before the prosecution witnesses were cross-examined and that subsequently after the cross-examination of those witnesses was finished and before the accused were called on for their defence there were further examinations of the accused yet the Magistrate did not satisfy the provisions of S. 342 of the Criminal Procedure Code as explained in *Bhokhari Singh* v. *The King Emperor* (1) inasmuch as the accused were merely asked whether they had anything further to say and their answers were in the negative. The accused have made detailed statements in their former examinations and it appears from the Magistrate's certificate that the accused were asked if they had to say anything in defence after the cross-examination of the prosecution witnesses and the reply was that they did not wish to say anything further. I do not think that the appellants have been prejudiced inasmuch as they explained in full and were also given opportunity to explain the evidence appearing against them at different stages in the course of the trial. An order of remand would serve no useful purpose. Moreover the learned counsel for the appellants does not want that the case should be sent back for retrial." It appears therefore that the learned Sessions Judge on appeal is of opinion that there was a sufficient compliance with the provisions of S. 342 in the present case by the mere fact of the Trying Magistrate asking the accused persons after the cross-examination of the prosecution witnesses whether they had anything to say in defence after hearing the cross-examination of the prosecution witnesses. He is further of opinion that the appellants were not prejudiced by their not being examined properly inasmuch as opportunity was given to them to explain the evidence appearing against them at different stages in the course of the trial. He was further of opinion that a remand would serve no useful purpose and it appears that the learned counsel for the appellants did not press before

(1) 1924 Patna 791=(1924) P. H, C. C. 198=5 P. L. T. 445=25 Cr. L, J. 711.

him for a retrial of the case. Before me, however, the learned counsel for the petitioners presses for a retrial. I am clearly of opinion that the examination of the accused persons in the present case has not been made in compliance with the provisions of S. 342 and it does not matter whether the accused persons were or were not prejudiced by the non-compliance with the provisions of S. 342 inasmuch as the non-compliance of the provisions of the said section amounts to an illegality which vitiates the trial altogether. The question as to the non-compliance with the provisions of S. 342 vitiating the trial is now firmly established by the decisions of the several High Courts in the country: see *Raghu Bhumij* v. *The King Emperor* (2) *Fatu Santal* v. *The King Emperor* (3); *Kashi Pramanik* v. *Damu Pramanik* (4), *Mst. Tani* v. *Emperor* (5); *Udhao* v. *Emperor* (6); and *Mazhar Ali* v. *Emperor* (7). Reliance has been placed by the learned Assistant Government Advocate upon the case of *Mir Tilawan* v. *Emperor* (8) where a Division Bench of this Court held that where an accused person files a written statement not only after the prosecution witnesses have been examined, and re-examined but also after the defence witnesses have also been cross-examined and discharged, the mere fact that the provisions of S. 342 of the Criminal Procedure Code have not been complied with would not vitiate the trial as in such a case the accused could not have been prejudiced and miscarriage of justice caused. But the decision in this case is opposed to the long string of decisions referred to above and I am not prepared to follow the decision in this case in preference to the considered opinion of the Judges in the different High Courts in the cases cited above. The question for consideration in the present case is as to whether the examination of the accused persons was a sufficient compliance with the law. There was no doubt an examination of the accused, but what is required by S. 342 is that the Court shall, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. The examination of the accused is for the purpose of enabling him to explain circumstances appearing in the evidence against him. In order to enable the accused to know what are the circumstances appearing in the evidence against him and what the Court considers to be such circumstances, it is necessary for the Court to put those circumstances directly to the accused and to ask him to explain those circumstances if he can. It is not always possible for the accused to know as to what are the circumstances which to the Court may appear to be against him; and, it is possible that the Court may consider one circumstance appearing from the evidence as being against the accused while the accused may not consider that circumstance to be against him. The object of S. 342 Criminal Procedure Code is to enable the accused to know what in the opinion of the Court are the circumstances which from the evidence appear to be against him. The section clearly makes it obligatory for the Court to tell the accused as to what are the circumstances which he has to explain. The time and the stage of the trial at which the Court is required to put the question to the accused are also of importance; it is after the close of the prosecution case and before the accused is called on for his defence. At this stage of the trial it is necessary that the Court should make up its mind as to whether there are circumstances appearing from the prosecution evidence to be against the accused and, if the Court is of opinion that there are no circumstances appearing in the evidence

(2) [1920] 1 P. L. T. 241=5 P. L. J. 430=58 I. C. 49=21 Cr. L. J. 705.
(3) [1921] 2 P. L. T. 288=6 P. L. J. 147=61 I. C. 705=22 Cr. L. J. 417.
(4) [1921] 27 C. W. N. 28=77 I. C. 988=25 Cr. L. J. 524.
(5) [1918] 20 Cr. L. J. 12=48 I. C. 487.
(6) 1924 Nag. 301=25 Cr. L. J. 417.
(7) 1923 Cal. 196=50 Cal. 223=36 C. L. J. 417=27 C. W. N. 99=24 Cr. L. J. 198.
(8) 1922 Patna 388=1 Pat. 31=4 P. L. T. 60=1 Pat. L. R. Cr. 35.

against the accused it is the duty of the Court to acquit the accused without calling on him to enter on his defence. In order to make up its mind the Court has to consider the evidence for the prosecution and to see what are the circumstances which appear to be against the accused and the accused has to be apprised of those circumstances so that he may, if he can, explain them to the satisfaction of the Court. The mere question as to whether the accused had anything to say after hearing the cross-examination of the prosecution witnesses is to my mind not a sufficient compliance with the provisions of the law. The question was considered by me in the case of *Bhokari Singh* v. *The King Emperor* (1) and I adhere to the view expressed by me in that case. The same view was taken by the Rangoon High Court in the case of *Maung Hman* v. *Emperor* (9), and in the Nagpur Judicial Commissioner's Court in the cases of *Udhao* v. *Emperor* (6) and *Tani* v. *Emperor* (5).

It is contended, however, by the learned Assistant Government Advocate that the sufficiency of the examination of an accused under S. 342 cannot be considered in revision and reliance has been placed upon the observations by Bucknill, J. in the case of *Panchu Chowdhury* v. *Emperor* (10). In that case his Lordships observed. "I am not prepared, without very convincing authority, to say that it is well open in Revisional Jurisdiction of this Court to enquire into the sufficiency of the examination which has been made under the section. Indeed, it is freely admitted that it is impossible to lay down any very definite hard and fast rule and my own view is that this Court would not enquire, in Revisional Jurisdiction, into any such sufficiency, except possibly in very exceptional and special circumstances." I am prepared to agree with his Lordship that where there has been an examination of the accused in compliance with S. 342 of the Criminal Procedure Code it may not be open to this Court in its Revisional Jurisdiction to enquire into the sufficiency or otherwise of the examination, but it must be shown that there was an examination of the accused as contemplated by S. 342. If there has been an examination of the accused as contemplated by S. 342, in other words, in cases where the Judge or the Magistrate has put to the accused questions indicating the circumstances which from .the prosecution evidence appear to be against him, it will not be open to this Court in Revision to say that the Judge or the Magistrate ought to have put other questions and that the examination of the accused was not sufficient. But, where there has been no compliance at all with the provisions of S. 342, in other words, where the circumstances appearing against the accused have not been put to him and he has not been called on to explain those circumstances, but a simple question has been asked as to whether the accused had any thing further to say, such examination is not an examination as contemplated by S. 342. It was pointed out by Sir John Bucknill J. in the case referred to that it can easily be seen that if it is to be said that a Judicial Officer must ask this or that question or this or that series of questions under the provisions of S. 342 of the Code of Criminal Procedure, the practical effect of the working of that section could be criticised in revisional applications on every possible occasion, and his Lordship observed that where an accused was undefended, the Tribunal may well point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation but where an accused is defended by a legal practitioner it would be altogether impossible to expect or desirable to contemplate a Tribunal entering upon a lengthy examination of an accused person which might easily develope into a recounting of the history of the whole case or into, what would be far worse, some sort of cross-examination. I agree with these observations and hold that once it is shown that there

(9) 1924 Rang. 172=1 Rang. 689=2 Bur. L, J. 238=25 Cr. L, J. 487.
(10) 1923 Patna 91 = 3 P. L, T. 649 = 23 Cr, L. J. 233.

has been a sufficient compliance with the provisions of S. 342, this Court will not enquire as to whether the Court had or had not put a certain question which ought or ought not to have been put. But, as I have said before, there must appear upon the record that the Court did examine the accused in the manner contemplated by S. 342. Once this is shown, I am of opinion that it would not be open to this Court in Revision to enquire as to whether such examination was or was not a sufficient compliance with the provisions of S. 342. In the present case I am clearly of opinion that there has not been a proper compliance with the provisions of S. 342, and although it is not necessary to examine as to whether the accused persons have been prejudiced by such non-compliance, it is clear from the judgment of the Sessions Judge himself that the accused persons have been prejudiced in the present case. The learned Sessions Judge observed in one part of his judgment as follows:—"At the outset I should say that neither in the examination of the appellants nor in the first information as per Ex. A lodged by the appellant Ram Lakhan any attempt has been made or suggestion has been thrown to explain the injuries appearing on the person of Sitaram (son of the complainant Harihar)." Now, this is clearly one circumstance appearing from the prosecution evidence against the accused, and this circumstance, at any rate, was not placed before the accused by the Trying Magistrate. It may be that if the accused were asked to explain the circumstance they might have come forward with an explanation which might have satisfied the magistrate.

Having regard to the view I have taken on the point of law, it is unnecessary to set out the facts of the case. In my opinion the trial became illegal at the point when the accused persons were not examined as required by the second part of S. 342 of the Criminal Procedure Code. The conviction and sentences must be set aside and the case sent back to the Trying Magistrate to re-try the case from the point at which the trial became illegal, namely, after the cross-examination of the prosecution witnesses. If for any reason the case cannot be tried by the Magistrate who tried it in the first instance, the trial will have to begin *de novo*.

Case remanded.

1925 PATNA 346

DAS AND ROSS, JJ.

Bansidhar Sharaff—Decree-holder—Appellant.

v.

Thakur Ashutosh Deo and another—Judgment-debtors—Respondents.

Appeal from Original Order No. 269 of 1923, decided on 9th December, 1924, against an order of the Sub. J., Santal Parganahs, D/.- 15th January, 1923.

Bengal Regulation (IV of 1910) S. 8—Personal services of Ghatwal commuted to money payment—Ghatwali becomes alienable.

The condition of inalienability attaching to a Ghatwali tenure ceases after the personal services, to be rendered in the past by the Ghatwalis, are commuted to a payment of money for the support of rural police.

There is no reason why an estate in which long leases can only be granted under certain conditions imposed by statute should not itself be freely alienable. 1 P. L. J. 197 (1916) Ref. 1925 Patna 210 Foll. [P 351 C 1 & P 352 C 1]

N. C. Sinha and *S. N. Bose*—for Appellant.

Hasan Imam, S. M. Mullick, Jagannath Prasad, N. N. Sen and *Bindeswari Prasad*—for Respondents.

Ross, J.—This is an appeal from an order of the Subordinate Judge of the Santal Parganas refusing an application for attachment and sale of the right, title and interest of the judgment debtor in a Ghatwali tenure consisting of Taluqa Rohini, Tiljuri, Satar, Gamardiha and Sardha Kokra in execution of a decree obtained against him. Among the grounds of the application were these "That the Ghatwals, as they are at present, enjoy their estate without doing anything or rendering any service whatsoever save and except paying a lump sum for the maintenance of the village Chowkidars and for keeping watch over the villages held by them"; and "that inasmuch as the Government has commuted for a money payment the services due from

the Ghatwals, at the present time their liability to police service has taken the form of money payment towards the maintenance of village chowkidars and the Government will not be prejudiced in any way by the tenure in question being sold, it having been released the Ghatwals from their liability to perform police service subject to a money payment by the Ghatwals in the shape of the Chowkidari dues". In a petition of which a copy was annexed to the application for execution, the decree-holder narrated the facts leading to the appointment of a receiver of the income of the Rohini estate for the satisfaction of certain decrees held against the Ghatwal; and, on the ground that the payments made by the receiver to the decree-holders were inadequate, he applied for the sanction of the Government to the sale of the tenure. In his reply to the application the judgment-debtor stated that Birbhum Ghatwalis like Rohini are, under the law and immemorial custom and usage not liable to sale; but did not traverse the allegation that the services had been commuted to a money payment. The learned Subordinate Judge in his order discussed the various decisions which establish the inalienability of the Birbhum Ghatwalis and on the strength of these decisions refused the application. With regard to the question of commutation all that he said was this: "That the services to be rendered by the Ghatwal have at present been commuted to a money payment does not alter the character of the incidents of the tenure which, from the decisions referred to above, is clearly inalienable and not liable to sale for the personal debts of the Ghatwal".

In appeal it has been contended that the services attached to this Ghatwali have been commuted for a money payment and that consequently the reason for the inalienability has ceased and the inalienability itself has therefore ceased; and, secondly, that in any view, the life interest of the judgment debtor is saleable.

I shall deal first with the second argument. It was argued from the following words in the preamble to Act V of 1859, "It is expedient that the power of granting leases for periods not limited by the term of their own possession should in certain cases be extended to the possessors of such lands" that the Ghatwal always had a power of leasing for his life and that consequently his life interest is saleable It is true that the power of leasing for life is recognized, but no other form of alienation is recognized; and in my opinion, it cannot be inferred from the words quoted that the life interest of the Ghatwal can be sold in execution.

The main argument, however, is on the point of commutation. It is conceded by the appellant that the Birbhum Ghatwalis were inalienable see for example *Sartukchander Dey* v. *Bhagat Bharat Chandra Singh* (1) (Saddar Dewany Adalat Reports, 900); and *Balli Dubey* v. *Genai Deo* (2) a case which refers to the Rohini Ghatwali where it was observed that the tenure had been repeatedly held by the Court not to be liable for debt. It is unnecessary to refer to the decisions at length because the point is conceded.

The learned Vakil for the appellant referred to the regulations and statute governing this tenure. In S. 1 of Regulation 29 of 1814, the Birbhum-Ghatwali Regulation, reference is made to the fact that the Ghatwals held their lands in perpetuity subject to the payment of a fixed and established rent to the zamindar of Birbhum "and to the performance of certain duties for the maintenance of the public peace and support of the police." Act V of 1859 is a legislative recognition of the fact that the Ghatwals have not the power of alienating their lands, and gave power to grant leases for terms extending beyond the lifetime of the Ghatwal in certain cases for the development of the mineral resources of the country and for the improvement of the lands. Then came the Police Regulation III of 1900. This is now superseded by Regulation IV of 1910 which was enacted for the organization and maintenance of the Rural Police in the Santal Parganas and applies to Tapah

(2) [1883] 9 Cal. 388.

Sarath Deoghar within which the Rohini Ghatwali is situated. The regulation empowers the Deputy Commissioner to form circles and to appoint Sardars for each circle (S. 4), the Sardar may appoint a Deputy Sardar subject to the approval of the Deputy Commissioner (S. 5) and the Deputy Commissioner is to determine the number of chowkidars to be employed (S. 6). S. 7 of the Regulation empowers the Deputy Commis ioner to determine the amount required for the salaries and equipment of the Sardars, Deputy Sa dars, and chowkidars; and S. 8, which is the imporant Section in this connection, enacts as follows: "Where a zemindar or under tenure-holder holds subject to the condition, expressed or implied of supporting the police within his zemindari or under tenure, he shall be liable to pay the amount determined by the Deputy Commissioner under S. 7." It may be noted that by the definition in S. 3 the Ghatwal of Rohini is a "Zamindar." The argument is that the payment of the amount determined by the Deputy Commissioner for the support of the rurul police established by the Regulation takes the place of the police services that have been required from the Ghatwal and that therefore the condition of inalienability has ceased to attach to the tenure. It is contended that no duty is now imposed upon Ghatwal except a money payment which requires no personal qualification and stands on no different footing from the payment of ordinary Government dues. The personal service has been released and has been commuted for a money payment. To use the words of their Lordships of the Judicial Committee in *Kumar Satya Narain Singh* v. *Raja Satya Niranjan Chakravarti* (3) "the lands are merely subjected to a pecuniary charge, so that the personality or the appointment of the holder would be of no importance." Reference was made to the decision in *Radha Bai* v. *Anantrao* (4) where the following passage occurs in the judgment of West J, "So long as lands are assigned by the sovereign for the support of a public office or the land tax payable on lands is remitted in consideration of services to be performed by a particular family or line of holders, the lands are, according to the principles of the Hindu law and the customary law of the country, incapable of an alienation or disposal such as to divert them or the proceeds of them from the intended purpose. When an estate is freed from its connection with a public office, the reason arising from that connection for the preservation of the estate intact and unencumbered nesessarily fails. There is not in the lands themselves according to the Hindu Law any inherent quality limiting them to special kinds of ownership and devolution. They become subject to the ordinary laws of descent and disposal just as where a particular custom concerning them has been abandoned." See also *Bhagwat Bukhsh Roy* v. *Sheo Prasad Sahu* (5) where it is said: "On principle it may well be maintained that when service can no longer be enforced and the tenure consequently ceases to be a service tenure, the land can be alienated. When an estate is freed from the burden of service the reason for the preservation of the estate as inalienable disappears; alienation can be prohibited only with a view to prevent the permanent severance of the estate from the services annexed to it."

In reply the learned Counsel for the respondent argued in the first place on S. 2, Regulation 4 of 1910, which empowers the local Government by a notification in Gazette to withdraw the regulation or any part thereof from a y portion of the Santal Parganas and to extend the regulation or any part thereof to any portion of the Santal Parganas from which the same has been so withdrawn, that the regulation is of a temporary character and cannot affect the permanent incidents of the Ghatwali tenures. In my opinion there is nothing in this Section to justify the contention that the regulation is a temporary measure. It is

(3) 1924 P. C, 5=3 Pat. 183=51 I. A. 37=34 M.L.T. 27=5 P.L.T, 171=28 C.W.N. 351 (P.C.)

(4) [1885] 9 Bom. 198 (F. B.)

(5) [1913] 18 C. W. N. 297=21 I.C. 481=18 C. L.J. 277.

a permanent enactment; and the fact that the power to extend or withdraw its provisions has been entrusted to the Local Government does not affect its permanent character. It was suggested that if the services were taken to have been commuted while the regulation was in force, the withdrawal of the regulation, which might occur at any time, would reestablish the duty of police service in the tenure and that consequently it could not have been the intention of the Regulation to commute the services. This suggestion, however, is contrary to one of the recognized principles of statute law. "If a right has once been acquired by virtue of some statute, it will not be taken away again by repeal of the statute under which it was acquired. "The law itself" says Puffendorf in his Law of Nature and Nations, Book I, Chap VI, S. 6 "may be disannulled by the author; but the rights acquired by virtue of that law whilst in force still remain, for together with a law to take away all its precedent effects would be a high piece of injustice" (Craies on Statute Law, Third Edition, page 317). This principle is expressly recognized by S. 6 of the General Clauses Act (X of 1897) which provides that the repeal of an Act shall not affect any right, privilege, obligation or liability acquired, created or incurred under any enactment so repealed.

In the second place it was contended for the respondent that there has in fact been no commutation. This argument rests on a construction of the words quoted above from S. 1 of Regulation 29 of 1814 "subject to the performance of certain duties for the maintenance of the public peace and support of the Police." It is argued that all that has been commuted is the duty of support of the police and that the duties for the maintenance of the public peace remain unimpaired and the tenure therefore remains inalienable. It is pointed out that in S. 8 of Regulation 4 of 1910 the words are...subject "to the condition, expressed or implied, of supporting the police." It is argued that this expression by necessary implication leaves the duty of maintenance of the public peace unimpaired and uncommuted.

The learned Counsel supported his argument by a reference to the Kabuliat and Mochelka executed by the present Ghatwal in 1911, that is subsequently to the passing of Regulation IV of 1910. He contended that the Mochelka provides for the performance of duties personal to the Ghatwal beyond the duty of supporting the Police and that these duties have not been commuted by the Regulation.

The learned Government Advocate, who was heard as *amicus curiae* on behalf of the Government (not a party), supported the argument of the respondent. He contended that the Ghatwal was liable for duties of two kinds; first personal duties; and, secondly, duties performed by others under him employed by him and paid by him. What was done by Regulation IV of 1910 was that the amount of money which the Ghatwal had to pay to his chowkidars was commuted for a lump sum to be paid to the Deputy Commissioner of the district who in turn, paid the chowkidars, and the chowkidars thus became the officers of the Deputy Commissioner; but the personal services of the Ghatwal remained intact. It was argued on the proviso to S. 4 of the Regulation that the Ghatwal becomes a sardar of the circle formed under that Section and that power is given by S. 25 to the Local Government to make rules regulating, among other things, the appointment and dismissal of sardars. It was argued that under the Regulation the Ghatwal is still liable to dismissal by the Deputy Commissioner and that therefore his personal liability remains and the duties of performing the function of sardar have not been commuted.

I shall deal first with the argument of the learned Government Advocate which, in my opinion, is unsound. The proviso to S. 4 does not necessitate the appointment of a Ghatwal as sardar. It merely provides "that, in the Damin-i-koh and in the Ghatwalis subject to the provisions of the Bengal Ghatwali Lands Regulation, 1914, the circles shall be so formed as to admit of the duties of sardar being performed

by parganaits, sardars, or ghatwals, as the case may be, according to exis ing arrangements." This merely means that the circles are to be such as to admit of the possibility of the performance of the duties of sardar by the existing Ghatwal: it does not mean that the existing Ghatwal is necessarily to be appointed sardar. The learned Government Advocate was unable to say whether the appellant had been appointed sardar; and, as the Rohini Ghatwali is an estate of a large extent, it appears unlikely that the Ghatwal should be sardar within the meaning of the Regulation whose salary is fixed between the limits of Rs. 8 and Rs. 12 a month. In any case, even if he had been appointed sardar, the power of dismissal would affect his appointment as sardar only, and not his position as Ghatwal, because he is in reality a different person when performing the duties of sardar from what he is as Ghatwal. It may be noted that the regular Police administration is enforced in the Deoghar Sub-division (see Gazetteer of the Santal Parganas, page 232) and that the rules, which were framed under S. 24 of Regulation III of 1900 corresponding to S. 25 of Regulation IV of 1910, are rules applicable to the Police tracts other than the Deoghar Sub-division (see the Santal Parganas Manual 1911, at page 119). There is therefore no foundation in fact for the argument which has been based upon the proviso to S. 4 and on S. 25 of the Regulation. The rest of the argument of the learned Government Advocate is the same as that advanced on behalf of the respondent and requires an examination of the terms of the Kabuliat and Mochelka. Now these terms must be construed in the light of the provisions of Regulation 29 of 1814, by which it is recognised that the Ghatwals therein referred to are entitled to hold their lands generation after generation in perpetuity subject to the payment of a fixed and established rent to the zamindar of Birbhum and to the performance of certain duties for the maintenance of the public peace and support of the Police. The duties imposed by the Kabuliat and Mochelka must therefore be duties for the maintenance of the public peace and support of the Police. It is conceded that the duties of supporting the Police have been commuted, but it is contended that the Mochelka contains terms which impose duties of a personal nature on the Ghatwal other than duties of supporting the Police. Learned Counsel referred first to the clause of the Mochelka under which the Ghatwal undertakes to continue as before the arrangement of Amlas. This, in my opinion. is nothing more than an undertaking to respect the law regulating the appointment of officials such as Patwaris He next referred to the clause "Whenever pilgrims and other persons pass through my taluk I will take them from my jurisdiction to another jurisdiction and make them over to the chowkidar of the same." It is contended that this is a personal duty which has nothing to do with supporting the Police. It is, however, clearly not a personal duty, as it would be physically impossible for the Ghatwal himself to conduct the pilgrims and other travellers through his Taluk. There is a further duty to lodge information of any dacoity, highway robbery, murder and other petty or serious occurrence happenning within his Taluk and to enquire into it. This is an ordinary zemindari duty. The Ghatwal also undertakes not to discharge, without the orders of the Government, such persons under him as have been engaged in doing Police duties; and, if it be found necessary to discharge any such person then he will first send an information thereof and report his faults to the authorities and abide by such orders as will be passed by them. This duty has clearly passed away with the control of the chowkidars and is now vested in the Deputy Commissioner by the Regulation, as has also the duty of submitting a list every year to the authorities of such persons as serve under the Ghatwal. I can find nothing in this Mochelka imposing any duty of a special character distinguishable from the duties of an ordinary zamindar with respect to the maintenance of the public peace, upon the Ghatwal. The duties are the duties imposed by the ordinary zemindary Sanad (See

Regulation I of 1793, S. 1; the Fifth Report (Firminger Volume 1, page XLVI); and Sir John Shore's Minute, paragraph 166, and the examples of Sanad and Mochelka in Phillips on the Land Tenures of Lower Bengal pages 478 and 479). At page 106 Phillips says that "The Sanad says what were the duties of the Zamindar and that they were duties devolving upon him as a representative of the Government in respect of the revenue as well as in respect of the preservation of order. He was also bound, it seems, to assist the sovereign in case of invasion. He was further responsible for the peace and order of his zemindari." It is only the duty of supporting the Police imposed by S. 1 of Regulation 29 of 18 4 which distinguishes the position of the Birbhum Ghatwals from that of the ordinary zemindars and it is this duty of supporting the Police which is expressly dealt with in Regulation IV of 1910. As that duty has been commuted for a money payment, it appears to me that nothing is left beyond the duties of the ordinary zemindary. Learned Counsel for the respondent also referred to Act V of 1859 and contended that the necessity for obtaining the sanction of the Commissioner of the Division to a lease granted under that act is inconsistent with the alienability of the Ghatwali itself. I can see no inconsistency. If the Ghatwali has become alienable, it will be alienable subject to the statutory limitations on the nature of the estate itself; and I can see no reason why an estate in which long leases can only be granted under certain conditions imposed by statute should not itself be freely alienable.

Finally reference was made to the decisions in *Lakshmi Narayan Mahton* v. *Satya Narain Chakravarty* (6) and *Midnapur Zamindhary Co. Ltd.* v. *Ajambar Singh Mura* (7), cases decided after the Regulation of 1914. These cases, however, do not touch the present question. The first was not a case of a Birbhum Ghatwali, but of a Ghatwali of Jamtara under the Raja of Hetampur where the appointment and dismissal of the Ghatwal rested with the Raja and not with the Government. Similarly the second case was a case of a Singbhum Ghatwali held under the Raja. There is nothing in these decisions inconsistent with the contention on behalf of the appellant in the present case; and learned Counsel was unable to point out any decision on a Birbhum Ghatwali subsequent to 1910 in his favour.

In *Kumar Satya Narain Singh* v. *Satya Narain Ckakravarty* (3) the Judicial Committee laid down the following rule: "To terminate the Ghatwali character of the lands it seems to their Lordships that it is necessary to find something done or omitted to be done on the part of the Government, as the grantor, which would have the legal effect of a surrender and regrant of the lands on new terms or at any rate of a release of the right to appoint the Ghatwal and call for the performance of the services." The learned Vakil for the appellant contends that this is the effect of Regulation 4 of 1910. Plainly the burden imposed upon the Ghatwal could not be increased. The liability to pay which is imposed by S. 8 must therefore be construed as being imposed in substitution for the pre-existing duty of supplying the Police force. It is argued that this has the legal effect of a surrender and regrant of the lands on these terms or of a release of the right to call for the performance of the service. For the respondent it is pointed out that there is no express release. But is there not a release by necessary implication? This is the view which has been taken by this Court in *Tikait Thakur Narain Singh* v. *Nawab Syed Dildar Ali Khan* (8). The fact that in that case it was held that the tenure was not a Ghatwali does not affect the reasoning on the subject of commutation, although the case cannot be referred to as an authority deciding the present question. In my opinion the performance of the special services which rendered this Ghatwali inalienable has been released in consi-

(6) [1916] 1 P. L. J. 197=36 I. C. 269=2 P. L. W. 419.

(7) [1916] 1 P. L. J. 601=2 P. L. W. 427=36 I C. 963.

(8) 1925 Pat. 210=3 Pat. 915.

deration of a money payment. There is no longer any question of the 'personal competence' of the Ghatwal to use the words of their Lordships of the Judicial Committee in the case already referred to, and there is therefore no reason to hold that the Ghatwali is any longer inalienable.

I would therefore allow this appeal and reverse the decision of the learned Subordinate Judge and direct that the execution do proceed in due course. The appellant is entitled to his costs here and in the Court below.

It may be added that the learned Vakil for the Manager of the estate argued that there could be no attachment or sale without the leave of this Court, because he is an officer of this Court and the property is in the hands of the Court This objection appears to be sound, but it was never taken before and the learned Vakil for the appellant says that he is prepared to apply for leave.

Das, J.—I agree.

Appeal allowed.

✱ 1925 PATNA 352

DAWSON MILLER, C. J. AND FOSTER, J.

Trikamjee Jiwan Das—Petitioner.

v.

The Commissioner of Income Tax B & O—Opposite Party.

Mis. Judicial Case No. 57 of 1924, decided on 18th November, 1924. from an order of the High Court, D/-12th May, 1924.

✱ (a) *Income Tax Act (11 of 1922), S. 66 (2)—Assessment accepted without appeal—No reference is competent.*

An application under S. 66 (2) for a reference to the High Court is incompetent where the assessment has been accepted without appeal. Under S. 66 (2) the assessee may only apply in cases where there has been an appeal from an assessment by the Income Tax Officer under S. 31 or S. 32. 1923 P. C. 138 Ref.

✱ (b) *Specific Relief Act, S. 45—Power to issue mandamus—Patna High Court has none.*

S. 45 of the Specific Relief Act, which gives the three High Courts in the Presidency towns power to make orders in the nature of *mandamus* requiring specific acts to be done or forborne by persons holding a public office, does not confer the same powers upon the Patna High Court.

✱ (c) *Income Tax Act (11 of 1922) S. 35—Separate returns of 5 concerns filed to avoid heavy assessment—Notice served—Applicant mixing one more losing concern with the five and applying for reduction—Application is not maintainable.*

Assessment was made on the basis of returns of 5 concerns submitted in the names of 5 different persons. Later on, it transpired that all the 5 concerns belonged to the applicant who was then served with a notice to show cause against enhanced assessment. The applicant thereupon claimed assessment collectively on those 5 and one more which was in great loss but his application was refused.

Held: that S. 35 did not apply and the claim was rightly refused.

L. N. Singh—for Opposite Party.

K P. Jayaswal—for Petitioner.

Dawson Miller, C. J.—This reference comes before us under an order passed by a Division Bench of this Court on the 12th May last directing the Commissioner of Income Tax to state a case upon the two points formulated in the order thus:—"First, as to whether an assessee under the law is entitled to apply for a refund under S. 35 (of the Indian Income Tax Act, 1922) without making any objection or appeal against the original assessment and demand under S. 29 of the Act; and secondly, the Commissioner having initiated proceedings under S. 35 of the Act if in the course of such proceedings it is discovered that the assessment was under a mistake and that no assessment ought to have been made at all, whether the assessee is entitled to a refund without any application being made on his part, and any other point that he may consider proper."

The second of the questions thus formulated for decision assumes first, that proceedings under S. 35 were initiated by the Commissioner and, secondly, that the assessment was made under a mistake. But the commissioner in the case stated has expressed the view that no proceedings under S 35 were initiated, by him at all and has further found that there was no mistake apparent on the record within the meaning of S. 35 of the Act. If these findings are accepted it would appear that the second question for decision becomes one of purely academical interest. Moreover, if the first question as formu-

lated should be answered in the affirmative it would not determine the real dispute between the parties in this case. The findings are not, however, strictly mere findings of fact but involve mixed questions of fact and law. It will be necessary therefore to consider the facts somewhat in detail and to refer to the appropriate sections of the Act before we can arrive at any satisfactory conclusion upon the real question at issue between the parties.

There are five collieries in the district of Manbhum which up to and including the year 1922-1923 were separately assessed to income tax upon returns made in the name of certain persons who in those returns represented the collieries as their property. When the assessments for 1922-1923 were made by the Income Tax Officer they were accepted without protest and without appeal by the persons upon whom the assessments were levied. Of the five collieries in question three were alleged to belong to Gopaldas Trikamjee, the fourth to Bisanjee Damodar and the fifth to Trikamjee Jiwan Das. The demands for payment of the income tax assessed on these five collieries were made upon the persons whom I have named between the 30th July and the 25th August 1922. The financial year ends on the 31st March and the tax is assessed on the basis of the previous year's income. The total amount payable upon these five properties was in round figures Rs. 58,000. The assessees were given the option of paying the taxes by instalments. They paid, again in round figures, Rs. 26,000 leaving a balance due of Rs. 32,000. This state of affairs continued up to August 1923 when the Income Tax Officer having received information that the five collieries all belonged to the same firm trading under the name of Trikamjee Jiwan Das whose principal place of business is in Bombay issued a notice on the firm, dated the 13th August 1923, calling upon it to shew cause why it should not be assessed at a higher rate based on the total income of the five collieries. The notice purported to be issued under S. 35 of the Income Tax Act. 1922. It should be mentioned that the rate of tax is levied upon an ascending scale according to the total income of the assessee. On receipt of this notice the firm of Trikamjee Jiwan Das filed a petition asking for a rectification of the original assessments on the ground that their Bombay business which is apparently unconnected with the colliery business and upon which they appear to have been assessed separately in Bombay had shewn a considerable loss in the previous year, the amount of such loss exceeding the profits made by the collieries. This petition was also made under S. 35 of the Act which provides as follows:—

"35 (1) The Income Tax Officer may, at any time within one year from the date of any demand made upon an assessee, on his own motion, rectify any mistake apparent from the record of the assessment, and shall within the like period rectify any such mistake which has been brought to his notice by such assessee:

Provided that no such rectification shall be made having the effect of enhancing an assessment unless the Income Tax Officer has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard.

(2) Where any such rectification has the effect of reducing the assessment, the Income Tax Officer shall make any refund which may be due to such assessee.

(3) Where any such rectification has the effect of enhancing the assessment, the Income Tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under S. 29 and the provisions of this Act shall apply accordingly."

In the case stated, the Commissioner has pointed out that this section has really no application to the facts under which the Income Tax Officer issued the notice and he states that he informed him of this at an early stage. He also points out that the proper section applicable for the recovery of income tax which has escaped assessment or has been assessed at too low a rate is S. 34 which

provides the procedure for recovering income tax which has either escaped assessment or has been assessed at too low a rate and limits the period within which a notice may be issued for the purpose of recovering such tax to one year after the year of assessment. Whether the notice is to be taken as having been issued under S. 34 or S. 35 is of no importance in this case for it is clear that under S. 35 even if the Income Tax Officer takes no action himself he must within the time therein specified rectify any mistake apparent from the record of the assessment which has been brought to his notice by the assessee. If therefore S. 35 is at all applicable to the circumstances of this case it would follow that the Income Tax Officer was bound to rectify the mistake and, if the assessment was thereby reduced, to refund the excess to the assessee. It is admitted by Mr. Jayaswal who appears for Trikamjee Jiwan Das, the Petitioner in this case, that for at least three or fours years before the year in question the five collieries were the property of this firm although the returns made during that period had been made in the names of different persons and assessed separately and there is nothing to shew that before the year in question the firm's Bombay business had been working at a loss. It was only in August 1923 and after the original assessments had been accepted that the Petitioner then, for the first time, disclosed the fact that all five collieries were owned by the same person. The Commissioner in his case states, " The representative of the firm virtually admitted to me that if they had been found liable to assessment in 1922-1923 in Bombay they would not have voluntarily disclosed the fact that all the five Manbhum collieries belonged to them " and he later on passed an order on the 7th January 1924 rejecting the application for a refund but ordering the proceedings taken by the Income Tax Officer nominally under S. 35 but actually under the powers granted by S. 34, to be dropped. The assessee shortly afterwards applied to him to review his order declining the refund but he refused to do so. An application was then made to him under S 66 (2) for a reference to the High Court which was also rejected on the 7th February 1924. This application was refused mainly on the ground that under S. 66 ( ) the assessee may only apply in cases where there has been an appeal from an assessment by the Income Tax Officer under S. 31 or S. 32 of the Act and that the assessment had been accepted without appeal in this case. In refusing to state a case for the opinion of the Court under that sub section the Commissioner was undoubtedly right. The assessee then applied to the High Court under the provisions of S. 66 (3) asking it to require the Commissioner to state a case and refer it. When the matter came before the High Court the learned Judges considered that although no application was maintainable to the Commissioner under sub-sec. (2) of S. 66 the Commissioner had nevertheless power under sub-sec. (1) of that section to state a case and relying upon the authority of *Alcock Ashdown and Company Ltd.* v. *The Chief Revenue Authority of Bombay* (1) directed the Commissioner to state a case. I have grave doubts whether in the circumstances the order of the High Court was justified. In the Bombay case cited which was a decision of their Lordships of the Privy Council, S. 45 of the Specific Relief Act, which gives the three High Courts in the Presidency towns power to make orders in the nature of mandamus requiring specific acts to be done or forborne by persons holding a public office was relied on but this section does not confer the same powers upon this High Court and S. 66 of the Income Tax Act, which differs in certain material respects from S. 51 of the Act of 1918 which was in force when the case cited was decided, gives the High Court no power over the Income Tax Commissioner except to the limited extent therein provided. The Court,

(1) 1923 P. C. 138—47 Bom. 742—50 I. A. 227—25 Bom. L. R. 920—21 A. L. J. 689—1923 M. W. N. 537—45 M. L. J. 592—33 M. L. T. 267—18 M. L. W. 918—4 L. R. P. C. 189—39 C. L. J. 302—28 C. W. N. 762 (P. C.).

however, by its order considered that it had jurisdiction and ordered the Commissioner to state a case which he has done and it is not competent to this Court now to question the validity of that order.

The real question for our determination is whether in the circumstances stated the petitioner was entitled under S 35 of the Act to require the Income Tax Officer to rectify a mistake apparent from the record of the assessment and to make a refund of the amount paid thereunder. The Commissioner has pointed out that it is very far from being apparent from the records of the assessments of the five collieries in question that they all belonged to one firm. In my opinion, he was justified in taking this view. Moreover, I think on the facts disclosed he might have gone much further and said that from first to last there never was any mistake at all. What was done with a view to getting separate assessments upon these five collieries was done deliberately and it was only when this mode of being assessed turned out unprofitable to the Petitioner that he first disclosed the fact that the properties were not separately owned but all belonged to him. In my opinion this was not a question of mistake at all and there was certainly no mistake apparent from the record of the assessment. I do not consider that S. 35 has any application to the facts of the present case. Had there been a *bona fide* mistake as to the manner in which the assessment ought to be made different considerations might have applied. The only mistake which appears to me to be shewn to have existed in this case is that the assessee failed to realise that in making returns to the income tax authorities honesty may in the long run prove to be the best policy. I think that the Commissioner was perfectly justified in the circumstances in refusing to make any rectification or to refund any sums paid under the assessments made. It is not, in the circumstances necessary to answer categorically the questions referred because even if they are both answered in the affirmative, that would not dispose of the real questions in issue between the parties. The real question is whether there was in the circumstances of the case, any mistake apparent from the record of the assessment which would entitle the assessee to a refund. In my opinion, there was not. The Commissioner of Income Tax is entitled to the costs of this reference and we assess a hearing fee of Rs. 200.

Foster, J.—I agree.

Reference rejected.

1925 PATNA 355

DAS AND ROSS, JJ.

Ram Krishna Misra, Ex parte.

Appeal from Original Order No. 94 of 1923, Decided on 2nd July 1924, from an order of the Dt. J Bhagalpur, D/- 19th February 1923.

Provincial Insolvency Act (V of 1920,) S. 43—Section is mandatory.

The word "shall" in S. 41 of the Act imposes a duty upon the insolvent the breach of which involves the consequences pointed out in S. 43. The provisions of S. 43 are mandatory. The Court has no discretion to enlarge the time after the expiry of the period fixed by the Court for an application for an order of discharge. [P 355 C 2 & P 356 C 1]

Nirod Chandra Roy—for Appellant.

Das. J.—This appeal must be dismissed. The only question is, whether the provisions contained in S. 43 of the Insolvency Act are mandatory. That section provides that:

"If the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of S. 37 shall apply accordingly."

It is contended on behalf of the appellant that the provisions of S. 43 are not mandatory and that there is a discretion in the Court to enlarge the time after the expiry of the period fixed by the Court for an application for an order of discharge. I am unable to agree with this view. S. 27 of the Act provides that:

"If the Court does not dismiss the petition, it shall make an order of adjudication, and shall specify in such order the period within which the debtor shall apply for his discharge."

The provision was intended to remedy the defect in the existing law under which the conduct of the debtor in many cases never came under the scrutiny of the Insolvency Court. It is a new provision and, in my opinion, must receive a strict interpretation. S. 41 provides that:

"A debtor may, at any time after the order of adjudication, and shall, within the period specified by the Court, apply to the Court for an order of discharge, and the Court shall fix a day, notice whereof shall be given in such manner as may be prescribed, for hearing such application and any objection which may be made thereto."

It is obvious to my mind that the debtor has complete discretion to apply when he likes provided he applies within the period specified by the Court. The word "shall" in S. 41 of the Act imposes, in my opinion, a duty upon the insolvent the breach of which involves the consequences pointed out in S. 43. In my opinion the decision of the learned District Judge on this point is right and must be affirmed.

I would dismiss this appeal.

Ross, J.—I agree.

Appeal rejected.

1925 PATNA 356

DAWSON-MILLER, C. J. AND MULLICK J.

(*Maharajdhiraj Sir*) *Rameshwar Singh*—Appellant.

v.

Sheikh Waizul Haq—Respondent.

Letters Patent Appeal No. 81 of 1923, Decided on 27th October 1924, from the decision of Foster, J., affirming the decision of the Sub. J., Muzufferpur, D/- 24th February 1921.

Custom—Evidence-Time for which existence should be proved cannot be fixed.

It would be very dangerous and improper to lay down any fixed time for which it is necessary to adduce evidence to show that a custom exists. [P 357 C 1]

K. P. Jayaswal and *M. Prasad*—for Appellant.

L. K. Jha—for Respondent.

Dawson-Miller, C. J.—This case came before us on appeal under the Letters Patent on the 28th November last year from a decision of Mr. Justice Foster affirming the decision of the Subordinate Judge which in turn affirmed the decision of the Munsiff. The question for determination in the case was whether the plaintiff as landlord was entitled in respect of a certain holding to claim from his tenant not merely the recorded rent but, in addition certain small sums in respect of palm trees. The case alleged on behalf of the landlord was that there was a custom of the village whereby the tenant in addition to the rent for the land was also liable to pay the landlord certain small sums by way of *sairat* in respect of palm trees when they became juice yielding. Both the Lower Courts appear to have taken the view that if these sums were recoverable at all they were included in the term rent and as the rent was recorded in the Record-of-Rights at a certain fixed sum nothing more than that sum was recoverable.

When the case came before this Bench on appeal from Mr. Justice Foster under the Letters Patent we took the view that there might be such a custom as that alleged by the landlord but as the point had not been dealt with by either of the Lower Courts we remanded the case to the Court of the Subordinate Judge for a finding upon the question of custom. The case has accordingly been dealt with on remand by the Subordinate Judge and the conclusions arrived at by him are set out in his judgment dated the 14th January 1924. The conclusions he arrived at are:—"1. That the plaintiffs do realise *sairat* at the rates claimed in respect of juice yielding palm trees standing on the *raiyati* holdings of all the raiyats of the village. (2) that he has been doing so openly and without coercion and without interruption at least from 1311 F. (3) That it is not an illegal imposition." He adds "The whole village in my opinion would never have paid *sairat* for such a length of time to the plaintiff if there had been no local custom in their village as alleged in the plaint. For

the above reasons I am of opinion that the plaintiff has established the custom regarding *sairat* as alleged in the plaint." That is a conclusive finding in favour of the custom and the only objection to entering judgment on behalf of the plaintiff for the whole amount claimed that has been urged before us is that the period covered by the evidence relating to the custom is only a period of something like 20 years from the present day and that is not in itself sufficient to establish an immemorial custom. It would be, in my opinion, very dangerous and improper to lay down any fixed time for which it is necessary to adduce evidence to shew that a custom exists. The learned Judge for the reasons given by him has come to the conclusion that the evidence is quite sufficient to prove an immemorial custom. Indeed he says that the raiyats would never have paid this *sairat* for such a long period of time if there had not in fact been a local custom in the village to that effect and in arriving at this conclusion, in the absence of any evidence to the contrary by the defendants, I think he was amply justified on the evidence. In my opinion, therefore, the appeal must be allowed; judgment will be entered for the plaintiff for the amount claimed which includes both the rent proper and the additional sums for *sairat* in respect of the juice yielding palms. The plaintiff is entitled to his costs here and in all the Courts below.

Mullick, J.—I agree.

Appeal accepted.

✱ 1925 PATNA 357

JWALA PRASAD, Ag. C. J. AND KULWANT SAHAY, J.

Charan Mahton and others—Defendants—Appellants.

v

Kumar Kamakhya Narayan Singh—Plaintiff—Respondent.

F. A. No. 246 of 1921, decided on 6th August 1924 against the decision of the Sub.J., Hazaribagh, D/- 28th June 1921.

✱ (a) *T. P. Act, S. 116—Lessee's heirs or assign—Section does not apply.*

S. 116 does not contemplate the position of the heirs or assignees of the original lessee. It contemplates the position of the lessee himself after the determination of the lease and it is only in the case where the lessee of a property remains in possession thereof after the determination of the lease granted to him and the lessor or his legal representative accepts rent from the lessee or under-lessee or otherwise assents to his, namely, the lessee's, continuing in possession, that the lease is in the absence of an agreement to the contrary renewed from year to year or from month to month according to the purposes for which the property is leased. [P 361 C 1]

(b) *Adverse Possession—Permanent tenancy claimed—Payment of rent does not affect adverseness.* [P 361 C 2]

Payment of rent by persons claiming the status of permanent mokarridars cannot derogate from their position of being in adverse possession.

(c) *Adverse possession—Permanent tenancy asserted—Marfatdari receipts granted by landlord—Yearly tenancies not created—Landlord and tenant.*

Where one party was claiming a permanent right and the other was not willing to accept that claim and asserting that the other party had no right whatsoever to remain in possession.

Held: that the grant of Marfatdars receipts by the landlord did not create the relationship of landlord and yearly tenant between the parties. [P 361 C 2 & 361 C 1]

✱ *K.B. Dutt* and *Bankim Chandra De*—for Appellants.

L. N Singh and *S. M. Mullick*—for Respondent.

Kulwant Sahay, J.—This is an appeal on behalf of the principal contesting defendants against the decree of the Subordinate Judge of Hazaribagh, dated the 25th June 1921, whereby he decreed the plaintiff's suit for *khas* possession over certain villages which were granted to the ancestors of the defendants Nos. 1 to 5 in *istamrari mokarrari* grant by a predecessor of the plaintiff.

It appears that in the years 1864 to 1866 Maharaja Ramnath Singh, the then proprietor of the Ramgarh Estate granted a large number of villages in *istamrari mokarrari* leases to several persons. In course of time when the original grantees began to die, a question arose between the ancestors of the plaintiff, who is the present owner of the Ramgarh Estate and the heirs or assignees of the original *mokarraridars* as to the nature of the grant. The plaintiff's ances-

tors alleged that the grants were merely life tenures and were resumable after the death of the original grantees, whereas the heirs or the assignees of the grantees alleged that the grants were permanent, heritable and transferable grants and the plaintiff's ancestors had no right of resumption. Some test cases were instituted and the controversy between the parties was finally set at rest by a decision of the Calcutta High Court in the case of *Ram Narayan Singh* v. *Chota Nagpur Banking Association* (1) wherein it was held that the grants did not create an estate of inheritance and were not permanent and heritable grants but merely life tenures and the plaintiff's ancestors had the right of resumption. Thereafter a large number of suits were instituted by the Ramgarh Estate against the heirs or assignees of the original *mokarraridars* for resumption of the grants and several of them have come up to this Court in appeal. The present suit is one of those resumption suits. In the present case the plaintiff's case as made in the plaint was that three villages Lemoia Sindurway, and Banderohua were granted under a *mokarrari istamrari* lease by Maharaja Ramnath Singh, the then owner of the Ramgarh Estate to two persons Tulshi Mahto and Lachman Mahton, under a *patta* dated *Chait Sudi* 9th, 1922 *Sambat* (13th April 1865), that both the original grantees were dead and the plaintiff's right to re-enter accrued on the death of the last surviving grantee, that the defendants Nos. 1 to 37, who were heirs or assignees of the original grantees or either of them or of their heirs, continued in possession with the assent of the landlord as tenants from year to year, but that at the time of the preparation of the record of the rights they falsely asserted a title of permanent *istamrari mokarraridars* and in the settlement papers they were recorded as such. Thereupon notices to quit were issued on behalf of the plaintiff upon the persons in possession in September 1915, asking them to quit at the expiration of the *Sambat* year 1972. Similar notices were again issued in September 1917, requiring the persons in possession to quit at the expiration of the *Sambat* year 1974. As doubts were entertained as to the due service of these notices another set of notices were issued on the 1st of September, 1919, asking the defendants or their predecessors-in-interest to quit possession at the expiration of the *Sambat* year 1976 but as the defendants did not surrender possession, the plaintiff instituted the present suit and prayed for a decree for *khas* possession and mesne profits. The suit was instituted on 1st April 1920.

Two sets of written statements were filed. One set was filed by the defendants Nos. 1 to 3, 11 to 16 and 19 to 22, and another set by the defendants Nos. 6 to 9. Defendants Nos. 1 to 3 and defendant No. 4 who died during the pendency of the suit and in whose place the defendant No. 5 was substituted are the heirs of the original grantees. Defendants Nos. 11 to 16 and 19 to 22 claim a *darmokarrari* interest under the defendants Nos. 1 to 3 to the extent of 8 annas share in Bunderohua and 6 annas in Lemoia. Their defence was that the village in dispute formed a permanent, heritable and transferable interest of the original grantees, and that after their death the heirs and assignees have been in possession as permanent *mokarraridars* and *darmokarraridars*, that after the death of the original *mokarraridars* the defendants did not take any yearly settlement as tenants from the plaintiff or his ancestor, that in the *Sambat* year 1958, after the decisions of one of the test cases brought by the Estate against one Narsingh Dayal Sahu (2) the defendant No. 2 Narhu Mahto went to the grandfather of the present plaintiff and asked him to grant receipt in his own name and in the name of the other heirs, but the said Raja having declined to grant such receipts, the defendants stopped paying the rent, and have since been in possession without payment of rent and adversely to the plaintiff and his ancestors and that, therefore, the suit is barred by limitation.. The defendants Nos. 6 to 9 set up an ancestral *khairat*

(1) [1914] 43 Cal. 332=36 I. C. 321.

(2) [190?] 30 Cal. 883.

lakheraj title in respect of 4·81 acres of land in *mouza* Lemoia under a grant from the ancestors of the present plaintiff. They denied their liability to pay any rent or to give up possession on the death of the original *mokarraridar*. Various issues were raised in the Court below and the learned Subordinate Judge found all the issue against the defendants other than the defendants Nos. 6 to 9 and made a decree for *khas* possession and mesne profits against them. As regards defendants Nos. 6 to 9 the learned Subordinate Judge found that they were in possession of 481 acres in Lemoia under *lakheraj* grant from the ancestors of the plaintiff and that they could not be ejected and he accordingly dismissed the suit against them.

The principal defendants have come up in appeal to this Court and the principal point argued in their behalf is the question of limitation and adverse possession.

In the plaint the plaintiff alleged that the *mokarrari* grant was made by Raja Ramnath Singh but at the trial the evidence given was that these villages along with other villages were held under a *khorposh* grant by Rani Hiranath Kumri, who was the wife of Raja Ramnath Singh the then proprietor of the Ramgarh Estate, and that the *mokarrari* lease in question was granted by Rani Hiranath Kumri with the consent of Raja Ramnath Singh. The fact, however, that the *mokarrari* grant was made by Rani Hiranath Kumri will not affect the decision of the case as the parties have accepted the position as if the grant had been made by Raja Ramnath Singh himself.

It has not been contended before us that the *mokarrari* grant created a permanent and heritable interest in the grantees. The finding of the learned Subordinate Judge on the Issue No. 1 as to what was the nature of the tenure in suit and whether it was only a life estate has not been challenged before us. The learned Subordinate Judge has found that having regard to the decision of the Calcutta High Court in the case of *Ram Narayan Singh* v. *Chota Nagpur Banking Association* (1) there can be no question that the interest created under the *istamrari mokarrari* deed was a mere life estate and not a permanent and heritable tenure. The *mokarrari* deed in the present case is in the same terms as the deed in the case referred to above; and the learned counsel for the appellant has accepted the position in this appeal that the estate created under the deed was a mere life estate in favour of the grantees. It has been contended before us that Lachman Mahton, one of the grantees died in the year 1923, *Sambat* (1866) and Tulsi Mahton the surviving grantee died in the year 1940 *Sambat* (1883), and that, therefore, the right of the plaintiff to resume accrued upon his own allegations on the death of the last surviving grantee in the year 1940 *Sambat*, and that since then the defendants have been in adverse possession and the plaintiff's claim is barred by the Statute of Limitation. On the other hand, it has been argued on behalf of the plaintiff that after the death of the last surviving grantee the status of the heirs and assignees who continued in possession became one of tenants by sufferance but, that, as the landlord gave his assent to the continuance of the tenancy by receipt of rent, the tenancy was converted into one from year to year and that the plaintiff's right to recover direct possession accrued only on the determination of this yearly tenancy by the notice to quit which was given for the last time on the 1st of September, 1919, and that the suit having been brought on the 1st of April, 1920, the claim was not barred by limitation.

In order to determine which of these two contentions is correct, it is necessary to see what was the legal position of the heirs of the original grantees after the death of the last surviving grantee. The learned Subordinate Judge has held that they were tenants by sufferance or tenants from year to year after the determination of the lease on the death of the last surviving grantee. He says that taking it for granted that they, the heirs, were in the beginning mere tenants by sufferance, the question for consideration is whether they

continued to remain all along in possession as tenants by sufferance. He refers to the decision of the Calcutta High Ccurt in the case of *Ram Chandra Singh* v. *Bhikhambir Singh* (3) that a tenancy by sufferance would not by itself make the position of the holder rightful so as to prevent limitation from running but he says that if the landlord does anything to indicate his assent to the continuation of the tenancy that would itself be sufficient to convert the tenancy by sufferance into a tenancy from year to year. He then finds that such assent of the landlord was given in the present case. He infers assent from the fact that the heirs used to get *marfatdari* receipts from the Raja for rents paid in respect of the disputed villages up to the year 1951 or 1952 *Sambat*. He is of opinion that the *marfatdari* receipts amounted to a tacit assent on the part of the landlord to the continuance of the tenancy, and he concludes therefrom that the status of the defendants 1 to 5 was by reason of the acceptance of rent and grant of *marfatdari* receipts converted into that of tenancy from year to year. Having found that the defendants became yearly tenants on account of the assent of the landlord, he proceeded to enquire when that yearly tenancy was determined and he held that this tenancy was determined by service of the notice to quit in the year 1919 and not before that, and that the present suit being brought within 12 years from that date, no question of limitation arose.

Now, having regard to the circumstances of the case I am of opinion that the learned Subordinate Judge has misconceived the legal position of the parties. In order to determine the status of the defendants in the present case one has to keep in mind the previous history of the litigation. As was pointed out in the case of *Ram Narayan Singh* v. *Chota Nagpur Banking Association* (1) especially in the judgment of Woodroffe, J, there has been a long course of litigation going on between the Ramgarh estate and the heirs or assignees of the grantees under the large number of *mokarrari* grants created by the Raja in the year 1864-1865; there were more than 600 such grants created then. One of the earliest attempts made by the Raja to take possession of the property granted under one of these *mokarrari* grants was in the year 1875 when Raja Ram Narayan Singh brought a suit for resumption against Amir Khan. This suit was dismissed on the ground that the interest created by the grant was a heritable interest and not a mere life estate. The decision of the Subordinate Judge in that case was upheld by the High Court in 1877. There were various other cases in which sometimes the Court held that the estate created by the *mokarrari istmarari* grants was a life estate, and sometimes that such estate was a permanent and heritable estate. In 1885 the Judicial Committee of the Privy Council reviewed all the previous decisions and held that a *mokarari istamrari* grant did not by itself denote that the estate granted was an estate of inheritance. In was, however, observed that it could not be said that such an estate could not be granted unless the words "*ba farzondan*" or "*naslan bad naslan*" or similar terms were used. There may be other terms, circumstances or conduct of parties showing the intention with sufficient certainty that the grant was to be perpetual [see *Toolshi Prashad Singh* v. *Ramnarain Singh* (4).] There were other cases relating to similar grants after the decision of the Privy Council which it is not necessary to state in detail here. It is sufficient to mention that in the case of *Narsingh Dayal Sahu* v. *Ram Narayan Singh* (2) referred to above it was held that the lease in the same terms as those in the present suit granted by Raja Ramnath Singh did not convey a perpetual and hereditary grant. Now, this decision of the High Court in the case of Narsingh Dayal Sahu was given in 1903. The original lessees in the present case had died before this date and suits were being brought or were in contemplation by the Raja at the time of the death of the grantees in the present case to

(3) [1910] 37 Cal. 674=6 I C. 339.

(4) [1885] 12 Cal. 117=12 I. A. 205=4 Sar. 646 (P. C.)

contest the nature of the grant. The Ramgarh estate consistently and uniformly held out that the estate granted under the *istamrari mokarrari* deeds was only a life estate, to enure during the life time of the grantees. The heirs of the grantees equally consistently insisted that the grants were permanent and heritable grants. In this state of things the last surviving grantee in the present case died and his heirs, the defendants in the present case, continued in possession. The question as to what was the status of the heirs after the death of the original grantee was not firmly determined and was still a subject of controversy. It has been contended on behalf of the plaintiff and the contention has been accepted by the Subordinate Judge, that the position of the heirs was the same as that of a lessee holding over after the determination of a lease under the provisions of S. 116 of the Transfer of Property Act. This is an untenable position S. 116 does not contemplate the position of the heirs or assignees of the original lessee. It contemplates the position of the lessee himself after the determination of the lease and it is only in the case of the lessee of a property who remains in possession thereof after the determination of the lease granted to him and the lessor or his legal representative accepts rent from the lessee or under-lessee or otherwise assents to his, namely, the lessee's continuing in possession, that the lease is in the absence of an agreement to the contrary renewed from year to year or from month to month according to the purposes for which the property is leased. S. 116 does not contemplate holding over by the heirs of the original lessee and, therefore, the heirs did not by continuing in possession acquire the status of a tenant holding over after the determination of the lease. The learned Subordinate Judge treats the position of the heirs as if it was the same as that of the lessee's continuing in possession after the determination of the lease and that therefore after the determination of such lease the heirs became tenants by sufferance and that such tenancy by sufferance could be converted into a tenancy from year to year by assent of the landlord. The position in the present case is that after the death of the original grantee under the *mokarriari* grant the heirs in possession were in possession without any right whatsoever, for the interest created by the grant became extinct on the death of the last surviving grantee, and their possession was that of trespassers and it was adverse to the landlord.

Reliance has been placed upon the fact that the defendants admit that after the death of the original grantee they continued to pay rent to the landlord and the landlord granted *marfatdari* receipts to them. Now, such payment of rent by the defendants was in no way inconsistent with their claim of adverse possession. What they were claiming was the status of permanent *mokarraridars*. As such permanent *mokarraridars* they were liable to pay rent and payment of rent under such circumstance would not in any way derogate from their position of being in adverse possession. The adverse possession claimed by the defendants was of a limited nature. The possession was not adverse to the proprietors absolutely. That adverse possession of limited nature can be claimed by a person in possession, is recognized in a number of decided cases and is settled by authorities. It is, therefore, evident that the fact of the payment of rent by the defendants would not in any way affect their position of being in possession adversely to the landlord.

Then the fact of the grant of the *marfatdari* receipts by the landlord is relied upon. These *marfatdari* receipts, as has been stated by the Subordinate Judge, are receipts granted by the landlord in the name of the original tenants but stating that the rents had been received through the defendants. The landlord by accepting the rent and granting these *marfatdari* receipts did not give his assent to the holding over by the defendants as yearly-tenants. There can be no relationship of landlord and yearly-tenants between the parties in the present case, because one party was claiming a permanent right and

the other was not willing to accept that claim and asserting that the other party had no right whatsoever to remain in possession. Therefore there is no question of holding over or of the defendants being tenants by sufferance after the death of the original grantee, and of such tenancy by sufferance being converted into tenancy from year to year by assent of the landlord. The position merely is that of a person in possession adversely to the landlord claiming an adverse interest of a limited nature, namely that of a permanent tenure-holder. I am, therefore, of opinion that the learned Subordinate Judge was wrong in holding that the question of limitation did not arise in the present case. If the position of the defendants was that of persons in adverse possession, the claim of the plaintiff to recover possession would be barred after 12 years under Article 144 of the Limitation Act. The fact that the defendants were claiming title of adverse possession is clearly alleged in the written-statement. Evidence of open assertion of adverse possession to the knowledge of the landlord is given in the present case. The fact that after the decision in the case of *Narsingh Dayal Sahu* (2) stated above, wherein it was held that the *mokarrari* grant created only a life estate, the defendants went to the Raja at Padma and demanded receipts in their own names, and on refusal of such receipts being granted, stopped payment of rent, is clearly an assertion of adverse possession of a limited nature. Rents had so long been paid by the defendants in the hope that their right as permanent tenure-holders would be declared or recognized, but once the decision was given by the Court in the case or Narsingh Dayal Sahu the tenants wanted a definite acceptance by the landlord in the shape of grant of receipts in their own names and not *marfatdari* receipts, and this having been refused they declined to pay rent. There can be no doubt that this was a clear assertion of an adverse title. Then again there is evidence that after the defendants stopped payment of rent the Raja made attempts to take direct possession of the villages and to make direct collection of rent from the raiyats and, indeed, he succeeded in collecting some rent from some of the tenants in one of the villages. The defendants, however, resisted the claim of the Raja and prevented him from taking direct possession of the villages. This is another clear assertion of adverse possession. Now, the right of the Raja to take direct possession accrued on the death of the last surviving grantee. His right to bring an action in ejectment against the defendants was extinguished after the lapse of years from the death of the original grantee. The suit having been brought more than 12 years after such date is clearly barred by limitation. The learned Subordinate Judge is of opinion that the evidence adduced in the case is not sufficient to prove an assertion of adverse interest. I am unable to agree with him and I am of opinion that the evidence is sufficient to prove such assertion.

The question raised in this appeal is similar to that raised in the case of *Ram Rachya Singh* v. *Kumar Kamakhya Narain Singh* (5) which was an appeal by the assignees from another *mokarraridar* under a similar *istammarari mokarrari* grant against the present plaintiff, and I agree with the decision of my Lord the Acting Chief Justice in that case.

I am, therefore, of opinion that the decision of the learned Subordinate Judge in so far as he decrees the plaintiff's suit for possession against the defendants other than the defendants 6 to 9 must be set aside, and the plaintiff's suit dismissed *in toto*.

The appeal therefore must be allowed with costs here and in the Court below.

Jwala Prasad, Ag. C. J.—I agree.

Appeal allowed.

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(5) 1925 Patna 216 (1924) P. H. C. C. 313= 6 P. L. T. 12.

1925 PATNA 363

DAWSON MILLER, C. J. AND

FOSTER, J.

Jalesar Mahto—Plaintiff — Appellant.

v.

Juthan Mahto—Defendant — Respondent.

Appeal No. 264 of 1922, decided on 4th December, 1924, from Original decree from the decision of the Offg. Dt. J., Saran, D/-26th August, 1922.

Probate and Administration Act (V of 1881) S. 70—Attesting witnesses and scribe supporting — Caveator's case resting on suspicion—Though caveat should be cautiously considered great discrimination is necessary.

Where there is a will propounded, and the attesting witnesses and the writer of the document support it, and where their testimony is not seriously impaired in cross-examination, it behoves the Court of Probate. to listen with the greatest caution to a caveator whose case rests for the most part on grounds of suspicion. On the other hand, this principle should not be applied in India without codsiderable discrimination. [P. 364 C. 2]

Hareshwar Prasad—for Appellant.

Shivanandan Rai—for Respondent.

Foster, J.—This is an appeal from the dismissal by the District Judge of Saran of an application for probate of what is propounded as the last Will and testament of one Raghunath Koeri. The property in dispute consists of about 4¼ bighas of cultivated land with trees standing thereon valued by the Collector at Rs. 1,400. The applicant stated in his petition that the testator was his cousin agnate and he had no other near relation and that the testator executed a Will on the 9th August 1921 leaving all his property to the applicant, and died 12 days later. The Will is in the simple form which is in vogue in the mufassil and need not be quoted in detail. The caveator Juthan Koeri claims to be the brother of the alleged testator's father and so son of the testator's paternal grand-father Manrup Koeri. He alleges that Manrup Koeri's wife's brother Phakira Koeri, his maternal uncle, adopted him and left him all his property, consisting of some cultivation in village Patti. Manrup Koeri's house, which the caveator describes as his ancestral house, is in village Nautan, ten miles from Patti. In this house undoubtedly Raghunath Koeri lived, and it is common ground that he had at the time of his death and for sometime before neither father nor mother nor brothers but he had one sister Dipia Koirin who is married. The applicant, as I have said, asserts that he is a near relative of Raghunath Koeri deceased and denies that Juthan, the caveator had any relationship with Raghunath. On the other hand, Juthan asserts that he was his paternal uncle and that the fact that he lives elsewhere, namely, in Patti, is due to his having possession of Phakira Koeri's lands. He contends that the document propounded is a forgery, the result of a conspiracy between certain persons. He adds that Raghunath on the date of the Will, namely, the 9th August 1921, was a minor and so incapable of making a Will.

It may be mentioned here that Raghunath Koeri had been a certificated ward under the Guardians and Wards Act. His first guardian was one Bhimal Mahto who for some reason or other was removed and was succeeded by Anurag Mahto, admittedly the uncle of the present applicant. There are also certain recent occurrences which have to be kept in mind. Anurag Mahto ceased to be guardian for some reason or other, and on the 15th October 1920 Raghunath executed a *zerpeshgi* deed in favour of Biran Rai, who is a Rajput. Of these Rajputs the applicant deposes: "They are looking after the Plaintiff's case. They had taken *farzi* documents from Raghunat. I do not admit the *kobalas* and *zerpeshgi* executed by him." He includes amongst these Rajputs one Dasai Rai who came to Court as a witness on behalf of the caveator, and he asserts that Dasai Rai has set up Juthan in this case. Now, about a month after this *zerpeshgi* deed, namely, on the 20th November 1920, Jalesar, the applicant, applied to the Court to be appointed guardian of Raghunath. On the 10th February 1921 Raghunath filed an objection in Court, purporting to be under his own signature, through a pleader whose

vakalatnama purports to bear Raghunath's own signature. In this objection he took the ground that he had already attained majority and that Jalesar was a nephew of Anurag, Raghunath's previous guardian who was removed for neglect of duty or dishonesty, and whose object now was to use his nephew as his instrument in misappropriating the property. On the 2nd July 1921 this application of Jalesar Mahto was dismissed in default of his appearance. The 9th August 1921 is the date of the will and the 21st August 1921 is the date of Raghunath's death. On the 18th October 1921, we are informed Raghunath's sister Dipia of whom I have spoken executed a deed waiving all claims to the property of Raghunath and acknowledging Jalesar to be his legatee under the will. On the 7th November 1921 the present application was made and the caveat was entered on the 23rd February 1922. The judgment dismissing the application for probate was passed on the 26th August 1922.

The main points of Juthan's case are that the will is a forgery, that Raghunath was a minor at the date of will, that he was unconscious for 15 days before his death, and that he was literate and so could have signed the will himself instead of by the pen of Moti Ahir, and that the applicant, Jalesar is in conspiracy with his uncle Anurag and others. So the issues are (1) as to the alleged testator's testamentary capacity, and (2) as to the authenticity of the will.

The question whether Raghunath was a minor on the 9th August 1921 can be answered at once. The evidence is all in favour of the applicant Jalesar, now the Appellant. The caveator might have produced copies of the proceedings under the Guardians and Wards Act in the District Judge's Court, where very probably the Court recorded the age of the minor Raghunath. In such circumstances it cannot be supposed for a moment that Raghunath was not *sui juris* on the 9th August 1921. No doubt, in this matter as in almost all important matters in this case, the evidence comes from Moti Ahir the *daffadar* of Nautan. This Moti Ahir produced a chaukidar's memorandum of births and deaths which he says he wrote in the course of his duties, and in that we see that Raghunath Koeri was born in December 1899. So he would attain majority on some date in December 1920. I agree with the learned District Judge in holding that Raghunath was not a minor on the date of the execution of will.

The other question, to as the authentictiy of the will, is much more difficult to determine. The attitude taken by the learned District Judge can be stated briefly. He admits that there is the evidence of Moti Ahir to show that on the 15th October 1920 (the date of the *zerpeshgi* to which I have referred), Raghunath Koeri put his thumb impression on he Registrar's thumb impression register, a document which has been produced from proper custody, and he finds that that thumb impression has been proved to be identical with the thumb impression upon the Will. He also mentions that the scribe, two of the attesting witnesses and Moti Ahir who signed Raghunath's name have deposed in support of the claim for probate. But he finds this evidence untrustworthy in the face of the caveator's case, and holds that the Will is not proved to be a genuine document. Against this position the present appeal has been mainly directed.

I recognise the principle that where there is a Will propounded, and attesting witnesses and the writer of the document support it, and where their testimony is not seriously impaired in cross-examination, it behoves the Court of Probate to listen with the greatest caution to a caveator whose case rests for the most part on grounds of suspicion. On the other hand, speaking for myself, I should never be inclined to apply the principle in India without considerable discrimination. If the document could have been registered, as was the fact here, why was there no proposal to register it, especially when it was a document which would effect a deflection of the course of inheritance and most certainly be challenged? If it was to have such important consequences, why, as the learned Judge

points out, were the witnesses chosen from a limited circle of friends and kinsmen? If as seems to be proved by the objection and *vakalatnama* of the 10th February 1921 (of which I have spoken above) Raghunath could write his own name, and if he was not bedridden or seriously ill, why did he use the pen of Moti Ahir and only affix his thumb impression? If more than one of Raghunath's authentic thumb impressions are, as the Appellant alleges, in existence, why was that one of the alleged impressions selected for production in Court which had in its support only Moti Ahir, when we know that there is the *zirpeshgi* deed in the custody of strangers actually interested in the authenticity of their document?

As to Moti Ahir's evidence, I wish to make a few comments. His deposition is the bulwark of the Appellant's evidence. He comes to the Court to prove four important documents. There is the chaukidar's memorandum of births and deaths of which I have spoken. There is his signature on the thumb impression register obtained from the record room; he is the only witness who can depose to any personal knowledge in this matter. He says that in his presence Raghunath affixed this thumb impression in this register in the Registration Office at the time when the *zerpeshgi* deed of 15th October 1920 was being registered and he himself signed below the thumb impression and also identified Raghunath to the Registrar. Then, looking at the Will, we find that it purports to be signed by Raghunath Mahto by the pen of Moti Ahir. Lastly the deed of relinquishment as it is called, of Raghunath's sister Dipia is covered with signatures of Moti Ahir. Dipia herself and the two witnesses of the document, who have not been called, signed by the pen of Moti Ahir at the time of the execution of the deed, and Dipia again, at the Registration Office signed by the pen of Moti Ahir who also formally identified her and signed his name as identifier. It is noticeable that the scribe of this document is the same as the scribe of the Will and whereas the scribe's deposition is full of information as to the mode of execution of the Will, when he was asked about the deed of relinquishment he states: "I do not remember any *ladavi* deed executed by Dipia in favour of Ganeshi Mahto and written by him. It is dated 18th October 1921. I do not remember how the signature of the executant was made. I do not remember at what time I scribed the said *ladavi* deed." So Moti Ahir is a very important witness. He admits that Raghunath, though he had dysentery, could move about on the day when he executed the Will. He states that the Will was written at the applicant's door. He was passing by that way when he was called and sat down. It is an unusual occurrence to find one person taking so large a part in all the important documents, in the chaukidari memorandum 25 years ago, in the thumb impression register nearly 21 years later, at the Registration Office, in the Will executed at Nautan and in the deed of relinquishment both at the place of execution and at the Registry Office three miles away.

Moreover there is a very forcible argument which seems to have prevailed with the learned District Judge. The facts proved suggest a strong doubt whether the whole story of the Appellant is true. We are told that in October 1920 Raghunath, probably then a minor, executed a *zerpeshgi* deed in favour of one Biran Rai (the deed that has not been produced to prove the thumb impression of Raghunath and to prove that he was illiterate; I have discussed this already). The applicant Jalesar stigmatised this document as *farzi*, nominal. We know that a month after the registration of this *zerpeshgi* deed Jalesar applied to the District Judge to be appointed guardian of Raghunath, and that Raghunath himself went into Court and entered objection under his own signature, protesting that he was *sui juris* and that Jalesar Mahto was set up by Jalesar's uncle Anurag Mahto, the discharged guardian. We know that this objection was successful in the *ex parte* decision of July 1921, though of course

the success was probably due to Jalesar's abstention. Jale ar tells us that Raghunath had dysentery and was nursed by him. After he had nursed him for a month at (Jalesar's) house Raghunath announced that as Jalesar had attended him in his illness he would execute a Will in his favour. He executed the Will within four or five days. The general evidence shows that when this young man of 21 years executed a Will he was able to move about the house, a fact which indicates that he wat not probably apprehensive of an early death. In connection with Raghunath's last illness, Juthan's account is that he came over to Nautan and attended Raghunath at the ancestral house. But unfortunately neither side has produced any *baid* or village doctor. Now, we know that in February 1921 Raghunath regarded Jalesar and his uncle Anurag as persons having designs upon his property and we are asked to believe that six months later he had so changed his mind that when suffering from what after all is not an uncommon ailment he executed his last Will and testament bequeathing all his property to Jalesar. It is surprising therefore that in the whole record we find no specific account of a reconciliation between these two men; the matter remains a mystery. It appears to me that Juthan Koeri, the caveator has produced acceptable evidence to prove that he is in fact Raghunath's father's brother. Jalesar has not only not mentioned any reconciliation between himself and Raghunath, but he has not stated, what is an important thing in India, who applied the fire at the cremation of Raghunath. He denies that Juthan came to Nautan. On his part Juthan has deposed that it was he who applied the fire. Whether Juthan is entitled to the property of Raghunath as the nearest male agnate, or whether his claim would be affected by his relation with Phakira, is not the present question. But this evidence as to the cremation is quite uncontradicted, and in my opinion highly significant. Then we see within two months after the death of Raghunath, Jalesar obtained from Raghunath's sister Dipia the deed of relinquishment and three weeks later applied in the District Judge's Court for probate.

The suggestion on the part of the caveator is that the proved facts fit in much more easily with his account of fraudulent attempt to seize the property of an unfortunate youth than with a bequest made out of gratitude and affection to a person who has not shown in detail how he is related to Raghunath, and who erstwhile was Raghunath's adversary in the Court.

The evidence-in-chief and cross-examination is unsatisfactory in that it has never gone below the surface. In the result numerous questions that suggest themselves must remain unanswered. This increases our responsibility. But the District Judge who decided the case is an Indian gentleman of considerable experience. He finds that it is extremely doubtful whether Raghunath would have ever executed such a Will, and he considers the circumstances extremely suspicious. He sums up his position as follows:—"The non-registration of the Will and its not being signed by Raghunath though literate and the fact that Raghunath strenuously objected to Jalesar being guardian as he thought Jalesar would misappropriate his property and the fact that the objector is a close relation to the deceased and there is no ground for giving the property to Jalesar in preference to him, all go to show that the Will propounded is an extremely suspicious document and it is not likely that Raghunath did execute it." It seems that the learned District Judge does not believe the attesting witnesses and the scribe called on the applicant's side. If they had impressed him by their demeanour he would not perhaps have put them aside without examining their evidence. This is a matter which must assuredly be taken into account, when, as in the present case both parties have succeeded in the course of their arguments in this Court in casting doubts upon the case propounded by the Opposite Party. In my opinion the Appellant Jalesar Koeri has not shown sufficient ground for our interference with the District Judge's decision.

I would dismiss the appeal. The hearing fee to be assessed as in ordinary first appeals.

Dawson-Miller, C. J.—I agree.

Appeal dismissed.

1925 PATNA 367

DAS, J.

(*Shaikh*) *Ali Hussain*—Appellant.

v.

Faguni Rai and others — Respondents.

Second Appeal No. 1089 of 1923, Decided on 8th December 1924, from a decision of the Dt. J., Darbhanga, D/- 4th May, 1923.

(a) Decree—Setting aside — Minor sued—Decree must be set aside.

Where the Lower Court found as a fact that the plaintiff was a minor at the date of the institution of the previous suit,

Held, that the High Court had no alternative but to give a declaration to the effect that the decree was a nullity so far as the plaintiff was concerned, whether or not as a fact the plaintiff had any interest in the property. [P 367 C 2]

(b) Civil P. C. S. 100—Question of party's minority cannot be re-investigated.

It is not open to the High Court in second appeal to investigate the ground upon which the lower appellate Court had come to a conclusion on a question as to whether a certain person was a minor at the date of a suit. [P 368, C 1]

Hasan Imam and S. K. Mitter—for Appellant.

Murari Prashad—for Respondent.

Judgment—This appeal arises out of a suit instituted by the appellant for setting aside a decree obtained against him and certain other persons by the defendants first party. Two questions were raised: first, that the decree was a fraudulent decree and secondly, that the plaintiff was a minor at the date of the institution of the suit, although he was sued as a major. The first Court dismissed the suit altogether holding that the plaintiff was not a minor at the time when the previous suit was instituted. On the other question the first Court decided in favour of the defendants first party. On appeal the Lower Appellate Court agreed with the Munsiff in holding that no fraud had been proved. In regard to the other question, namely, whether the plaintiff was a minor at the time of the institution of the previous suit, he differed from the Munsiff. He has come to the conclusion that the plaintiff was minor at the date of the institution of the previous suit and he has held that the decree is a nullity so for as he is concerned. But having come to that conclusion he has investigated the title of the plaintiff to the property in dispute and as a result of this investigation he says that the plaintiff has no interest in the property and that therefore "so far as the decree affects the property, the plaintiff has nothing to complain and so the decree to this extent must stand valid." I differ from the learned District Judge on this point. Whether the plaintiff has an interest in the property was not a matter for him to consider in this suit. The defendant first party sued the plaintiff as having interest in the property and that matter is concluded so far as this litigation is concerned; and in any event upon the finding of the learned Judge that the plaintiff was minor at the date of the institution of the previous suit, he had no option but to give a declaration to the plaintiff that the decree was a nullity so far as he was concerned. Mr. Murari Prasad appearing on behalf of the opposite party says that this is what the learned District Judge has substantially done. Well, it this is what he has done, then there can be no objection to my putting it in proper form, so that no controversy can arise in future. I hold that the decree is a nullity so far as the plaintiff is concerned and that the plaintiff is entitled to a declaration to that effect. Mr. Hasan Imam contends that I ought to set aside the entire decree as the interest of the plaintiff is joint with the defendants second party who apparently were the defendants in the previous suit. I am clearly of opinion that this contention should fail. Whether the plaintiff has any interest or not I do not know. But in any case, so far as he is concerned, the decree is a nullity and I am not prepared to say that the decree is not perfectly good as against the defendants second party. What the effect of the decree will be upon the defendants second

party I am not prepared to say at the present moment. But in any case the plaintiff is entitled to the declaration that the decree is a nullity as against him and that it has no operation so far as he is concerned.

Mr. Murari Prasad contends before me that the learned Judge's finding that the plaintiff was a minor at the date of the institution of the suit ought to be set aside. The question is a pure question of fact and I am not prepared to admit that it is open to me to investigate the ground upon which the learned Judge has come to that conclusion. The appeal succeeds to the extent I have indicated. There will be no order as to costs. The cross-objection is dismissed.

1925 PATNA 368

DAS AND ROSS, JJ.

Sheikh Abdul Gani—Petitioner.

v.

Sito Singh and others—Opp. Party.

Civil Review No. 9 of 1924, Decided on 31st October, 1924.

Civil P. C., O. 47 R. 1—Mesne profits claimed—No evidence adduced by either party—Claim dismissed—Review of dismissal was refused is no ground for review.

Where the question was as to the amount of mesne profits for a certain year to be awarded to the plaintiff and the Court dismissed the claim as there was no evidence adduced by either party on the point, and where in a petition for review of the decision, it was contended that as the opposite party was admittedly in possession, the burden of proving the value of the crops was on them and that the Court made an error of law in deciding as it did.

Held: that the question as to whether the decision was right or wrong might be a matter for argument, but there was not any mistake or error apparent on the face of the record within the meaning of O. 47, R. 1.

Sultan Ahmed and *Niamatullah*—for Petitioner.

Shiveshwar Dayal and *Jagernath Prasad*—for Opposite Party.

Ross, J.—The first question that arises on this application for review of judgment is the amount of Court fee payable on the application. The contention of the learned Counsel for the petitioner is that in the original suit there were two several causes of action, one relating to possession of the land and the other to mesne profits. In my opinion the causes of action were not separate. The suit was a suit for possession of land and mesne profits to which the plaintiff was entitled by reason of dispossession. Then it is contended that the appeal was in substance directed against the decree for mesne profits only. I am unable to accept this view. The whole decree was appealed against; and, although the appellant having seen the weakness of the case on the question of possession did not argue with any vigour on this part of the case, still this was part of the appeal as much as the question of mesne profits. In my opinion, therefore, there is no reason for not enforcing the plain terms of Article 5 of Sch. 1 to the Court Fees Act, 1870, which require that in an application for review of judgment presented before the ninetieth day from the date of the decree, as in the present case, the fee payable is one half the fee leviable on the plaint or the memorandum of appeal. I therefore accept the stamp report made in this case.

The principal question is whether this application for review falls within that portion of Order 47 Rule 1 which provides for cases where there is some mistake or error apparent on the face of the record or any other sufficient reason. Now in *Chhaju Ram* v. *Neki* (1) the Judicial Committee have laid it down that the words, "any other sufficient reason." in Order 47 Rule 1 mean sufficient reason of a kind analogous to those specified immediately before. The real question therefore is whether there is some mistake or error apparent on the face of the record. The question was as to the amount of mesne profits to be awarded for the year 1327. The learned Subordinate Judge had observed in his judgment that the parties had not adduced any evidence, but as cash security amounting to Rs. 3,000 had been furnished, he adopted this as the basis of his judgment. It was pointed out by this Court for the reasons given in the judgment that the figure Rs. 3,000 afforded no criterion for the amount of mesne profits due for the

(1) 1922 P. C. 113 = 3 Pat. 107 = 69 I. C. 114=39 M. L. T. 395=16 M. L. W. 37=25 C. W. N. 697 = 3 P. L. T. 435 = 17 P. W. R. 1922 = 24 Bom. L. R. 1233 = 36 C. L. J. 459=43 M. L. J. 332 (P. C.)

year 1327; and as there was no evidence on the point the claim was dismissed. It is now argued that as the opposite party was admittedly in possession, the burden of proving the value of the crops was on them and that this Court made an error of law in deciding as it did. Whether the decision was right or wrong may be a matter for argument, but it does not seem to me that there is any mistake or error apparent on the face of the record within the meaning of these words as they are used in Order 47, Rule 1. It does not seem to me that on a mere reading of the judgment it could be said that there was such error or mistake. It may be that as the result of certain decisions a different conclusion might have been arrived at, but such a conclusion does not seem to have been inevitable or to be apparent on the face of the record.

I would therefore dismiss this application with costs. Hearing fee three gold mohurs.

Das, J.—I agree.

Application dismissed.

✱ ✱ 1925 PATNA 369

BUCKNILL AND ROSS, JJ.

(*Lala*) *Gobind Prasad*—Decree-holder—Appellant.

v.

(*Lala*) *Jugdip Sahay*—Judgment-debtor—Respondent.

Appeal No. 149 of 1924, Decided on 23rd December 1924, from Appellate Decree, against an order of the Dt., J., Durbhanga, D/- 8th April 1924.

✱ ✱ (a) *Limitation Act, S. 14—Decree declaring plaintiff entitled to certain relief if he paid certain sum within certain time—Appeal—Time for payment runs from appellate decree.*

Where the plaintiff was given a decree by which it was ordered that on his paying certain sum within a certain date the defendant was to execute a conveyance of certain property to him and where the matter went up in appeal and second appeal,

Held: that the time for the payment of the amount by the plaintiff should be calculated only from the date of the decree passed in the second appeal. 39 Bom. 175 Foll. [P 371 C 2]

✱ (b) *Civil P. C., O. 21 R. 11 (2)—Decree-holder's disappearance—Nothing known as to death—Pleader can apply.*

Where a decree-holder disappears but his death cannot be legally presumed, his pleader can, under R. 11 (2) file an application for execution and deposit any money that may have been ordered to be paid by the decree-holder though no person can legally be substituted for the decree-holder until his death can legally be presumed. [P 372 C 1]

✱ ✱ (c) *Practice—Unexplained disappearance of party—Death may be presumed upon affidavit if circumstances justify—Or, some one should be appointed to look after the vanished party's affairs till his return or till death can be legally presumed.*

Where one has to face an unexplained disappearance of a person about whose death nothing is known, there are two possible alternative courses which might be utilised. One might be that if the circumstances were such as would justify a prudent person in coming to the conclusion that death was extremely probable an application might be made to the proper Court upon affidavit showing the circumstances and asking leave to presume the death; or, in the alternative if the Court did not think that the evidence produced before it was sufficient upon which it could prudently be said that death could be presumed, then in such cases the Court could and should appoint some person to look after the affairs of the individual who had disappeared until his return or until his death can properly be presumed [P 372 C 1 & 2]

Naresh Chandra Sinha for *Rai Tribhuannath Sahai*—for Appellant.

P. C. Rai and *Janak Kishore*—for Respondent.

Bucknill, J.—This was an appeal from an order of the District Judge of Durbhanga, dated the 8th of April last, by which he confirmed an order of the Munsif of Samastipur, dated the 19th of January last. The circumstances under which this matter comes before this Court are undoubtedly far from simple and indeed peculiar. It would seem that many years ago (it is said in 1900) a property was purchased by the Appellant here in the name of the judgment-debtor who is here the Respondent. In 1918 a deed, dated the 7th of May, which was regarded by the Appellant as a deed of relinquishment by the judgment-debtor of whatever, if any, interest he had in this land, was executed by the judgment-debtor in favour of the decree-holder. The judgment-debtor, however, declined to hand over this document to the decree-holder and in consequence on the 9th of December 1918 the decree-holder brought a suit

against the judgment-debtor for the usual declarations and for the delivery up of the document. On the 10th of September 1919 the suit was decreed by the Munsif but, on appeal to the District Judge, the District Judge on the 19th of April 1920 modified the decree of the Munsif and being of the opinion that the document was not a deed of relinquishment but was one really of sale, ordered that if the decree-holder paid Rs. 250 to the judgment-debtor within two months from the date of his (the District Judge's) order, he (the decree-holder) was to obtain a proper conveyance to himself of the property. From this judgment the Appellant appealed to this Court. My learned colleague who heard the appeal dismissed the appeal on the 21st of March 1922. A Letters Patent appeal followed which was dismissed on the 15th of May of the same year.

Now up to this point the only question which would have arisen in this matter is with regard to limitation. But at this stage took place a curious occurrence which has somewhat complicated the position and added to it another matter for argument and consideration. This circumstance was that, on the 27th of May 1922, the Appellant is said to have disappeared. It is not known where he actually is, if indeed, he is still alive. He is said to have been at that date a man of about seventy years of age, to have been in a train coming from Barh, about 35 miles from Patna, to this city and not to have been seen since then. Now on the 12th of July 1922, that is, it will be observed, within two months from the date when this Court dismissed the appeal which had been presented to it under the Letters Patent, a pleader deposited in the Court of the Munsif the sum of Rs. 250 purporting to act on behalf of the decree-holder's son who was an adult. Objection, however, was taken to this deposit on the ground that the son had no *locus standi* to be substituted for or to take the place of his father in the proceedings as there was no presumption in law that the father was in fact dead, although it was known that he had disappeared. The objection succeeded before the Munsif and an appeal to the District Judge was dismissed by the District Judge on the 21st December 1922. From the decision of the District Judge there was again an appeal to this Court which came before Mr. Justice Mullick and myself and was unsuccessful, this Court dismissing the appeal on the 2nd of July 1923.

Now no steps appear to have been taken to persuade any Court that the Appellant was really dead. It is said, and I have no doubt, correctly, that no evidence was forthcoming at all as to whether he was or was not alive and in view of S. 108 of the Evidence Act, it is perhaps somewhat difficult to see how any Court could, in the absence of any evidence, have presumed at that date that the decree-holder was no longer alive. However, the next step which took place was that on the 31st of August an application for execution of his decree was made by a pleader on behalf of the decree-holder (not, it will be observed, on behalf of his son) purporting to act under the provisions of sub S. (2), R. 11 of Or. 21 of the Civil Procedure Code. On the 1st of September 1923 the Rs. 250 was again paid into Court by a pleader on behalf of the decree-holder. Again there was an objection and the application was on the 19th of November last refused by the Munsif. An appeal was preferred to the District Judge who, on the 8th of April, upheld the Munsif's decision holding that on two grounds the application could not be admitted: firstly, because he was of the opinion that the pleader had no *locus standi* and secondly, on the ground that the amount was paid in too late.

I think that it will be convenient if I take the question of limitation first. It will be observed that in the first instance the sum was paid in on behalf of the decree-holder by his son within two months from the date when the Letters Patent appeal had been dismissed by the Court. It is urged on behalf of the Respondent here that the date from which the two months ran is not the date when the Letters Patent appeal was dismissed but the date of the District Judge's judgment. He points out that there

are undoubtedly certain cases which are in his favour. The one upon which he principally relies is the case of *Ramaswami Kone* v. *Sundara Kone* (1). It certainly somewhat supports the Respondent's contention. In that case the decree of the lower Court provided that on the Plaintiff paying into Court the balance of consideration Rs. 10 within a month from the date of the order, the Defendant should execute a sale deed in the Plaintiff's favour of the land in suit. The money was not paid within the month and the Defendant preferred an appeal but after the expiry of the month. The Appellate Court simply confirmed the decree of the lower Court and dismissed the appeal. Within a month of the Appellate decree the Plaintiff did deposit Rs. 10 and applied for execution of his decree. It was held that he was not entitled to execute the decree as he had not made the payment within the time fixed by the original decree and that the Appellate Court could not under the circumstances have held otherwise or have enlarged the time fixed by the original Court. Now although that decision appears to lend some colour to the contention which has been put forward by the Plaintiff, yet the latest and the best authority, which is based upon the Privy Council decision in *Bhup Indar Bahadur* v. *Bijai Bahadur* (2) is the decision of the Bombay High Court given in 1914 in the case of *Satwaji Balajirao Deshmukh* v. *Sakharlal Atmaramshet* (3). In that case the Plaintiff brought a suit to recover possession of property as purchaser. The first Court having dismissed the suit, the Appellate Court, on the Plaintiff's appeal, passed a decree directing that the Plaintiff could recover possession on payment of a certain sum within six months from the date of his decree and that if the plaintiff failed to pay this sum within such period, he should forfeit his right to recover possession. An appeal was preferred to the High Court. The High Court confirmed the decree and within six months from the High Court's decree the Plaintiff deposited in Court the amount payable by him and applied for execution. It was contended that he could not do so, because he should have paid the money within six months from the date of the order of the lower Appellate Court. Both the lower Courts upheld this objection but, on appeal to the High Court, it was held (reversing their decision) that the time for executing a decree for possession ran from the date of the High Court's decree confirming a decree of the lower Court. This case appears to me to be in point here. I am content to rest on that authority although numerous subsidiary authorities both for and against this argument have been put before us. It seems to me that in this case, in the first place, on the analogy of S. 14 of the Limitation Act of 1908, we see that the Plaintiff has been endeavouring throughout to try and obtain what he believed to be his rights. The first payment into Court was made really on behalf of the decree-holder, though coupled, it is true, with the desire that the son should be substituted in the litigation for him. This was certainly paid in within two months from the date of the dismissal of the Letters Patent appeal. The first endeavour was met with objection and was carried from Court to Court, the Plaintiff throughout fighting for what he conceived to be his proper remedy. The second application was lodged before the expiration of two months from the decree of this Court of the 2nd of July 1923 in which this Court held that the sum could not be deposited on behalf of the decree-holder's son, that is to say, that the son could not be substituted for the father who had disappeared owing to the fact that there was no presumption of death. I think that in such circumstances it cannot be said that there have been any laches of any kind on behalf of the Appellant and that the decision of the lower Court on that ground must be reversed.

There then arises the question of *locus standi*. Now this Court has already held that it was impossible

(1) [1907] 31 Mad. 28=17 M.L.J., 495=3 M.L.T., 26.
(2) [1900] 23 All. 152=27 I.A., 209=2 Bom. L.R., 978=5 C.W.N., 52. (P.C.)
(3) [1914] 39 Bom. 175=26 I.C., 754=16 Bom.L.R., 778.

for the son of the decree-holder to be legally substituted in the place of his father whilst in law the father was still alive. I have already explained that no steps were taken with a view to obtaining the presumption of the decree-holder's death being legally ratified, and there can be no doubt that the difficulty does arise that no person can legally be substituted for the decree-holder until his death is presumed. At the same time it is not possible for the objector to have the argument both ways in his favour, and, if the decree-holder's death cannot be yet legally presumed, he is still civilly alive and, in these circumstances, there seems no reason whatever why under sub S. (2), r. 11 of Or. 21 of the Civil Procedure Code the pleader should not file an application for execution and deposit the money on behalf of this decree-holder who is in law still alive. The application may be and is signed and verified in this case by the son of the decree-holder who is thoroughly acquainted with the facts of the whole of the case. Although, therefore, I am quite in agreement with the argument of the learned vakil who has appeared for the Respondent that it is impossible for the son or any one else to be legally substituted in the proceedings for the decree-holder (which is an argument which is based upon what was said by my learned colleague when he dismissed the first appeal in this Court), yet I am unable to see that it can be suggested seriously that if the law does not regard the Appellant as dead it must not regard him as alive or his affairs are not still subject to the ordinary rules of the Civil Procedure Code. I think therefore on this ground also that the decision of the lower Courts must be reversed and the appeal must be allowed.

There is one word which I should like to say in conclusion and that is that it has been represented that there is some serious difficulty in knowing what should be done under such peculiar circumstances as these where one has to face an unexplained disappearance of a person about whose death nothing is known. It seems to me that there are two possible alternative courses which might be utilised. One might be that if the circumstances were such as would justify a prudent person in coming to the conclusion that death was extremely probable, an application might be made to the proper Court upon affidavit showing the circumstances and asking leave to presume the death; or, in the alternative, if the Court did not think that the evidence produced before it was sufficient upon which it could prudently be said that death could be presumed, then in such cases the Court could and should appoint some person to look after the affairs of the individual who had disappeared until his return or until his death can properly be presumed. These two courses—and I have known both adopted—seem to me to be remedies for or rather solutions of the very practical difficulty which has arisen in this case.

The appeal therefore will be allowed with costs in both the Courts. The case will now go back to the Munsif to be dealt with according to law.

Ross, J.—I agree.

Appeal allowed.

1925 PATNA 372

DAS AND ADAMI, JJ.

Raghunandan Prashad Singh—Petitioner.

v.

Bhagwat Sahay and others — Opposite Party.

Civil Rev. No. 199 of 1924, Decided on 11th December, 1924, against an order of the Sub. J., Monghyr, D/- 9th May 1924.

(a) *Civil P. C., S. 60 — Decree assigned—Subsequent attachment of decree—Attachment is wrong unless assignment is not* bona fide.

Money deposited under decree to the credit of decree-holder, who has already assigned his interest in the decree, cannot be attached by his creditors unless the transfer is proved to be not *bona fide*. (1912) M.W.N. 176 diss. [P. 374, C. 1]

(b) *Civil P. C., S. 115 — Subordinate Judge deciding a question following a ruling of another High Court—High Court taking different view—No revision lies.*

Where the Subordinate Judge decided a question following a decision of the Madras High Court which was directly in point, the Patna High Court refused to interfere in revision although it would have taken a different view on that point. [P. 374, C. 1]

S. M. Mullick and *Janak Kishore*—for Petitioner.

Naresh Chandra Sinha and *Atul Krishna Roy*—for Opposite Party.

Das, J. — The material facts are these. On the 14th April 1909, Tikait Chandi Pershad obtained a decree for recovery of possession of a property and also for the ascertainment of mesne profits against the Maharaja of Gidhaur. On the 14th September 1920, a decree was passed by the Court below for nearly a lakh of rupees as mesne profits against the Maharaja of Gidhaur. On the 2nd October 1920, the decree-holder assigned his decree to the Petitioner. Thereafter the Petitioner applied to have his name substituted in the record of the suit in the place of Tikait Chandi Pershad. The first Court refused the application on the ground that the Maharaja of Gidhaur had appealed against the decree of the 14th September 1920, to this Court. This Court added the Petitioner as a party Respondent to the appeal. On the 4th June 1923, the High Court practically dismissed the appeal of the Maharaja of Gidhaur against the decree of the 14th September 1920. On the 16th April 1924, the Maharaja of Gidhaur deposited the decretal amount of Rs. 71,122 to the credit of Tikait Chandi Pershad. The Opposite Party represented by Mr. Naresh Chandra Sinha and Mr. Atul Krishna Ray attached the decree obtained by Tikait Chandi Pershad as against the Maharaja of Gidhaur on the 7th October 1920, on the 9th October 1920, and on the 5th July 1923, and the question now arises whether the Petitioner as the assignee is entitled to an order giving him liberty to withdraw the sum of Rs. 71,122 from Court.

The attaching creditors have obtained decrees against Tikait Chandi Pershad and they claim that by virtue of the decree of this Court, directing the Maharaja of Gidhaur to pay a definite sum of money to Tikait Chandi Pershad, they are entitled to attach the interest of Tikait Chandi Pershad in the decree given to him by this Court.

The learned Subordinate Judge relying upon a decision of the Madras High Court in *V. Thiruvengadam Pillai* v. *Doridla Subbiah* (1) had disallowed the claim of the assignee and the assignee has presented this application in this Court as against the order of the learned Subordinate Judge.

In my opinion, the order of the learned Subordinate Judge is erroneous. I am informed that it is the case of the Opposite Party that the assignment in favour of the Petitioner was not a *bona fide* assignment but that it was intended to defeat the rights of the creditors ef Tikait Chandi Pershad.

Now this matter has not been gone into by the learned Subordinate Judge. I have no doubt whatever that if the Opposite Party can establish their case that the assignment was not *bona fide*, they are undoubtedly entitled to recover the sum deposited in Court to the credit of Tikait Chandi Pershad. But this is not the basis of the decision of the learned Subordinate Judge. He has proceeded on the hypothesis that the assignment was a perfectly proper one. and the question arises whether on that hypothesis the Opposite Party were entitled to an order in their favour from the Court. The dates which I have given show clearly that the assignment in favour of the Petitioner was prior in date to the attachments made by the Opposite Party. Having assigned the benefit of the decree obtained against the Maharaja of Gidhaur to the Petitioner, Tikait Chandi Pershad could no longer have disposed of that interest afterwards; nor could he have claimed any benefit under that decree after the date of the assignment.

The question then arises, was the attachment made by the Opposite Party good in the circumstances of the case? S. 60 of the Civil Procedure Code deals with the matter, and it clearly lays down that only those properties are liable to attachment which belong to the judgment-debtor, or over which or the profits of which he has a disposing power which he may exercise for his own benefit.

Now, as I have said, the decree-holder had prior to the dates of the attachment parted with all the interest that he had in the subject-matter of the decree; in other words he had no disposing power over the de-

(1) [1912] 11 M.L.T. 144=13 I.C. 659=(1912) M.W.N. 176.

cree after the date of the assignment, nor could he have exercised a disposing power over the subject-matter of the decree for his own benefit.

The point has been debated in various cases in England—it is not necessary for me to deal with those cases; it is sufficient for me to refer to a passage in the 14th Volume of Halsbury's Laws of England. The passage will be found at p. 93 and is as follows:—

"The debt," that is to say, the debt which is sought to be attached "must be one which the judgment-debtor could himself enforce for his own benefit; for the creditor acquires no larger rights than those of the debtor. If, therefore, the debt is due to the judgment-debtor in the capacity of a trustee only, or if he has parted with the debt by assigning it even though he has reserved power to himself to revoke the assignment, it cannot be attached."

This, in my opinion, is exactly what the Civil Procedure Code provides in S. 60. With all respect, I am unable to agree with the view taken by the Madras High Court in *V. Thiruvengadam Pillai* v. *Doridla Subbiah* (1) upon which the learned Subordinate Judge has relied for his decision in this case. If it were open to me to deal with this question on the merits, I would have no hesitation in setting aside the order of the learned Subordinate Judge.

But then the question arises whether this Court ought to invoke its revisional jurisdiction in a case of this nature. Before I exercise my power under S. 115 of the Code, I must be satisfied that the learned Judge in the Court below has either usurped a jurisdiction which did not belong to him, or declined a jurisdiction which he should have exercised, or that in exercising his jurisdiction he has acted illegally and with material irregularity. Clearly the question was for the learned Subordinate Judge to decide and he has decided it, and, in deciding it, he has followed a decision of the Madras High Court which is directly in point. It is quite true that I take a different view, but that is not to say that it was not open to the learned Subordinate Judge, to follow a decision of the Madras High Court. That being so, it is quite impossible for this Court to interfere with the order passed by the learned Subordinate Judge in this case. The Petitioner has clearly his remedy at law and he ought to pursue his remedy at law.

For the protection of the fund, however, we direct that this fund should lie in Court for three months. If any suit is filed respecting this fund and an injunction obtained, the Subordinate Judge will act in accordance with the terms of the injunction; but if no injunction is obtained respecting this fund, within three months from the date of this order, the attaching creditors will be entitled to withdraw this fund. We dismiss this application but make no order for costs.

Adami, J.—I agree.

Petition dismissed.

✱ 1925 PATNA 374

ROSS AND KULWANT SAHAY, JJ.

(*Babu*) *Durga Prasad* — Judgment-debtor—Appellant.

v.

A. H. Forbes — Decree-holder — Respondent.

M. A. Nos. 65, 66 and 67 of 1924, Decided on 8th January, 1925, against orders of the Sub-J., Purnea, D/- 5th January and 11th January, 1924.

✱ (*a*) *Civil P.C., O. 9, R. 8 — Dismissal—No appeal lies—Question of jurisdiction involved —Appeal may be treated as revision petition.*

No appeal lies against an order of dismissal for default. But when it raises the question of excess of jurisdiction the appeal may be treated as an application for revision.

[P. 375, C. 1]

(*b*) *B. T. Act, S. 98—Execution proceedings against common manager appointed under S. 95—Dt. Judge's sanction is essential.*

The sanction of the District Judge should be obtained before proceedings are taken against the common manager appointed under S. 95 for realization of rents. [P. 375, C. 2]

Shiveswar Dayal—for Appellant.

Lalmohan Ganguly — for Respondent.

Kulwant Sahay, J.—These three appeals arise out of three orders made

in three execution proceedings in which the decree-holder took out execution of three decrees for rent and sought to sell the property of the judgment-debtor for realisation of the decretal amount. The property sought to be sold was in the hands of a common manager appointed under the Bengal Tenancy Act. The common manager, who is the appellant in these appeals, filed objections in all these three execution proceedings urging several grounds against the execution; and the principal point taken was that the execution against him could not proceed without the sanction of the District Judge.

In the case giving rise to Appeal No. 65 the objector, namely, the common manager, failed to appear when the case was called on for hearing and his objection was dismissed for default. In the other two cases the learned Subordinate Judge has held that there is no law which required the decree-holder to obtain the sanction of the District Judge for leave to execute the decree against the common manager and he has accordingly dismissed the objections.

As regards Appeal No. 65 a preliminary objection is taken on behalf of the respondent that as the order appealed against is an order of dismissal for default, no appeal lies. This objection is well founded and must prevail. In fact it is conceded by the learned vakil for the appellant that the appeal is incompetent, but he says that the matter ought to be considered by us under our powers of revision. As the same question arises in the other two appeals and as it affects the jurisdiction of the Subordinate Judge to execute the decree, I think we ought to accede to the request and treat the memorandum of appeal in Appeal No. 65 as an application in revision.

The question as to whether execution can proceed without obtaining the sanction of the District Judge depends upon the question as to the legal position of the common manager. If he is considered to be an officer of the court, it is clear that no proceedings ought to be taken against him without obtaining the sanction of the Court which appointed him the common manager. Under S. 94 of the Bengal Tenancy Act the common manager may be appointed by the co-owners themselves under orders of the District Judge. Such an appointment will not be an appointment by the District Judge but by the co-owners themselves. If the appointment be made by the District Judge under S. 95 of the Bengal Tenancy Act, then S 98 provides that a manager appointed under S. 95 is to act under the directions of the District Judge. He has under clause (3) all the powers of the co-owners for the purposes of management of the estate, subject to the control of the District Judge and the co-owners cease to exercise such powers so long as the appointment lasts. Now the payment of rents for tenures or holdings held by the co-owners is an act of management and under clause (4) the manager has to deal with and distribute the profits in accordance with the orders of the District Judge. The co-owners are declared to be incapable of exercising such powers and the common manager alone can exercise such powers and as such powers have to be exercised under the control of the District Judge, the sanction of the District Judge should be obtained before proceedings are taken against the common manager for realization of such rents. That the position of the common manager is analogous to that of a receiver appointed by the Court was held by the Calcutta High Court in the case of *Beni Madhab Sukul* v. *Upendra Chandra Singh* (1). I am, therefore, of opinion that it was necessary for the decree-holder to obtain the permission of the District Judge before taking out execution against the common manager. Under the circumstances I would set aside the orders of the Subordinate Judge in all these three appeals and remand the cases to him for finding as to whether the appointment of the appellant as common manager was under S. 95 of the Bengal Tenancy Act. If it be found that the appointment was under S. 95, it must be held that the execution proceedings were bad inas-

(1) [1919] 24 C.W.N. 138=53 I.C. 747=30 C. L.J. 279.

much as no sanction of the District Judge was obtained.

The appeals succeed and must be allowed with one set of costs.

Ross, J.—I agree.

Appeals accepted.

1925 PATNA 376

DAWSON-MILLER, C. J., AND FOSTER, J.

Lachmi Narain Singh and others—Plaintiffs—Appellants.

v

Rebati Debya and others—Defendants—Respondents.

First Appeal No. 198 of 1923, Decided on 5th January 1925, against a decision of the Sub. J., Deogarh, D/- 29th September 1923.

(a) *Civil P. C., O. 21 R. 92—Suit by judgment-debtor for possession of property not sold in auction but wrongly taken by auction-purchaser—Rule does not apply.*

A suit for possession by a judgment-debtor after sale of his property in execution would not lie as long as the sale was not set aside and the period of limitation within which such a sale could be set aside is one year from the date of confirmation of the sale. But the rule does not apply when the property for possession of which the judgment-debtor sued was never sold at all but was wrongly taken possession of by the auction-purchaser. [P 377 C 2 & P 378 C 1]

(b) *Civil P. C., S. 47—Suit by judgment-debtor for possession of property not sold in auction but wrongly taken by auction-purchaser—Section does not apply.*

If the property was in fact attached and sold then the judgment-debtor's only remedy as a party to the suit would be under S. 47 of the Civil P. C. and not by a separate suit. But if the property was not included either in the sale proclamation or in the sale certificate and was not in fact purchased at the auction sale, but was wrongly taken possession of by the auction-purchaser under colour of a title which he did not possess no question arises within S. 47 of the Code and the period for recovering possesion of property taken under such circumstances will be 12 years from the date of dispossesion. [P 378 C 1]

S. M. Mullick and *S. S. Bose*—for Appellants.

N. C. Sinha and *S. N. Bose*—for Respondents.

Dawson-Miller, C. J.—The history of this litigation commences as long ago as the year 1899 when Hari Kissun Bhagat, the father of the Defendant No. 2, obtained a decree against Srimati Gayabati Kumari, the grandmother of the first two Plaintiffs. All efforts to obtain execution of the decree appear to have been persistently opposed by the original judgment-debtor and, although all the original parties are long since dead, the litigation has been carried on by their representatives with unabated vigour. After many previous attempts to obtain satisfaction, but which left the decree unsatisfied, execution proceedings were instituted at Monghyr in the year 1911 but in the subsequent year were transferred to Deoghar in the Santhal Parganas where certain property of the judgment-debtor, then in the hands of her representatives, was attached and sold in execution. Various attempts were made by the present Plaintiffs as the representatives of the judgment-debtor to set aside the attachment, and afterwards the sale, but they all failed. In pursuance of the sale the auction-purchaser got possession of the three houses which it is alleged by the Plaintiffs were not in fact sold and were not included in the description of the property appearing in the sale proclamation or the sale certificate. The object of the present suit is to recover back from the representatives of the purchaser, who died during the pendency of this suit, one of the houses which the Plaintiffs claim belongs to them and not to the judgment-debtor. The sale proclamation is not before us but the sale certificate, which is admittedly in similar terms, describes the property as follows :—

"The judgment-debtor's right, title and interest in 2 bighas of *lakhiraj* land with *kutcha* and *pucca* houses standing thereon in Chandni Bazar (known as old thana) in the town of Deoghar where no settlement has been made. It is bounded by roads on north, south, east, and west."

It is the Plaintiffs' case that the property known as old thana, which has apparently been converted into a bazar or market on the site of an old police station, is *lakhiraj* land, as in fact the description of the property in the sale certificate indicates, and that it is bounded on the north, east and south by Municipal roads. On the west also there is a road or pathway which it is claimed is the bound-

ary referred to in the sale proclamation. Immediately west of this path are the three houses in question including that claimed as belonging to the Plaintiffs. To the west of these houses again is a Municipal road. This road has apparently been taken by the auction-purchaser as the western boundary of the property sold and he has succeeded in ousting the Plaintiffs from possession under colour of the auction-purchase. It is further the Plaintiffs' case that the house in suit is neither a part of the property known as old thana nor does it stand on *lakhiraj* land. It is important to bear in mind that the Plaintiffs allege that this house was not intended to be sold and was never sold nor was it attached or proclaimed for nor purchased by the Defendant first party. They claim a declaration to that effect and possession of the house.

Four pleas in bar were raised by the written statement in the present suit and the following issues amongst others were framed for determination :—

(1) Is the suit barred by the general and special laws of limitation ?

(2) Is the suit barred by the principles of *res judicata* ?

(3) Is the suit barred by the provisions of S. 47 of the Civil Procedure Code ?

(4) Is the suit barred by Or. 21, R. 92 of the Civil Procedure Code ?

An application was made by the Defendants to decide these preliminary issues before going into the evidence. The Subordinate Judge at first decided to hear the parties on all the issues after evidence had been gone into, but on an application for review of this order he appears to have changed his mind, notwithstanding the fact that the Plaintiffs filed a petition pointing out that the determination of even these preliminary issues would require that some evidence should be gone into, and on the 19th July 1920 he passed an order that the first four issues should be determined first without taking any evidence. It is unfortunate that in spite of the protest of the Plaintiffs he should have thought fit to follow this course, for it was obvious from the moment that he applied himself to the determination of these issues that certain facts would have to be ascertained before the preliminary questions raised could be satisfactorily determined. He considered that the suit was one to set aside the portion of the sale in the guise of a possessory suit. The suit, however, does not pray for the cancellation of the sale. In fact it was the Plaintiffs' contention that the property now claimed had never been sold at all. The learned Judge appears to have felt this difficulty, for he states at the beginning of his judgment : "It may be true that the decree-holder gave wrong boundaries of the property known as *purana* thana but there is no denying the fact that the property with such wrong boundaries was proclaimed for sale and sold." And later he says : "The certificate of sale may not be conclusive as to the property purchased by the auction-purchaser but the property advertised and offered for sale in the sale proclamation and bid for by the auction-purchaser was certainly the property ordered to be sold." This appears to me to be begging the question. One of the real issues in dispute between the parties was whether the property claimed had been sold or not. There was no evidence before the learned Judge to show whether the property claimed formed part of what is known as old thana or not ; nor was there anything to show whether it was *lakhiraj* land. These are questions of fact which, in my opinion, it was essential to determine before it could be confidently decided whether the property was sold or not.

Having arrived at the conclusion that the property was in fact sold the learned Judge found, and I think found rightly upon the facts assumed by him, that a suit for possession would not lie as long as the sale was not set aside, and as the period of limitation within which such a sale could be set aside was one year from the date of the confirmation of the sale, which took place in 1913, the Plaintiffs were not entitled to maintain the present action. The learned Judge also found that the suit was barred by S. 47 of the Civil Procedure

Code on the ground that the matters now in dispute were questions relating to the execution, discharge or satisfaction of the decree. I agree that if the property was in fact attached and sold then the Plaintiffs' only remedy as a party to the suit would be under S. 47 of the Civil Procedure Code and not by a separate suit, but this again pre-supposes that the property was in fact sold. Now if it in fact should turn out that this property was not included either in the sale proclamation or in the sale certificate and was not in fact purchased at the auction-sale, but was wrongly taken possession of by the auction-purchaser under colour of a title which he did not possess, no question arose within S. 47 of the Code and the period for recovering possession of property taken under such circumtstances would be 12 years from the date of dispossession.

The learned Judge further found that the suit was barred under Or. 21, R. 92 as it was in substance a suit to set aside an order passed under that rule confirming the sale. The same objection however, applies to this finding as to his findings on the other issues namely, that according to the case pleaded the property was not sold at all and the sale of such property was never in fact confirmed.

On the question of *res judicata* he found that the inclusion of the property in suit within *purana* thana was never directly and substantially in issue in the execution proceedings although the matter might and ought to have been raised in those proceedings. But as Expl. 4 of S. 11 of the Civil Procedure Code did not, in his opinion, apply to execution proceeding he held that the suit was not barred by the principle of *res judicata*. Here again the learned Judge assumes that the property was not sold, for if it was not sold he is mistaken in saying that the question ought to have been raised in execution proceedings.

Much as I regret that this litigation will be still further protracted by our decision I am afraid it will be necessary to remand the case for further consideration upon the preliminary points after taking evidence of the facts upon which the Plaintiffs rely as the basis of the relief claimed. Before deciding the preliminary issues it will be necessary for the learned Judge to take evidence and come to a decision on the question whether the property claimed in this suit was included in the description of the property sold as described in the sale proclamation and the other documents in the case. If it was sold then the present suit is barred. If it was not sold then the suit would have to be decided on the merits. The decree of the trial Court is set aside and the suit is remanded for rehearing according to law in accordance with the directions given in this judgment. The appellants are entitled to the costs of this appeal. The costs already incurred in the lower Court will abide the ultimate result of the suit and will be provided for by the judgment of the trial Court on remand.

Foster, J.—I agree.

Case remanded.

✱ 1925 PATNA 378

ADAMI AND BUCKNILL, JJ.

Bhagwat Singh and others —Accused —Petitioners.

v.

Emperor—Opposite party.

Criminal Rev. No. 472 of 1924, Decided on 24th November 1924, against an order of the S. J., Monghyr, dated 16th July, 1924.

(a) Criminal P. C., S. 360—Section is mandatory.

The provisions of S. 360 are mandatory and their intention is to protect the witnesses as also to help the accused. But the absence of a memorandum sub-joined to a deposition and stating the fact of compliance does not itself prove that the provisions of the section have not been observed.

✱ *(b) Criminal P. C., S. 342—Accused filing written statement and refusing to answer questions—Magistrate is not bound to go on questioning.*

Though it is the duty of the Magistrate to question the accused generally on the case after the close of the prosecution yet when the accused refuses to answer a question, the Magistrate is not bound to go on asking

questions especially where a written statement is put in at the time, meeting the points of the prosecution. [P. 381, C. 1.]

Ali Imam, S. N. Rai and B. C. De—for Petitioner.

Sultan Ahmad—for Crown.

Adami, J.—[His Lordship disposed of the questions of fact and then referring to the fact, that while in the case of six witnesses the examination-in-chief bore a memorandum to the effect that the deposition had been read and explained to and admitted to be correct by the witnesses, the cross-examination of these witnesses and the whole deposition of the other witnesses did not bear this memorandum but had merely the signature of the witnesses at their foot or in some cases only a thumb impression of the witness, proceeded as follows :—] Sir Ali Imam asks us to hold that under these circumstances the trial must be held to be vitiated. He argues that the provisions of S. 360 are mandatory, and he relies chiefly on the case of *Hiralal Ghosh* v. *The King-Emperor* (1). There is no doubt in my mind that the contention is correct that the provisions of S. 360 are mandatory and that their intention is to protect the witnesses as also to help the accused.

The learned Judges of the Calcutta High Court, Newbould and Mukerji, JJ., have, in the above cited case, laid down the law on this point, and there is no reason to disagree with their findings as to the mandatory character of the provisions of S. 360. But it is to be noticed that in that case there were two witnesses whose evidence was not read over to them at all and this fact was admitted by the prosecution. As in this case, so in that case, the depositions of the other witnesses had been signed by them but there were no certificates that the depositions had been read over to them in the presence of the accused or their pleaders. But there were two witnesses who, as I have said, had never had their evidence read over to them at all. Newbould, J., held that as the evidence of the two witnesses had not been read over to them there had been an illegality which vitiated the trial. Mukerji, J., stated :

"In the case before us the evidence was not read to the witnesses at all. The depositions of five of the prosecution witnesses bear at their foot the signatures of the witnesses, and we are asked to presume from those signatures alone that the witnesses had actually read the depositions before they put their signatures down ; and as regards two of the prosecution witnesses their signatures even do not appear, and it is admitted that so far as their depositions are concerned, there was no attempt made to comply even with the spirit of the section. There is, therefore, no escape in the present case, from the conclusion that the whole trial was conducted in utter disregard of the imperative provisions of the law as contained in S. 360 Cr. P. Code and was, therefore, a nullity."

It is plain, therefore, that in that case the learned Judges of the Calcutta High Court were impelled to declare the trial a nullity, because admittedly in respect of the two witnesses their depositions were never read over at all.

In the case of *Jyotish Chandra Mukerji* v. *Emperor* (2) on which Sir Ali Imam has relied, it is to be noticed that the depositions had in fact not been read over to the witnesses ; in fact it was the Counsel for the Crown who called the attention of the Sessions Judge to the non-compliance with the provisions of S. 360, but the Sessions Judge was wrongly of opinion that S. 360 was only a directory and not a mandatory provision and held that the non-compliance was a mere irregularity.

Now in the present case, no complaint was made in the trial court that the depositions were not read to the witnesses, and in the Sessions Court the point was not raised and no appeal was made on this ground. In the grounds put forward in the petition to this Court, there is no allegation that the depositions were not read to the witnesses. Sir Ali Imam has raised the point for the first time in his argument, and his argument seems to be that, because there is at the foot of the deposition of several of the prosecution witnesses no memorandum to the effect that the deposition had been read over and explained, this Court must hold that

(1) [1924] Cal. 889=52 Cal. 159—28 C. W. N. 968.

(2) [1909] 36 Cal. 955=14 C. W. N. 82=4 I. C. 416=10 Cr. L. J. 581.

the depositions were not read over to them as required by S. 360 and, therefore, the trial was vitiated.

We are asked to presume from the fact that these depositions do not bear a memorandum, that the depositions were not read over, and therefore the convictions must be set aside. There is no allegation made that, as a matter of fact, the depositions were not read over to the witnesses, and there is no admission by the Crown that there was a failure in this respect. We cannot, in revision, look into a question of fact like this which had never been put forward in the Lower Courts. As a matter of fact the Code of Criminal Procedure in S. 360 does not require that a memorandum should be subjoined to the deposition. In the Code of 1861 there was a requirement to this effect but that provision has been repealed. Where the Code requires a certificate it states so in the section. I may refer to S. 164 and S. 364.

It must not be inferred that in our view the practice at present followed in all Courts of appending a memorandum to a deposition after it has been read and explained to a witness in the presence of the accused should not be continued, or that we consider such a memorandum unnecessary. It is obviously necessary in order to show on the face of the record that the mandatory provisions of S. 360 have been followed. What we do wish to point out is that the absence of a memorandum does not itself prove that the provisions of the section have not been observed.

Sir Ali Imam argues that in a criminal case the Court cannot use the presumption against the accused that the provisions of the Code had been duly carried out, and he further argues that the fact that there is a memorandum on some of the depositions to the effect that they had been read and explained to the witnesses, gives rise to the presumption that where there is no such memorandum, the deposition has not been read out. We cannot assent to this proposition. In revision we are unable to enquire whether as a fact the depositions, were read out or not, there being no allegation in any of the pleadings up to this Court that in fact the depositions had not been read out.

We are not satisfied that in the present case the depositions were not read to the witnesses, and therefore there is no reason to interfere on this ground.

Finally we come to Sir Ali Imam's objection as to the Court's compliance with the provisions of S. 342. It seems that after the prosecution case was closed, the petitioners were asked whether they would make a statement after hearing the case which had been brought against them by the prosecution. The answer of the petitioners was "No, I shall file a written statement" and thereupon a written statement was that same day filed by the petitioners, meeting the points put forward by the prosecution.

Sir Ali Imam argues that under the provisions of S. 342, the Court at that stage was bound to question each petitioner generally on the case and that a mere question, whether the accused had any statement to make, was not a sufficient compliance with the section. He points out that the object of S. 342 is to give the accused a chance of meeting and explaining any points which have come out in the prosecution evidence against him and also to enable him to find out from the questions put by the Magistrate what points seem to have especially struck the Magistrate and to require explanation. Even if the accused says that he will file a written statement, the Magistrate must still give him notice by the questions of what points are exercising the mind of the Magistrate. Sir Ali Imam has relied on the cases of *Fatu Suntal* v. *King-Emperor* (3) and *Raghu Bhumij* v. *King-Emperor* (4) as well as on the case of *Promotho Nath Mukhopadhya* v. *King-Emperor* (5).

It is quite true that the filing of a written statement cannot take the place of the examination of an accused as required by S. 342; but in the present case the accused petitioners filed their written statement

(3) [1931] 2 P. L. T. 288=6 P. L. J. 147=61 I. C. 705=22 Cr. L. J. 417.
(4) [1920] 1 P. L. T. 241=5 P. L. J. 130=58 I. C. 49=21 Cr. L. J. 705.
(5) [1923] Cal. 470=50 Cal. 518=27 C. W. N. 389=24 Cr. L. J. 248.

in answer to the Magistrate's question, and when asked to make a statement they said "here is my written statement." Sir Ali Imam contends that it was the bounden duty of the Magistrate, even though this written statement was filed to put a number of questions to the accused.

Now, experience shows that, when a written statement has been drawn up for an accused, he will commonly refuse to answer questions orally ; he is very often instructed by his pleader not to answer questions, and where an accused has refused to answer questions and puts forward a written statement, it would be useless for the Magistrate to go on questioning him, knowing that the only reply he will get is a refusal to answer questions.

The learned Government Advocate has shown that in the present case the written statement put forward by the petitioners covered all the points in the case. It is very difficult to lay down a rule as to the minimum number of questions which should be put to an accused. If numerous questions are put, there is generally an allegation that the Court has attempted to cross-examine the accused.

While agreeing that it is the duty of the Magistrate to question the accused generally on the case after the close of the prosecution, we are not prepared to hold that when the accused refuses to answer a question, the Magistrate is bound to go on asking questions especially where a written statement is put in at the time, meeting the points of the prosecution.

I can see no reason to hold that in the present case the trial has been vitiated by the fact that the Magistrate did not continue asking questions after the accused had refused to answer.

Finally Sir Ali Imam has moved for a reduction of the sentences passed against the petitioners on the ground that this was not a case of wanton aggression. I have held, however, above, that the petitioners had no justification for their action and that it cannot be held that they had a *bona fide* belief that they had a right to attack the Itarha people and break down the *bandh*. The sentences are, in my mind, not excessive and I see no reason to reduce them.

[His Lordship wound up by rejecting the application. Bucknill, J. concurred.]

Rule discharged.

✱ 1925 PATNA 381

ADAMI AND BUCKNILL, JJ.

Jamal Momim and another—Appellants.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 155 of 1924, Decided on 7th November, 1924, against the judgment and order of the S. J. Darbhanga, D/- 24th July, 1924.

✱ *Criminal P. C., (1923) S. 284—Trial with three assessors—No reasons given for not having four—Trial is legal.*

Where four assessors are not chosen, it is right that the Court should give reasons in the order-sheet to explain the impracticability of choosing four, but the trial with three assessors, without the record of these reasons, is not irregular but is still according to law and does not offend against the provisions of S. 284. [P 382 C. 2.]

S. P. Sen—for Appellants.

Sultan Ahmed—for the Crown.

Adami, J.—The two Appellants have been convicted by the Sessions Judge of Darbhanga and sentenced to seven years' rigorous imprisonment under S. 304, I. P. C., to two years' rigorous imprisonment under S. 148, and to one year's rigorous imprisonment under S. 326 read with S. 149 ; the sentences are to be served concurrently. The Appellants were also bound down under S. 106, Cr. P. Code to keep the peace for one year in sums of Rs. 200 each.

According to the prosecution story, Sri Mohan Jha, the zemindar, wanted to make his tenant Manir execute a *kabuliyat* for the payment of enhanced rent. Manir refused and this made the zemindar angry.

At 6 A. M., on the morning of the 17th November 1922, a large mob of men came on to Manir's land and began looting away the crop. Sheikh Madari and Jheri, Manir's men, came

up and protested, and thereupon they were attacked, Bideswar struck Manir first and then these two present appellants struck Madri with *garassas* on the head. He fell and died from the effects of the wounds he had received. Jheri also received injuries.

Information was given at the police station, which is eight miles distant, at 11-30 that same day. In that information Manir stated to the police that two sons of Sri Mohan had been present on horse-back directing the mob and also his *tehsildar*. Altogether nine persons were mentioned in the information as having taken part in the assault.

The police investigated and sent up six persons including the two sons of the zemindar and the *teshildar*: the three other persons including these two Appellants could not be found, and the trial proceeded without them, resulting in the acquittal of the two sons of the zemindar and the *teshildar* and the conviction of the other three persons sent up. That was in June 1923.

The two present Appellants were absconding, and steps were taken against them under Ss. 87 and 88 and then in January of this year it was decided that in their absence the evidence should be taken under S. 512 of the Code of Criminal Procedure, and the 28th of January was fixed for that purpose. On that date the two Appellants surrendered and asked for some time in order to enable them to procure the surrender of the third absconder Jhingru Dusadh. He, however, could not be found and the two Appellants were put on their trial, after commitment, before the Sessions Judge.

The same witnesses were examined as had been examined in the previous trial in 1923, and the three assessors gave it as their opinion that these two Appellants were guilty on the charge brought against them. The learned Sessions Judge agreed and they were convicted and sentenced as I have stated above.

Mr. Sen, the learned Counsel for the Appellants, in the first place, attacks the constitution of the Court by which the Appellants were convicted. He points out that under S. 284 of the Criminal Procedure Code it is required that if practicable four assessors should be chosen and that the minimum number of assessors is three; and he argues that it is only where it is not practicable to find four assessors that the Court can be properly constituted with three; and where only three assessors are chosen, reasons should be recorded why it has not been practicable to choose four. In the present case the proceedings do not show any reason why four assessors were not chosen.

We have dealt with this question on this Bench before, and, while pointing out that where four assessors are not chosen, it is right that the Court should give reasons in the order-sheet to explain the impracticability of choosing four, the trial with three assessors, without the record of these reasons, is not irregular but is still according to law and does not offend against the provisions of S. 284.

Mr. Sen does not contest the finding that there was a riot on the 17th of November 1922. He contends however, that the proof that the two present Appellants took part in that riot is insufficient.

In the first place he points out that several of the witnesses in their cross-examination have made statements which are not in accordance with the statements which they made in the previous trial, and on this ground he urges that the evidence should not be believed.

Secondly, he attacks the admission of the former depositions of these witnesses by the Sessions Court as evidence to test the credibility of the witnesses.

Thirdly, he points out that, according to the first information and the evidence of the witnesses, the two Appellants inflicted the wounds with *garassas*, while the medical evidence admittedly shows that the wounds on the head of the deceased man Madri were lacerated wounds caused by some blunt weapon.

Lastly, he points to a suggestion that Manir received a letter at the police station from one Abdul naming the two Appellants and that it

was owing to this letter that Manir mentioned the Appellants' names in the information.

The learned Sessions Judge in his judgment has most carefully considered the alterations in the statements made by some of the witnesses. He has admitted the previous depositions made by some of the witnesses under S. 157, Evidence Act, and after discussing the evidence, he has shown that there are three reliable witnesses, namely, witnesses Nos. 7, 9 and 12 who have not changed their statements, and it is on the basis of the evidence of these three men chiefly that the learned Sessions Judge has come to a finding that the Appellants did take part in the riot and wounded Madri.

Mr. Sen argues that the depositions are inadmissible under S. 157 to contradict the statements made in the present trial by the witnesses. As a matter of fact a consideration of the evidence of those witnesses shows that in the examination-in chief they stated the same story as they stated in the previous trial, and those previous depositions might rightly be admitted under S. 157 to corroborate the present story. But at the same time it appears that those depositions have been used to contradict what the witnesses further stated in their cross-examination in the present trial and it is plain that they could not be admitted for that purpose under S. 157. The section under which such evidence may be admitted for the purpose of contradiction is S. 155. However that may be, it is clear from the judgment of the learned Sessions Judge that, after noticing and explaining that the evidence given in the cross-examination of those witnesses is unreliable because they contradicted themselves, he has partically discarded the evidence of those witnesses and has contented himself with relying on the evidence of the three witnesses I have mentioned. This he was perfectly justified in doing; and, after reading the evidence of those three witnesses, corroborated as it is by their previous statements, there is no reason to find that the Sessions Judge was mistaken in basing his conviction on their evidence. The assessors also believed those three witnesses. Where witnesses have changed their statements, naturally it is difficult for a Court to put full reliance on them even though the previous depcsitions may be brought forward to show that their present denials are false; and I myself would, in this case, be quite satisfied with the evidence given by the three reliable witnesses.

Then Mr. Sen urges that since in the previous trial the two sons of the landlord and the *teshildar*, who were the leading men, were acquitted, and since the three witnesses now relied upon mentioned in the previous trial that these three men were present, the Court should look with some doubt on their evidence. It has to be remembered, however, that in the previous trial too, though it was found that three of the accused who had been named by the witnesses were in fact not there, the Court was satisfied that the evidence of those witnesses was true with regard to the three other accused; and in this trial I see no reason to doubt the evidence of the three witnesses because in the previous trial three other men who are not now before the Court were acquitted.

With regard to the letter alleged to have been written by one Abdul, there is no evidence to prove that any such letter was delivered to Manir. Manir was asked whether he had received that letter and he absolutely denied having done so. A witness Mian Sultan, who has been treated as a hostile witness, says that he heard from Manir that he had received a letter from Abdul; but Manir was not asked whether he had made any statement on this subject to Mian Sultan. There is absolutely no evidence to show what enmity Abdul had against the two Appellants and there is no evidence to satisfy the Court that any letter was in fact written by Abdul which served as a guide to Manir in naming the persons accused in the first information.

It is true that the medical evidence shows that the wounds on the head of Mardi were not inflicted by a sharp-

edged weapon like a *garassa*. The learned Sessions Judge has carefully considered this point and has come to the conclusion that, as the witnesses were at some distance and saw the two Appellants carrying *garassas* when they hit Madri, the witnesses concluded that they were using the *garassas*. The learned Sessions Judge points out that the wounds may have been inflicted by a *garassa* but with the *lathi* end of it, and wounds thus inflicted would be of the nature found on medical examination. It is possible too that the Appellants used the back of the *garassa* in hitting Madri. Throughout the evidence it is shown clearly that the Appellants hit Madri with *garassas*. This has been the story throughout even in the first information, and there is no reason to think that the witnesses have purposely told a false story. It is much more likely that if they were going to tell a false story they would have fitted their story to suit the medical evidence and mentioned some other weapon. To my mind the evidence that these two Appellants were present in the mob and that they were the assailants of the deceased Madri is quite clear and the finding of the assessors and the learned Sessions Judge is, I am satisfied, correct. The sentence passed against the Appellants is not severe considering the injuries they inflicted.

There is one other matter to which Mr. Sen called our attention and that is that the learned Sessions Judge refused to call a defence witness when requested to do so by the Appellants. The proceedings show clearly the reasons for this refusal and those reasons are sound. The learned Sessions Judge says that though defence witnesses had been mentioned, the Appellants gave him to understand that they were not going to call any defence witnesses, and it was not until the case had come to an end that their request was made. The learned Sessions Judge points out that the defence had sufficient time to procure the attendance of this witness earlier and they had been aware that no defence witness was present throughout the trial. The reasons given for the refusal were satisfactory, and there is no reason to consider that the accused had been prejudiced by the refusal to call this witness.

I see no good reason to interfere in this appeal and would uphold the conviction and sentences passed against the Appellants and dismiss the appeal.

Bucknill, J.—I agree.

Appeal dismissed.

✱ 1925 PATNA 384

ROSS AND KULWANT SAHAY JJ.

Barhamdeo Narayan Pande and others—Plaintiffs—Appellants.

v.

Saligram Sahay Pande and others—Defendants—Respondents.

Second Appeal No. 1502 of 1922, Decided on 14th January, 1925, against a decision of the Sub. J., Saran, D/- 19th February, 1922.

✱ (a) *Civ. P. C. S. 100—Finding of fact cannot be disturbed.*

A finding of fact upon the evidence cannot be questioned in second appeal. [P 386, C 1]

✱ (b) *Civil P. C. O. 21 R. 90—Property attached during judgment-debtor's lifetime but sold after his death—Legal representatives not brought on record—Sale is irregular and not void.*

Where the property was attached in the life-time of the judgment-debtor but was sold after his death,

Held: that the failure to bring the legal representatives of the judgment-debtor on the record did not make the sale null and void. It only amounted to an irregularity which would have entitled the legal representatives of the judgment-debtor to have the sale set aside if they had taken proper steps within the period of limitation prescribed by the Statute. Case law discussed. [P 367, C 1]

Bhagwan Prasad—for Appellants.

Parmeshwar Dyal, Jadubans Sahai and B. Saran—for Respondents.

Facts.—This was an appeal on behalf of the plaintiffs against the decision of the Subordinate Judge of Saran, reversing the decision of the Munsif of Chapra and dismissing the plaintiffs' suit.

The facts of the case were shortly these:—

One Nawrang Lal had a holding of 11 *bighas* odd in village Kolhua. He died leaving the plaintiffs and the

fendants Nos. 2 and 3 as his heirs. In execution of a decree for rent obtained against Nawrang Lal the holding was sold on the 19th of November, 1908, and purchased by the defendant No. 1. The learned Subordinate Judge has found that after execution had been taken out and the property attached, Nawrang Lal died on the 18th of June 1908, about five month before the auction-sale. His heirs, however, were not brought on the record in the execution proceedings and the execution proceeded in the name of the deceased judgment debtor. The plaintiffs' case is that they and the defendants Nos. 2 and 3 came into possession of the holding in dispute after the death of Nawrang Lal and have continued in possession; but that in the Revisional Survey the defendant No. 1 got his name recorded in respect of the lands in dispute by virtue of his auction purchase in the execution sale. The plaintiffs allege that the decree was fraudulent, that all processes in execution were suppressed, and, that, therefore, the defendant No. 1 did not acquire any title to the land by virtue of his purchase. The plaintiffs accordingly instituted the present suit on the 3rd of December, 1920 for a declaration that the defendant No. 1 had no title to the land and for confirmation of possession or, in the alternative, for recovery of possession.

Various pleas were taken by the defendant No 1 in answer to the suit; but the principal defence was that Nawrang Lal was alive at the time of the execution; that he purchased the suit land for proper value; that the plaintiffs were not in possession of the disputed lands on the death of Nawrang Lal; and, that the suit was barred by limitation.

The learned Munsif held that Nawrang Lal died on the 18th of June, 1908, long before the sale took place, that no attachment or any other process in execution was issued or served in the life-time of Nawrang Lal, and that the sale was brought about by fraud. He, accordingly, decreed the suit.

On appeal the learned Subordinate Judge found that although Nawrang Lal died on the 18th of June, 1908, yet the processes were duly issued and the property was attached and sale proclamation was served during his life-time; that there was no fraud in the execution proceedings; that the plaintiffs were never in possession of the disputed holding and that the defendant No 1 is in possession since he took delivery of possession in 1909. He further held that the failure to bring the heirs of Nawrang Lal on the record in the execution proceeding after his death only amounted to an irregularity and did not render the sale null and void and, that, the plaintiffs could not succeed without taking proper steps to set aside the sale and as their remedy to have the sale set aside either by suit or by proceedings under order XXI rule 90 was barred by limitation they could not succeed in the present action. The Subordinate Judge, accordingly, dismissed the suit.

Kulwant Sahay J.—[His Lordship stated facts as set out above and proceeded:-] On Second Appeal the points raised by the learned Vakil for the appellants are that the finding of the learned Subordinate Judge that attachment and sale proclamation were served in the life-time of Nawrang Lal is not a legal finding on a consideration of the evidence, and, secondly, that the sale without bringing the heirs of Nawrang Lal on the record was null and void and it was not necessary to have it set aside before the plaintiffs could succeed in their action to recover possession of the property.

As regards the first point, it is clear that the finding of the learned Subordinate Judge that attachment was served in the life-time of Nawrang Lal is a finding based on a consideration of the evidence in the case. No doubt, the first court came to a different finding and the learned Subordinate Judge does not discuss the evidence on this point. But it appears on a reference to the judgment of the Munsif that the only evidence on the point consisted of the depositions of certain witnesses on both sides, and, while the Munsif believed the plaintiffs' witnesses and disbelieved the defendants' witnesses, the Subordinate Judge on appeal believed the defen-

dants witnesses and found that the attachment was served in the life-time of of Nawrang Lal. This is a finding of fact upon the evidence and cannot be questioned in second appeal.

The second point raises a question of law. The contention of the learned Vakil for the appellants is that on the date of the sale the property had vested in the plaintiffs and the other heirs of Nawrang Lal and, that, as these heirs were not brought on the record, the sale was a nullity; and he relies upon the decision of the Madras High Court in *Ramasami Aiyangar* v. *Bagirathi Ammal* (1) and *Groves* v. *Administrator-General of Madras* (2). He also relies upon the decision of the Judicial Committee of the Privy Council in the case of *Khairajmal* v. *Daim* (3). Reliance has, on the other hand, been placed by the learned Vakil for the respondents upon the Full Bench decision of the Allahabad High Court in *Sheo Prasad* v. *Hiralal* (4) and upon the decision of a Division Bench of the Calcutta High Court in *Bepin Behary Bera* v. *Shashi Bhushan Datta* (5). After a careful consideration of the authorities I am of opinion that the view taken by the learned Subordinate Judge is correct and there is no substance in the argument of the learned Vakil for the appellant. No doubt, the two Madras cases referred to above held that a sale held after the death of the judgment-debtor without making his representatives parties to the proceedings would be illegal, even if the land had been attached before the death of the judgment debtor. But those were cases for setting aside the sale and, although it must be held that the sale was illegal, it must be held that the question was considered in connection with proceedings taken to set aside the sale. What was decided in those cases was that the failure to bring his heirs on the record after the death of the judgment-debtor was a good ground for setting aside the sale Those two cases are not authority for the proposition that the sale was absolutely null and void. In the case of *Khairajmal* v. *Daim* (3) the decree was passed in the absence of the legal representatives. Lord Davey in delivering the judgment of the Board observed that their Lordships thought that the estate of Naurez was not represented in law or in fact in either of the suits, and the sale of his property was therefore without jurisdiction and null and void. This case is no authority for the proposition that the sale would be null and void if the decree was properly obtained against the judgment-debtor and the judgment-debtor died after execution had been taken out and his property attached before the sale in the absence of his legal representatives. On the other hand, in the well known case of *Malkarjan* v. *Narhari* (6) Lord Hobhouse observed that there can be no question that omission to serve notice on the legal representative is a serious irregularity, sufficient by itself to entitle the plaintiff to vacate the sale. The view taken, therefore, by the Judicial Committee in the latter case was that the omission to serve the notice on the legal representative only amounted to an irregularity and did not render the sale invalid and null and void, and that such sale had to be vacated in one or other of the modes prescribed by law. This case was followed by this Court in *Syed Muhammad Rafi* v. *Syed Muhammad Askari* (7) where Mullick, J. distinguished the case of *Khairajmal* v. *Daim* (3) with the observation that the reason of the decision in that case was that the person whose property was sold was not at all a party to the suit and their Lordships of the Privy Council observed that a sale held in execution of a decree in a suit not properly constituted is not voidable but is a nullity. In *Bepin Behary Bera* v. *Shashi Bhushan Datta* (5) Mookerjee and Beachcroft, JJ., considered the Madras cases and the other cases deal-

(1) [1882] 6 Mad 180.
(2) [1898] 23 Mad 119=8 M. L. J 288.
(3) [1904] 32 Cal 296=32 I. A. 23=9 C. W. N. 201 = 2 A. L J. 71 = 7 Bom. L. R. 1=1 C. L. J. 584 (P.C.)
(4) [1889] 12 All. 440 = 1890 A. W. N. 103 (F. B.)
(5) [1913] 18 C. W. N. 766=22 I. C. 95=18 C. L. J. 628.
(6) [1900] 25 Bom. 337=27 I. A. 216=5 C. W. N. 10 = 2 Bom. L. R. 927 = 10 M. L. J 368=7 Sar. 739 (P. C.)
(7) [1916] 1 P. L. J. 261=37 I. C. 433=3 P. L. W. 390.

ling on the point and came to the conclusion that the decision of the Full Bench in *Sheo Prasad* v. *Hira Lal* (4) was good law and that the effect of the omission of the Court to bring on the record the legal representatives of the judgment-debtor, who had died after attachment and before sale, amounted to irregularity and did not necessarily invalidate the sale, although upon appropriate proceedings taken the sale may be set aside. This case was followed in a subsequent Calcutta case in *Jagdish Bhattacharjee* v. *Bima Sundari Dasya* (8). In my opinion this is the correct view of the case and I agree with the learned Subordinate Judge that the failure to bring the legal repesentatives of the judgment-debtor on the record did not make the sale null and void. It only amounted to an irregularity which would have entitled the plaintiffs to have the sale set aside if they had taken proper steps within the period of limitation prescribed by the Statute. They having failed to do so it is not open to them to question the title of the defendant No. 1 in the present action.

In my opinion the suit was properly dismissed and this appeal must be dismissed with costs.

Ross, J.—I agree.

Appeal rejected.

(8) [1919] 23 C. W. N. 608 = 51 I. C. 972 = 29 C. L. J. 411.

1925 PATNA 337

DAWSON MILLER, C. J. AND FOSTER, J.

Tofa Lal Das—Plaintiff—Appellant.

v.

T. N. Partridge—Plaintiff—Respondent.

First Appeal No. 215 of 1922, decided on 10th December, 1924, against the decree of the Sub. J., Purnea, D/-31st May, 1922.

Bengal Tenancy Act, S. 62—Receipt granted to tenant—Presumption is that the tenant was entitled to make deposit.

S. 62 provides in effect that the money tendered by the tenant shall only be received by the Court if it appears to the Court that the applicant was entitled under S. 61 to make the deposit and if the Court is so satisfied it shall receive the rent and give a receipt for it under the seal of the Court. Once the receipt is given under this section it is provided that it shall operate as an acquittance for the amount of rent paid by the tenant and deposited, in the same manner and to the same extent as if the amount of rent had been received by the person entitled thereto. Therefore if such receipt is produced by a tenant in a suit for arrears against him it must be presumed that the Court was satisfied at the time the receipt was given that the applicant was entitled under S. 61 to deposit the rent.

[P. 388 C. 1]

L. N. Singh and *S. H. Hasan*—for Appellant.

K. Husain—for Respondent.

Dawson Miller, C. J.—In this appeal the only question is whether a sum of Rs. 2,839-15-0 said to have been deposited by the Defendant under S. 61 of the Bengal Tenancy Act should be taken into account and credited to the Defendant.

The suit was instituted by the Plaintiffs to recover from the Defendant, their tenant, a sum of Rs. 20,253-7-3 arrears of rent and cess together with interest for the years 1326 to 1328 M. S. and for the Baisakh *kist* of 1329. The suit was instituted on the 31st May 1921 in the Court of the Subordinate Judge of Purnea. On the 10th December 1920 the Defendant through his Vakil had deposited in the same Court to the credit of the Plaintiffs for rent and cess a sum of Rs. 2,839-15-0 under a challan of that date. The money appears to have been accepted by the Subordinate Judge by directing the officer in charge of the Purnea treasury to receive the sum if tendered in the treasury by 3 P. M., the same day. The money was deposited and the Treasurer's receipt was given on the face of the challan. No mention is made of this matter in the judgment and no credit is given for it in arriving at the amount due from the Defendant. The Defendant has accordingly appealed and contends that the sum deposited should be deducted from the sum found payable by the decree which amounted to Rs. 18,380-8-7.

The challan appears to have been tendered in evidence and accepted without objection. Apart from what appears on the face of the document itself there is no evidence to shew

under which of the clauses of S. 61 the money was paid into Court. The Defendant's witnesses are silent about it. From the document itself it appears that the sum was deposited by the Defendant through his Vakil Babu Shushil Chandra Neyogi to the credit of the present Plaintiffs for rent and cess with interest up to the Kartick *kist* 1328 M. S. and that it was received in the Purnea treasury on the 10th December 1920 upon the instructions of the Subordinate Judge.

It was argued on behalf of the Respondents that there was nothing to shew under which of the provisions of S. 61 the money had been paid into Court or whether the facts were such as to entitle the Defendant to pay the money into Court under that section. S 62, however, provides in effect that the money shall only be received by the Court if it appears to the Court that the applicant was entitled under S. 61 to make the deposit and if the Court is so satisfied it shall receive the rent and give a receipt for it under the seal of the Court. Once the receipt is given under this section it is provided that it shall operate as an acquittance for the amount of the rent paid by the tenant and deposited, in the same manner and to the same extent as if the amount of rent had been received by the person entitled thereto. It follows therefore that if the challan produced is a valid receipt given under S 62 it must be presumed that the Court was satisfied at the time the receipt was given that the applicant was entitled under S. 61 to deposit the rent and we cannot now at this stage consider that matter afresh.

It was contended, however, that the challan does not bear the seal of the Court and cannot be regarded as a receipt within meaning S 62. Apart from the fact that the challan does not bear the seal of the Court it would appear to be a valid receipt for the money deposited. It bears the signature of the Subordinate Judge and of the Treasury Officer who acknowledges receipt of the money. No special form of receipt is prescribed by the Bengal Tenancy Act and it was the duty of the Court to affix its seal thereto. If this was not done it was the fault of the Subordinate Judge and I do not consider that this defect should be held to deprive the Defendant of his just rights. Once the money was received it was also the duty of the Court under S. 63 to notify the receipt by notice in the Court house and to serve notice upon the persons specified in the application free of charge as provided in that section. If within 15 days the money was not paid to the person appearing to be entitled to it under S 64, the Court may either pay the amount of the deposit to any person appearing to it to be entitled to the same or may, if it thinks fit, retain the amount pending the decision of a Civil Court as to the person so entitled and if the money is not paid under this section within three years of the deposit the Court may, in the absence of any order of a Civil Court to the contrary, refund the money to the depositor on return of the receipt.

In my opinion the Defendant was entitled in the circumstances to have the deposit taken into account in determining his liability in the suit and it follows that the amount of the decree should be reduced by the sum of Rs. 2,889 15-0 and the interest and costs payable under the decree will be reckoned upon the reduced amount and the decree will be varied accordingly.

It is further ordered that the amount in deposit be directed to be paid to the Plaintiffs upon their application to the proper officer.

With regard to the costs of this appeal it appears to me that the Appellant's grievance has arisen solely owing to his neglect to draw this matter to the notice of the Subordinate Judge at the trial. Had he done so the matter would undoubtedly have been dealt with in the judgment and credit for the amount deposited would have been given to the Appellant. In the circumstances it is ordered that each party bears his own costs of this appeal.

Foster, J.—I agree.

Decree varied.

✱ 1925 PATNA 389(1)

FOSTER, J.

Banamali Kumar and another—Petitioners.

v.

King Emperor—Opposite party.

Criminal Rev No. 508 of 1924, Decided on 6th November. 1924, against an order of the S. J., Manbhum, Sambalpur, D/- 3rd July 1924.

✱ (a) *Criminal P.C., S. 342—Putting general question is enough.*

Where after the prosecution evidence was over the Court asked the accused "Have you any statement to make?" and the accused replied in the negative,

Held: **in the circumstances of the case, the provisions of the section were complied with.**

[P 389, C. 2]

(b) *Criminal P C, S. 238—I. P. C., Ss, 426 & 430—Cr. P.C., S. 238 applies.*

When the charge is under I P.C., S. 430, the conviction can be under S. 426.

A. K. Gupta—for Petitioners.

Judgment—Each of the petitioners has been fined Rs. 60 on a conviction under S. 426 I. P. C. The prosecution case is that the first petitioner, who is a co-sharer of the complainant in the village Deogaon, cut the embankment of a reservoir which was their common property and in doing so committed mischief as defined in the Code. It is alleged that the first petitioner was aided in so doing by the other petitioners. A charge was framed under S. 430, I. P C., but the conviction was under S. 426. It is urged that this conviction is illegal. But it is clear that the law empowers the Magistrate to convict of the minor offence: I refer to S. 238 of the Criminal Procedure Code. Then it is contended, if I have understood properly the point advanced, that the Courts below made a confusion of the acts of cutting the bundh and selling the fish with the result that the second and the third petitioners who only purchased the fish were made by an oversight liable for mischief to the bundh. I have looked at the judgment and do not think that there was confusion. I find definite findings that each of the appellants cut the bundh in such a manner and with such intention as to commit the offence of mischief.

The last point urged is that the examination of the accused was not such as is indicated in S. 342 of the Cr P. Code and therefore the trial was vitiated. After the examination of the prosecution witnesses each of the accused was asked "Did you cut the Deogaon bundh and drain out the water which is used by men and cattle?" and the answer of each accused was a statement of his defence case which has been discussed in detail in both the judgments. When the accused were about to be called on for their defence after the charge had been framed the Court asked "Have you any statement to make" and the accused said "No." From the record it is clear that the purpose of S. 342—to enable the accused to explain any circumstances appearing in the evidence against him—had been fulfilled and it is not asserted in argument here that anything that the accused wished to say had not been recorded. It appears to me that this argument has no substance.

The rule is discharged and the application dismissed.

Rule discharged.

✱✱ 1925 PATNA 389(2)

BUCKNILL AND ROSS, JJ.

Alauddin—Petitioner.

v.

Emperor—Opposite Party.

Criminal Rev. No. 547 of 1924, decided on 1st December 1924, against the decision of the Dt. Mag. Bhagalpur- D/- 6th September, 1924.

✱✱ *Criminal P. C., S. 514—Failure to produce accused due to his being arrested in another case—Forfeiture is improper.*

Bail bond should not be forfeited for failure of the surety to produce the accused person, where the failure to produce is due to an act of law, e. g. his being arrested. 16 C. W. N. 550; 37 Mad. 156 Ref. [P. 390, C. 1 & P. 391, C. 2]

Akbari and K. Hussain—for Petitioner.

Sultan Ahmed—for the Crown.

Bucknill, J.—This was an application in Criminal Revisional Jurisdiction. The matter relates to an order under which the applicant was directed to forfeit the amount of security which he had undertaken to pay on behalf of a person who was under

trial in the event of that person not appearing from time to time during the continuance of the trial. The applicant and another man who does not appear before us, executed a bail bond in the usual form, undertaking that one Anandi Singh, who was on trial before the Sub-Divisional Officer of Bhagalpur under the provisions of S. 110 of the Criminal Procedure Code, should appear before the Sub-Divisional Officer on the 8th February 1924 and should continue to appear until further orders. The case apparently continued for some months and the accused regulary appeard. On the 30th May last the case was put down for judgment and, so far as I understand, on that day the accused appeared in Court; but on that day judgment was not delivered and an order was passed as follows: "Orders not ready. Put up on 2nd June 1924. The accused as before." Now, on the 2nd June the accused was not present. The reason for this was found to be that on the 31st May or 1st June he had been arrested on a charge of dacoity at a place called Maldah which is not very far from Bhagalpur but which is said to be in the province of Bengal. The applicant and his fellow sureties were called upon to show cause why their bail security should not be forfeited. The applicant did show the reason why he was in fact unable to produce the accused; but notwithstanding this, the Magistrate, on the 18th August, ordered that the full amount of the bond should be forfeited and distress warrants issued against the sureties. The applicant then applied by way of appeal to the District Magistrate who, however, upheld the decision of the Sub-Divisional Officer. It is on this point that the applicant has now applied to this Court in revision.

No direct authority in this country upon this question has been quoted but there are numerous cases which have been decided both in England and in India (and it would appear there is also authority in the United States of America) which seem to throw considerable light upon the proper elucidation of this question. The case which is nearest to the point in English decisions is the case of *Roberts* v. *Patterson* (1). This is a very old decision, reported in 1806. In that case a seaman who was out on bail on process for a debt under £20 was seized by the Press Gang and impressed into the service of the King. The person who had given bail for him applied to a Judge in Court for a *habeas corpus* to be directed to the Captain of the ship on which the sailor was serving for the purpose of bringing the seaman up before the Court so that the surety might be discharged from his bail. The Court refused this application but granted a rule *nisi* for entering an exoneratur on the bail-piece on the ground that by act of law the surety was rendered incapable of taking the Defendant's body for the purpose of rendering him before the Court; and that, therefore, the surety should not be prejudiced. The rule was made absolute and an exoneretur was granted. It seems to have been thought clearly by the Court that it was impossible for the surety practically to have prevented what had taken place and impossible for him to have in fact produced the seaman before the Court. There are several cases which are somewhat similar although the circumstances vary. In *Merrick* v. *Vaucher* (2) (a case decided in 1794) it was held that a surety should be exonerated from his security where the person for whom he had become surety had been sent out of the kingdom under the provisions of an Act relating to Aliens' expulsion (33 Geo. 3, cl 4). In another case *Sharp* v. *Sheriff* (3) (a case decided in 1797) the facts seem to have been that the Defendant had been arrested at the suit of the Plaintiff and then been enlarged on bail. After his enlargement he was arrested on a charge of murder in Ireland and it would appear that application had been made by the authorities in Ireland to have him sent over for trial there. The person who had stood as surety for him applied to the Court that his bail bond should not be forfeited; and in the result, although this applica-

(1) [1806] 103 Eng. Rep. 157
(2) [1794] 101 Eng. Rep. 429.
(3) [1797] 101 Eng. Rep. 945

tion was not granted in terms, the effect was similar because the man was brought up before the Court on a *habeas corpus*. He was thus surrendered to the Court and the bail in consequence was discharged. After that, he was committed to Newgate on the charge of felony. In what is known as *Hunts*'s case (4), a case decided in 1696, Hunt had been committed for trial on suspicion of high treason. He was admitted on bail and his surety applied to the Court proving on an affidavit that he could not produce Hunt because Hunt had been violently removed from his house by a party of French who had forcibly taken him to France. The Attorney-General opposed the application stating that it would be made to appear that this abduction was of Hunt's own contrivance in order to avoid the risk of a trial. Holt. L. C. J., refused to make any order of the nature asked because he thought that it was premature. He pointed out that if it could be shown that Hunt had voluntarily or at his own contrivance been carried off by the French the bail would be forfeited. But if upon the matter being enquired into it was subsequently found that this was not so, then the bail would not be forfeited. The matter was left with an order for an enquiry; it does not appear whether the merits of the matter were in fact enquired into, nor, as to what happened in this case finally, does there appear any account. These cases I think sufficiently show that where a surety is unable to produce the person for whom he has given bail owing to some circumstance which was not really under the surety's control, such as, for example the impressment of a person into the King's service, his arrest on a charge of felony or the like, he will not be compelled to forfeit his bail in ordinary circumstances. In India there are two interesting cases where the suicide of the person for whom an applicant had become surety was held to discharge the surety from his bail obligation. One is the case of *Nrisingha Deb Chatterjee* v. *The King-Emperor* (5) where the Court laid down that when a person who has been let out on bail commits suicide the sureties are discharged from their obligation to produce him. Another case is that of *Re S. Vijiaraghavalu Naidu* (6). In this case the question of what might be held to constitute the discharge of a bail surety was dealt with at considerable length and the exceptions were divided into three classes, (1) act of God, (2) act of law, and (3) act of parties. Suicide of course belongs to the last of these three classes and in that particular case it would seem that it was suggested that the sureties might and should have been able to prevent the individual from committing suicide. The act of God would of course include cases such as the death of the person. The act of law was regarded as including being sent abroad under an Aliens Deportation Act, becoming a peer, being sentenced to transportation or being impressed by the Press Gang. See also the case of *Re: Rama Bapu Pujari* (7). The case now under consideration by us falls, I think, under the second class, *i. e.*, an act of law. It is interesting to observe, although it is unfortunate that we have not got the Report, that Mr. Sohoni in the 11th Edition of his Criminal Procedure Code at p. 1076 when discussing S. 514 of the Criminal Procedure Code states that in the United States of America it has been definitely held that it is a good defence to an action on a recognizance for a person's appearance to answer a criminal charge that he had been arrested and committed to jail in another country. [*People* v. *Bartlet* (8)].

The learned Government Advocate does not think that in this case he can support the order which has been passed. I think there is no doubt that in this case the bail bond should not have been forfeited, the failure to

(4) [1696] 90 Eng. Rep. 544

(5) [1912] 16 C. W. N. 550=15 I. C. 1008=13 Cr. L. J. 592.
(6) [1912] 37 Mad. 156=26 M. L. J. 63=13 Cr. L. J. 684=16 I. C. 322=1913 M. W. N. 77.
(7) [1916] 18 Bom. L. R. 683= 5 I. C. 825 17 Cr. L. J. 393.
(8) 3 Hill 570.

produce the person, being due to an act of law. The order will be set aside and this application will be allowed If the amount has beed paid it will be refunded.

Ross, J.—I agree.

✱✱ 1925 PATNA 392

(Full Bench.)

DAWSON-MILLER, C. J., MULLICK, JWALA PRASAD, DAS AND FOSTER, JJ.

Krishna Mohan Sinha—Appellant.

v.

Raghunandan Pandey—Respondent.

Full Bench Reference, decided on 23rd December, 1924.

✱ (a) *Court Fees Act—Drafting is unscientific.*

The drafting of the Act is unscientific and its interpretation gives rise to considerable difficulty. [P 396, C 1]

✱✱ (b) *Court Fees Act, S. 5—Valuation of subject-matter—Taxing officer has jurisdiction—He should take evidence.*

Per Curiam, (Das J. dissenting):—**The Taxing Officer or Taxing Judge, as the case may be, is, under S. 5, the proper person to determine the fee payable on a memorandum of appeal presented to the High Court and for this purpose, he may investigate the question of the proper valuation of the subject-matter of the appeal.**

It is essentially desirable that the Taxing Officer in determining questions of valuation should not as a rule base his decision merely upon allegations in the plaint as to the annual profits of the property to be valued. In order to arrive at a proper decision on such question the parties should be called upon to produce in such manner as may be convenient such documentary or other evidence as they may be prepared to tender to enable the Taxing Officer to decide the question. [P 396, C 2 & P 397, C 1, 2]

Per Jwala Prasad, J., (Semble.)—**The non-observance by the Taxing Officer of such precautions will detract from the finality of his decision.**

N. C. Sinha and *B. B. Ghosh*—for Appellant.

Sultan Ahmad—for Respondent.

Dawson-Miller, C. J.—The question for determination in this appeal is formulated in the Order of Reference thus:—"Has the Taxing Officer jurisdiction to decide a question relating to valuation for the purpose of determining the amount of court-fee payable by the Appellant either on his plaint or on his memorandum of appeal under S. 5 of the Court Fees Act and if he assumes such a jurisdiction, has the High Court any power to interfere?" The Taxing Officer has not in fact assumed any jurisdiction to determine the fee payable on the plaint or on the memorandum of appeal in the lower Courts. The only order he has made relates to the fee payable by the Appellant on the memorandum of appeal in this Court and no question arises for determination as to the Taxing Officer's powers with regard to fees payable in the subordinate Courts. I propose therefore to confine my judgment to his powers with regard to the fee payable upon the memorandum of appeal presented in this Court.

The facts are as follows:—The Plaintiff, who is the Appellant before us, sued in the Court of the Munsif at Bhagalpur for a declaration of title and for possession, together with mesne profits for two years, in respect of 3 bighas 10 cottahs 2 dhurs of *jagir* land. The mesne profits claimed for two years were valued in the plaint at Rs. 146-12-0. The land was valued at Rs. 11 being ten times the Government revenue proportionate to the land claimed, making a total of Rs. 157-12-0. The court-fee was paid on that valuation. The trial Court considered that the court fee payable on the land should be calculated not on the Government revenue but on the market value as provided in S. 7 (v) (*d*) of the Court Fees Act. The plaint was then amended by valuing the land at Rs. 70. This valuation was accepted in the trial Court and the deficiency of the court fee in proportion to the higher valuation was paid. The Plaintiff succeeded in the trial Court and the Defendant appealed to the Subordinate Judge paying a court-fee on his memorandum of appeal upon the value above stated. The appeal succeeded and the Plaintiff filed a second appeal to this Court paying a court-fee on his memorandum of appeal based upon the same valuation. The Stamp Reporter whose duty it is to see that the proper fee is paid upon documents

presented in this Court reported that the claim was under-valued because it was manifest that if the mesne profits amounted in round figures to Rs. 70 per annum as stated in the plaint the market value of the land must be more than Rs. 70. He considered that the value of the land based upon the yearly profits alleged in the plaint would not be less than Rs. 1,260 or 18 years' purchase. He reported that the memorandum of appeal in this Court was insufficiently stamped and that the plaint and memorandum of appeal in the trial Court and the lower Appellate Court respectively were also insufficiently stamped. The Appellant being aggrieved the matter was referred under S. 5 of the Court Fees Act 1870, to the Taxing Officer who found that the Stamp Reporter had correctly valued the land and that the court-fee was payable on the increased valuation. He allowed the Appellant three weeks' time to make up the deficiency on the memorandum of appeal, failing which he directed the appeal to be placed before the Bench for orders. The Appellant considering that the Taxing Officer was acting without jurisdiction refused to pay the court-fee within the time ordered and the case came before the Bench for disposal. The Appellant contended that the Taxing Officer had no jurisdiction to consider the question of valuation of the subject-matter of the suit for the purpose of deciding the amount of fee payable on the memorandum of appeal and that his order was *ultra vires* and not binding. It was contended, on the other hand, that the Taxing Officer had jurisdiction and that his order was final The Bench before whom the case came considered that the Taxing Officer had exceeded his powers and, differing from the earlier decision of this Court in *Ram Sekhar v Prasad Singh Sheonandan Duby* (1) referred the case to a Full Bench formulating the question of law as above stated.

The Court Fees Act of 1870 as amended by subsequent legislation is divided into seven chapters which, as indicated by their headings, purport to deal with different subject-matters. S. 5 under which the Taxing Officer acted in this case is included in Chap. II which is headed, "Fees in the High Courts and in the Courts of Small Causes at the Presidency-towns." It provides as follows:—

"5. When any difference arises between the officer whose duty it is to see that any fee is paid under this chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the Taxing Officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf.

When any such difference arises in any of the said Courts of Small Causes, the question shall be referred to the Clerk of the Court, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the first Judge of such Court.

The Chief Justice shall declare who shall be Taxing Officer within the meaning of the first paragraph of this section."

In determining what is meant by fees paid under this chapter the heading is important, but reference must also be made to Ss 3 and 4. S. 3 provides as follows:—

"3. The fees payable for the time being to the clerks and officers (other than the sheriffs and attorneys) of the High Courts established by Letters Patent by virtue of the power conferred by S. 15 of the Indian High Courts Act, 1861, or S. 107 of the Government of India Act, 1915; or chargeable in each of such Courts under No. 11 of the first, and Nos. 7, 12, 14, 20 and 21 of the second schedule to this Act annexed; and the fees for the time being chargeable in the Courts of Small Causes at the Presidency-towns, and their several

(1) 1943 Patna 137=3 Pat 198=4 P. L. T. 71=1 Pat. L. R. 25=1922 P. H. C. C. 337.

offices ; shall be collected in manner hereinafter appearing."

The reference to the Government of India Act of 1915 was added by an amending statute passed in 1917. The mode of collecting the fees mentioned in S. 3 is dealt with in S. 25 which provides that they shall be collected by stamps. The fees mentioned in S. 3 are such as would be payable in the High Courts under their Ordinary Original Jurisdiction or in appeals from orders or decrees passed in the exercise of such Jurisdiction and this is indicated in the margin by the words "levy of fees in the High Courts on their Original Sides." S. 4, on the other hand, as the marginal notes indicate, deals with the fees on documents coming before the High Courts in the exercise of their Appellate or Revisional Jurisdiction in cases coming from the subordinate Courts, or in their Extraordinary Original Jurisdiction. It provides, in effect, that none of the documents mentioned in the first or second schedules of the Act as chargeable with fees shall be filed, exhibited or recorded in, or shall be received or furnished by a High Court exercising the jurisdiction named unless the same are sufficiently stamped as provided in the schedules. The section is a prohibition against the use of improperly stamped documents and in that sense may be said to make the fees on those documents payable, at least in so far as they are payable in High Courts. S 6 which comes under Chap III contains a similar prohibition in respect to the subordinate Courts. It would seem therefore that S. 5 which is part of Chap. II is referring to those fees mentioned in S. 4 which are payable in the High Courts when it refers to the duty to see that any fee is paid under this chapter. Such fees would include a memorandum of appeal presented in the High Court in appeals from subordinate Courts and, if such a document requires to be stamped and a question arises between the Stamp Reporter, who is the officer charged with the duty mentioned in S. 5, and the suitor as to the amount thereof, the Taxing Officer, who is the Registrar in this Court, is the proper person to determine the question and unless he refers it to the Taxing Judge his decision is final.

The first question is whether such a document requires a stamp. If a memorandum of appeal presented in a High Court when exercising the jurisdiction mentioned in S. 4 is a document referred to in either of the schedules then until sufficiently stamped as prescribed in the schedule it cannot be received in the High Court and the appeal is not properly instituted.

A difficulty arises at the outset owing to the wording of Sch. 1, Art. 1, which prescribes the stamp fee for, *inter alia*, a memorandum of appeal. The language of Art. 1 of Sch. I would appear to exclude such documents when presented in a High Court. The documents there mentioned are those presented in any Civil or Revenue Court except those mentioned in S. 3. The Courts mentioned in S. 3 are High Courts and certain of the Small Cause Courts. S. 4 carries the case no further, for the prohibition in that section against the reception of documents extends only to documents of the kinds specified in either of the schedules. We are therefore driven back to the schedules. If the document specified in Art. 1 of Sch. I are those presented in Courts other than High Courts and Small Cause Courts, there would appear to be no provision for stamping a memorandum of appeal presented in a High Court. The Act can hardly have been intended to exclude so important a document as a memorandum of appeal presented in the High Court exercising Appellate Jurisdiction and so far as I am aware the point has not been definitely raised but it has always been assumed that it was included. The wording of this Act is in some respects certainly unscientific and difficult to interpret and its interpretation has been the subject of a multitude of decisions in the Courts. It seems to me that the intention was to include a memorandum of appeal presented in the High Court amongst the documents referred to in S. 4, the words "documents of any of the kinds specified in the first or second schedules" being a description of the documents mentioned in

the schedules without reference to the words of exclusion appearing in Art 1 of Sch. I. Or it may be that Sch. I, Art. 1 was intended to exclude from the documents there named only those presented to the High Courts on their Original Sides and the Small Cause Courts. In either case the wording is unfortunate. But as the point was conceded in argument it need not be further discussed.

The substantial question which was argued before us was whether in ascertaining the fee payable on the memorandum of appeal presented to the High Court on appeal from the subordinate Courts the question of valuation can be taken into account by the Taxing Officer to whom the matter has been referred, or whether the Taxing Officer is bound by the valuation appearing on the memorandum of appeal where such valuation has been accepted in the lower Court either without question or after contest.

The wording of S. 5 is undoubtedly wide enough to cover any question which may arise, including valuation, for the purpose of ascertaining the amount of fee payable in the High Court. It is contended, however, that all questions of valuation are under S. 12 to be determined by the lower Court and that the decision there arrived at is final and cannot be disturbed except under the express conditions referred to in the second clause of S 12 which is contained in Chap. III. That Chapter is headed "Fees in other Courts and in Public Offices." S. 12 provides as follows:—

"I. Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

II. But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided, to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of S 10, para. 11, shall apply."

It should be mentioned that Ss. 9 and 10 in the same Chapter provide machinery for ascertaining the value of land and houses, the subject-matter of a suit when the Court thinks that the value has been wrongly estimated to the detriment of the revenue. It was contended on behalf of the Appellant that the power given under Cl. II of S. 12 is confined to the Court of appeal in which the question arises and that the Taxing Officer is not the Court for the purposes of S. 12. Assuming without deciding that this contention is accurate it seems clear, in my opinion, that S. 12 has no application to a question of Court-fees payable on a memorandum of appeal presented to a High Court but only applies to the fees payable in other Courts. It is true the High Court would have the power conferred by Cl. II but the fees dealt with are the fees paid in the lower Court, for the fees dealt with in Chap. III which includes S. 12 are stated to be the fees in other Courts and in Public Offices, that is, in Courts other than those referred to in Chap. II, and questions relating to the fees payable in the High Court are not governed by any of the provisions in Chap. III unless it should appear from the context that they are necessarily included. It was suggested that Chap. III which includes Ss. 6 to 19 does in fact, in some cases, deal with fees payable in the High Court and S. 8 was referred to as an instance. This section deals with the fee payable on a memorandum of appeal against an order relating to compensation under any Land Acquisition Act for the time being in force, and under the Land Acquisition Act of 1894 such appeals lie only to the High Court. The section, however, is not inconsistent with the heading of Chap. III, for in 1870, when the Court Fees Act was passed, by the Land Acquisition Act then in force such appeals lay to the District Judge and no inference can be drawn from this section that Chap. III was intended to deal with fees payable in the High Court. S. 15 was

also referred to which provides for repayment in certain cases of so much of the fee paid on an application for review as exceeds the fee payable on any other application to the Court under the second Schedule, Art. 1, Cl. (*b*) or Cl. (*d*) where the Court reverses or modifies on review its former decision. Cl. (*d*) in Art. 1 of the second Schedule is an application presented to a High Court The fee therefore repayable may be part of the fee paid upon an application for review in the High Court as the section now stands. But this also, it must be remembered, is a piece of patch work legislation. In the Act as originally passed the words "plaint or memorandum of appeal" appeared instead of the word "application" and, although the word "application" was substituted in place of the words "plaint or memorandum of appeal" by a later Act of the same year, it would appear that the fee actually recoverable under the Act, as originally passed, was part of that paid on the plaint or memorandum of appeal. This was an obvious blunder and had to be rectified by an amending Act. As already stated in another connection the drafting of this Act is somewhat unscientific and its interpretation certainly gives rise to considerable difficulty, but even if there should be found in Chap. III an isolated instance of reference to fees payable in a High Court I think that the intention of the Act was to deal in that Chapter with fees payable in the subordinate Courts only, unless the contrary must necessarily be inferred from the context.

The High Court may undoubtedly under the second clause of S. 12 require a party to pay an additional fee upon the plaint or memorandum of appeal in the lower Court and this power is conferred on the Court itself as distinguished from the Taxing Officer whose powers are confined under S. 5 to the fees payable in the High Court. Similarly, in my opinion, the fees mentioned in the first clause of S. 12 are those payable on a plaint or memorandum of appeal in the subordinate Courts and the section does not impose upon the High Court as distinguished from the Taxing Officer and the Taxing Judge the duty of deciding questions relating to valuation for the purpose of determining the amount of the fee chargeable in the High Court on a memorandum of appeal. The powers of the High Court in this respect, in so far as the fees payable in that Court are concerned, are delegated under S. 5 to the Taxing Officer and the Taxing Judge. It was argued that it would be contrary to the intention of the Act to allow the High Court to go into questions of valuation when no machinery is provided in Chap. II similar to that given in Chap. III for determining such questions. Ss. 9 and 10 of Chapter III give the other Courts power to issue a commission to hold a local or such other investigation as may be necessary to determine the value of the subject-matter of the suit but no express provision for this purpose is made in Chap. II. I am not much impressed by this argument, for once it is determined that the power of the High Courts to decide the amount of the fee payable on the memorandum of appeal presented in those Courts is delegated to the Taxing Officer and the Taxing Judge under S. 5 those officers could always, if need be, require evidence to be produced before them and to hold an investigation as to the value of the subject-matter, for they would have all the powers incidental to the discharge of those duties which the High Court itself possessed.

In my opinion the Taxing Officer or Taxing Judge, as the case may be, is under S 5 the proper person to determine the fee payable on a memorandum of appeal presented to the High Court and, for this purpose, he may, investigate the question of the proper valuation of the subject-matter of the appeal. Even under S. 12, clause I, it would appear that in the Subordinate Courts it is the Appellate Court which alone can decide the question of valuation for the purpose of determining the amount of fee chargeable on the memorandum of appeal presented in that Court and for this purpose it could, if necessary, exercise the powers conferred by Ss. 9 and 10 It can also, as can the High Court, exercise the power conferred by cl. II of S. 12 if it

thinks the question has been wrongly decided in the Court below. It would, I think, be an anomalous state of affairs if the High Court alone had no power to decide the question of valuation for the purpose of determining the amount of the fee chargeable on the memorandum of appeal presented before it, a power which the lower Appellate Court possesses in determining the amount payable on its own memorandum of appeal. The scheme of the Act appears to me to be that in the subordinate Courts under S. 12 the trial Court alone has power to decide what is the proper valuation for the purpose of determining the fee payable on the plaint and the Appellate Court alone has the like power with regard to the memorandum of appeal presented in that Court, even if the trial Court has arrived at a different valuation, and each Court's decision is final subject to the provisions of the second clause of S. 12 Under S. 5 the High Court also has similar powers with regard to its own memorandum of appeal, which powers, however, are delegated to the Taxing Officer or the Taxing Judge whose decision again is final. Even if those officers should make a manifest mistake in the exercise of their jurisdiction, their decision is not subject to appeal to or review by the Court itself, In the present case I consider that the Taxing Officer was acting within his jurisdiction and his decision can not be disturbed by this Bench. As the Appellant has deliberately elected not to pay the fee ordered by the Taxing Officer after time was given to him for that purpose but has chosen to rely upon his right to question the Taxing Officer's jurisdiction I think that his memorandum of appeal should be rejected as not having been properly presented in time.

Before concluding this judgment I desire to point out that although there was some evidence before the Taxing Officer upon which he might arrive at a decision on the question before him it is essentially desirable that the Taxing Officer in determining questions of valuation should not as a rule base his decision merely upon allegations in the plaint as to the annual profits of the property to be valued. It may be that such valuation was over-estimated in the plaint as sometimes happens. In order to arrive at a proper decision on such questions it would be better that the parties should be called upon to produce in such manner as may be convenient such documentary or other evidence as they may be prepared to tender, to enable him to decide the question He will then be in a position to deal adequately with the matters in dispute.

Mullick, J.—I agree with the judgment just delivered by the learned Chief Justice and I still think that the case of *Ram Sekhar Prasad Singh Sheonandan Dubey* (1) was rightly decided. The Court Fees Act in spite of its obscure drafting seems to me to lay down the following scheme for the taxation of plaints and memoranda of appeals.

Suits and memoranda of appeals are classified according to the subject-matter or the subject matter in dispute or the nature of the relief claimed. Schs. I and II endeavour to give a comprehensive classification of the various kinds of suits with reference to these heads of classification. The schedules also provide that the proper fee payable on some documents shall vary according to the Court in which they are filed and that in regard to others there shall be no such variance. Again in Sch. II it is declared that the plaints and appeals in the suits therein specified shall bear the fixed fees prescribed while in Sch. I are specified various suits in which the plaints and appeals shall bear an *ad valorem* fee. Art. I of Sch. I provides that the fee payable on plaints and appeals in suits not otherwise provided for in this Act when presented to any Civil or Revenue Court except those mentioned in S. 3 of the Act shall be levied upon the amount or value of the subject-matter in dispute according to certain rates given in a table at the end of the schedule. The words, "not otherwise provided for in this Act" refer to certain sections in the body of the Act and to the remaining articles of Schs. I and II. S. 3 of the Act which falls in Chap II provides that in respect of certain proceedings in the Original Side of a

Chartered High Court and in all suits in the Small Cause Courts in Presidency Towns court-fees on plaints and applications shall be collected in the manner provided in Chap. V of the Act. The section is not a charging section and merely prescribes the mode of collection. The fees leviable on the Original Side of a Chartered High Court and in the Presidency Small Cause Courts are prescribed by enactments other than the Court Fees Act.

S. 4 of the Act is a charging section and declares that no document, which is chargeable under Schs I and II, shall be received in the High Court in exercise of its extraordinary Original Civil Jurisdiction, or extraordinary Original Criminal Jurisdiction, or Appellate Jurisdiction, or its jurisdiction as a Court of Reference and Revision unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document. The language of the section when read with Art. I of Sch. I may raise a doubt as to the fee chargeable on a memorandum of appeal; but in my opinion the meaning of the legislature is that the fee on a memorandum of appeal preferred in the High Court shall not be less than that which would have been payable on the document if it had been filed in the Courts referred to in Art. 1, Sch. I.

I next turn to Chap. III which deals with fees in Courts and public offices other than those referred to in Chap. II. S. 6 in this Chapter is the charging section and it declares that no plaint or memorandum of appeal shall be received unless in respect of it there be paid a fee of an amount not less than that indicated in Sch. I or II as the proper fee for such document.

Let us next refer to the procedure to be followed when a plaint or a memorandum of appeal is filed in a Court other than a Chartered High Court or a Presidency Small Cause Court.

The Court will first of all decide into which of the various classes enumerated in Schs I and II the document falls. This has sometimes been called deciding the category of the suit. The process involves the construction of the plaint and a determination of the real relief prayed for. It is essentially judicial and requires the Court to be astute to see that reliefs are not so cast as to secure an evasion of the Court Fees Act. A familiar instance is when declarations are only asked when consequential relief is the real claim.

The Court will then proceed to see whether the proper fee is a fixed fee under Sch. II or an *ad valorem* fee under Sch. I. No question of valuation arises if the fee is a fixed fee; but if an *ad valorem* fee is leviable then the Court will proceed to value the subject matter or the subject-matter in dispute or fix the amount of the relief claimed according to rules for computation set out in Ss. 7 and 8 of the Act. If a local or further investigation is necessary the Court may proceed under S. 9. This computation is the valuation referred to in S. 11 of Chap. III and the Court's adjudication on a question relating thereto is final in respect of a plaint or memorandum of appeal under the first clause of S. 12.

It has been held that a question of valuation does not include a question of category and although the two questions may in practice often overlap and a decision on a question of valuation for the purpose of determining the amount of fee chargeable may involve a decision on the question of category, it has been conceded here before us that a decision on a question of category is not final within the meaning of cl. (1) of S. 12, while a decision on a question of valuation pure and simple as defined above is final as between the parties to the suit. The second clause of S. 12, however, gives a Court of appeal power to collect deficit Court-fees in respect of fees payable in subordinate Courts, and it seems now settled that the High Court as a Court of appeal, reference and revision is competent to exercise this power in respect of all Courts subordinate to it.

S. 12 does not apply to the Original Side of the High Court but does the first clause of it apply to the Appellate Side of that Court? I think the answer is in the negative.

The scheme of the Act does not permit us to hold that the first clause is applicable to High Courts, and the heading of Chap. III, in which S. 12 falls specifically states that this Chapter applies to fees in Courts other than those referred to in Chap. II. It is true that S. 8 deals with the fee payable in Land Acquisition appeals which lie now exclusively to the High Court and that S. 15 which also falls under Chap. III deals with the refund of Court-fees upon applications for review in certain Courts including the High Court. I agree with the learned Chief Justice that S. 8 does not raise any difficulty. When that section was first enacted, appeals in certain Land Acquisition cases lay to Courts other than the High Court and the inclusion of the section in Chap. III of the present Act merely means that in the event of the former jurisdiction of these latter Courts being restored, the Court fee shall be computed in accordance with the section. The section does not in terms provide for fees on a memorandum of appeal to the High Court and in my opinion the charging section for such appeals still remains S. 4 of the Act.

With regard to S. 15 it is to be observed that the section deals not with the payment of fees but with refunds, and it does not assist us in deciding whether the first clause of S. 12 is applicable to a High Court. Further I agree with the learned Chief Justice that the reference to a High Court in this section is probably due to some carelessness in drafting and it seems to me that the proper place for the section was in Chap. VI which deals with miscellaneous matters.

Next let us inquire who is the authority competent to determine a question of valuation or a question of category with respect to a memorandum of appeal presented to a High Court on the Appellate Side. In my opinion S. 5 designates the authority. It prescribes that in all High Courts there shall be, firstly, an officer whose duty it is to receive the memorandum; secondly, an officer who shall be the Taxing Officer; and thirdly, when the Chief Justice so directs, a Judge of the High Court who shall be appointed to determine disputes arising between the suitor and the Taxing Officer. It is not necessary to consider what would be the position if there was no Taxing Officer appointed; but the law states in clear and unequivocal language that so long as there is a Taxing Officer his decision shall be final as regards the amount of the Court-fee payable. This decision must include a determination not only on the question of category but also on the question of valuation. It is conceded that the Taxing Officer of this Court has jurisdiction to decide the question of category, but it is urged that he has no jurisdiction to decide a question of valuation which requires the exercise of judicial functions, and it is suggested that by S. 12 the High Court is the only authority that can decide that question.

Now in the first place I have already expressed the opinion that the first clause of S. 12 does not apply to High Courts and in the second place if it is sought to create jurisdiction by the application of S. 107 of the Code of Civil Procedure the answer is that in view of the unrestricted language of S. 5 of the Act it must be assumed that the legislature intended to divest the Court and to transfer its jurisdiction to the Taxing Officer. The decision of a question of category often requires the exercise of judicial powers of a higher order than the decision of a question of valuation: this is recognized in S. 12 which confers finality only as to the latter, and it could not have been intended to grant to the Taxing Officer jurisdiction as to the more difficult question and to deny it as to the less difficult ones.

If on the other hand it is contended that the Taxing Officer has jurisdiction neither to determine a question of category nor a question of valuation, then his jurisdiction must be limited to an exercise in arithmetic only and this could not possibly have been intended by the Act.

But it is pointed out that the Act provides nothing of the nature of S. 9 for the Taxing Officer. The answer to this is that the jurisdiction to fix the amount of the Court-fee being given the law implies that the Taxing Officer shall have power to adopt such

procedure as may be necessary for the exercise of that jurisdiction. Certainly a taxing statute must be strictly construed, but in this case the power to hold an inquiry is in aid of the subject and in no way to his prejudice; nor is it repugnant to the Act. The fact is that where the High Court has delegated it jurisdiction to a Taxing Officer, it has no jurisdiction left to do any of the acts which it could otherwise have performed, and if the Taxing Officer cannot decide a question of valuation no other authority can discharge that duty.

I agree however that in the case before us the inquiry has been too summary and that the Taxing Officer would have been well advised to have called upon the suitor to give further evidence of the value of the subject-matter in dispute. The Taxing Officer had power either to take evidence himself or to refer the matter to the trial Court, but though it is unfortunate that he preferred to rely on the somewhat meagre materials on the record it cannot be said that he has acted without jurisdiction. His decision is therefore final.

Jwala Prasad, J.—The question referred to us for decision runs thus:—

"Has the Taxing Officer jurisdiction to decide the question relating to valuation for the purpose of determining the amount of Court-fee payable by the Appellant either on his plaint or on his memorandum of appeal under S. 5 of the Court-Fees Act, and if he assumes such a jurisdiction, has the High Court any power to interfere?"

Now, what is the power of the Taxing Officer under S. 5 of the Court-Fees Act (Act VII of 1870)? That section occurs under Chap. II of the Court-Fees Act headed "Fees in the High Courts and the Courts of the Small Causes at the Presidency-towns," and it runs as follows:—

"When any difference arises between the officer whose duty it is to see that any fee is paid under this Chapter and any suitor or attorney as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the Taxing Officer, whose decision thereon shall be final, except when the question is in his opinion, one of general importance, in which case he shall refer it for the final decision to the Chief Justice of such Court, or of such Judge of the High Court as the Chief Justice shall appoint generally or specially in this behalf."

We are not concerned with para. 2 of that section which relates to the Courts of Small Causes. Para. 3 of the section says that the Chief Justice shall declare who shall be Taxing Officer within the meaning of the first paragraph of the section. Under this paragraph the Chief Justice of this Court has appointed the Registrar as the Taxing Officer. The Stamp Reporter is the officer whose duty under the first paragraph of the section is to see that proper fee is paid under Chap. II of the Court Fees Act. Chap. II which relates to fees in the High Courts consists of three sections, namely, Ss. 3, 4 and 5. S. 3 relates to levy of fees in High Courts on their Original Sides. This High Court has no Original Jurisdiction and therefore we are not concerned with that section.

S. 4 deals with fees on documents coming before the High Courts in the exercise of their Appellate or Revisional Jurisdiction in cases coming from the subordinate Courts or in their Extraordinary Original Jurisdiction. It provides that no document of any of the kinds specified in the first or second Schedule of the Act chargeable with fees shall be filed, exhibited or recorded in, or shall be received or furnished by a High Court exercising the jurisdiction named, "unless in respect of such document there be paid a fee of an amount not less than that indicated in any of the said schedules as the proper fee for such document." A memorandum of appeal is a document within the meaning of this section; *Balkaran Rai* v. *Govind Nath Tiwari* (2). Thus if a memorandum of appeal is filed in the High Court the Court-fee leviable will have to be determined with respect to Schs. 1 and 2. Memorandum of appeal is

(2) (1890) 12 All. 129=1890 A.W.N. 39 (F.B.)

mentioned in Art. 1, Sch. 1 and in Arts. 11, 17, 20 and 21 of Sch. II. Arts. 11, 17, 20 and 21 of Sch. II have prescribed fixed sums to be payable on memorandum of appeal filed in any Court and no question of valuation arises for the purposes of determining the Court-fee payable in those cases. Art. 1 of Sch. I applies to memoranda of appeals presented to any civil or revenue Court except those mentioned in S. 3. S. 4 not having been excepted, a memorandum of appeal filed in the High Court will come under this Article though it is not happily worded. The amount of fee payable under this Article depends upon "the amount or value of the subject-matter in dispute" as mentioned in column 2 of the schedule. Therefore in order to ascertain the amount of fee payable upon a memorandum of appeal under Art. 1, Sch. I, the amount of value of the subject-matter in dispute has to be determined.

In order to ascertain the fee payable upon a memorandum of appeal coming under the aforesaid Arts. 11, 17, 20 and 21 of Sch. II, the nature of the document has to be determined. For instance, in order to apply Art. 11 of that schedule it has to be ascertained whether the appeal is from a decree or an order having the force of a decree. If it is from a decree or an order having the force of a decree, Art. 11 does not apply and the Court-fee payable will be upon "the amount or value of the subject-matter in dispute" under Art. 1 of Sch. I. Similarly, in order to apply Art. 17 of Sch. II it will have to be ascertained as to whether the memorandum of appeal is with respect to suits enumerated therein, for instance, whether or not it is with respect to a suit to obtain a declaratory decree where no consequential relief is prayed. Likewise, the nature of the appeal will have to be ascertained in order to apply Arts. 20 and 21 of Sch. II. Therefore, in order to find out whether a memorandum of appeal filed in the High Court is properly stamped under the Sch. I and 2, the nature of the suit, the nature of the decree or order appealed from or the amount or the value of the subject-matter in dispute as the case may be, will have to be determined. Upon the determination of this question will depend the proper Court-fee payable under Sch. 1 and 2. There are certain documents which need not bear any Court-fee, such as, a written statement which does not plead a set off or a counter claim. Therefore the question as to the necessity of paying a fee with respect to a document filed in the High Court, say, with respect to suits tried by the High Court in its extraordinary Original Jurisdiction, will have also to be determined and for this purpose the nature of the document has to be ascertained. Therefore two questions arise with respect to a document filed, exhibited or recorded in or received, or furnished by a High Court, namely, (1) the necessity of paying a fee and (2) the amount of fee payable.

Reading S. 4 and Schs. I and II the fee payable upon a document filed in the High Court is a fee payable under Chap. II of the Court Fees Act.

Under S. 5 of the Act it is the duty of the officer appointed in this behalf by the High Court, say, the Stamp Reporter, to see whether and what fee is payable under Chap. II upon a document filed, exhibited or recorded in or received or furnished by the High Court. His duty is to see under what Articles or Schs I and II the aforesaid document falls. If it is a document with respect to which a fee is to be paid under the said schedules it is his duty to find out the amount of the fee leviable upon it. Therefore with respect to a memorandum of appeal filed in the High Court it is the duty of the Stamp Reporter as an officer of the Court to determine under which Article of the said schedules the document falls and the amount of fee payable with respect thereto. If he finds that the memorandum of appeal falls under Art. 1 of Sch. I of the Act, he has to find out "the amount or value of the subject-matter" as stated in column 2 of the Article in order to determine the amount of fee payable under column 3 of that schedule. In other words, he has to determine the value of the subject-matter in dispute,

for without it the amount of fee payable cannot be ascertained. Therefore the question of valuation is involved in the determination of the amount payable upon a memorandum of appeal. If the suitor contests the amount fixed by the Stamp Reporter, a difference arises between him and the officer whose duty it is to see that proper fee is paid under Chap. II of the Court Fees Act upon the memorandum of appeal. When such a difference arises the question shall be referred to the Taxing Officer. This contest gives rise to an issue and that issue has to be determined by the Taxing Officer. The issue may be with respect to the nature of the document in order to find out in which category of the schedules the document falls, or it may be as to the value of the subject-matter in dispute upon which the amount of fee payable depends. In the latter case the question of valuation is involved in the determination of the issue. The Taxing Officer has, therefore jurisdiction to determine the question relating to valuation for the purpose of determining the amount of Court-fee payable under S. 5 of the Court Fees Act.

It has, however, been argued at the Bar that if the legislature had intended to give jurisdiction to the Taxing Officer to determine questions of valuation under S. 5 of the Act, provisions similar to S. 9 and 10 in Chap. III would have been made in Chap. II providing proper machinery for the purpose of determining valuation. As was pointed out in the Full Bench case of *Amjad Ali* v. *Muhammad Israil* (3) the procedure enjoined by the statute and practice of the High Court and of the District Courts is so very different in these matters that no useful analogy can be drawn from them. The duty of determining the fees in the subordinate Courts, Original and Appellate, under S. 6, Chap. III of the Act rests in those Courts, whereas such a duty is cast upon the officer appointed under S. 5 of the Act with respect to fees payable on documents filed in the High Court. The subordinate Courts have been given powers under S. 9 and 10 of Chap. III to determine the net profits or market value of the subject-matter in dispute. In the High Court the duty of determining the fee payable upon a document, such as memorandum of appeal presented to the High Court, is cast upon the officer appointed under S. 5 of the Act to see that proper fee has been paid. It is only when a difference arises between the said officer and the suitor that the matter is referred to the Taxing Officer for his decision. The power of deciding the question given to the Taxing Officer implies the power to make an enquiry as to the amount payable upon the document, and if the amount of court-fee payable depends upon valuation the Taxing Officer has power to inquire into questions relating to valuation. Therefore, in vesting the Taxing Officer with power to give decision with respect to a dispute between the suitor and the officer of the Court referred to therein as to the amount of fee payable depending upon the value of the subject-matter in dispute the legislature has impliedly vested the Taxing Officer with power to make inquiries into the question of valuation and to fix the amount of Court-fee payable.

Lastly it has been argued that cl. (2) of S 12 gives power to the High Court to determine the question of valuation in order to determine the proper fee payable upon a plaint or memorandum of appeal when the matter comes before it in appeal, reference or revision. That clause relates only to plaint and memorandum of appeal filed in the subordinate Courts, and does not relate to memorandum of appeal filed in the High Court, and the power given thereunder can only be used when the question of valuation is wrongly decided by the Courts "to the detriment of the revenue." Therefore, the contention based upon S. 12 is not tenable. Besides, the language of S. 12 is different from that of S. 5. Under S. 12 it is merely the decision of the subordinate Courts as to valuation, and not as to the category in which the suit or appeal falls which is final, whereas under S. 5 the decision of the Taxing Officer is final as

(3) (1897) 20 All. 11=(1897) A.W.N. 57 (F.B.)

to the amount of fee determined by him to be payable upon the memorandum of appeal or other documents filed in the High Court, no matter how he arrives at his conclusion, namely, by determining the valuation or the category: *Kunwar Karan Singh* v. *Gopal Rai* (4) (Tudball, J.),

It would thus appear that the Taxing Officer has not only jurisdiction to decide questions relating to valuation but that his decision thereupon shall be final for the purpose of determining the amount of Court fee payable by the Appellant on the plaint or the memorandum of appeal under S. 5 of the Court Fees Act, and a Division Bench has no right to question it. This High Court has taken this view in the cases of *Chanderbati Kuer* v. *Gorey Lall Singh* (5) (Mullick and Atkinson JJ.), and *Lugan Birt Kuer* v *Bhukhan Singh* (6). The other High Courts took the same view: *vide Kheshara* v. *Kharaj Singh* (7) (Tudball, J.); *Lurkhur Chaube* v. *Ram Bhajan Chaube* (8), *Chhunnu Lal* v. *The Bank of Upper India, Limited, Delhi* (9), *Amjad Ali* v. *Muhammad Israil* (3) and *Ringa Pai* v. *Baba* (10) (Shepard and Davies, JJ.). *Jugal Pershad Singh* v. *Parbhu Narain Jha* (11) and *Badri Prasad* v. *Kundan Lal* (12) (Elge, C. J.); *Kunwar Karan Singh* v. *Gopal Rai* (4) (Tudball, J.); and *Balkaran Rai* v. *Gobind Nath Tiwari* (2) (Elge, C. J.).

Now in order that the decision of the Taxing Judge shall be final, the following conditions would seem to be necessary: (1) there must be a contest between the officer whose duty it is to see that proper Court-fee is paid and the suitor, and (2) that an opportunity is given to the parties to the contest, namely, the suitor and the Government. Therefore, the decision of the Taxing Officer cannot be final if he determines it *ex parte* and without giving an opportunity to the suitor to show by adducing evidence or otherwise what the value of subject-matter of the appeal and consequently the amount of Court-fee payable should be; *Jugal Pershad Singh* v. *Parbhu Narain Jha* (11) and *Kasturi Chetti* v. *Deputy Collector, Bellary* (13) (Collins, C. J. and Benson, J.) and *Amjad Ali* v. *Muhammad Israil* (3).

Apart from authorities, upon general principles also there can be no decision upon a contest between two disputants if the aforesaid principles are violated. There must, therefore, be an inquiry into the questions such as those relating to valuation in order to determine the amount of Court-fee payable under S. 5 by the Taxing Officer.

Now, let us examine the decision of the Taxing Officer in the present case in the light of the aforesaid principles. The learned Taxing Officer says:—

"The learned Vakil for the Appellant appears to dispute the corrections of the Stamp Reporter, asking that it should be referred to the Bench. This is, however, a matter for the Taxing Officer so far as the appeal is concerned. In my opinion the Stamp Reporter has rightly assessed the value of the land in dispute at Rs. 1,406-12 including mesne profits and Court-fee is payable on it. I allow three weeks' time to make good the deficiency on the memorandum of appeal, failing which place before the Bench for orders."

The Appellant in the present case disputed the correctness of the Stamp Report. There was, therefore, a dispute as to difference between him and the Stamp Reporter as to the amount of fee payable. The Taxing Officer had, therefore, jurisdiction to determine the dispute and to give a decision thereupon under S. 5 of the Act. The suitor disputed the jurisdiction of the Taxing Officer and asked for a reference of the question to a Bench. The Taxing Officer refused this request and said that the matter was entirely for him to decide, and not for a Bench. So far it is all right. Thereafter, the Taxing Officer at once says that in his opinion the Stamp Reporter rightly assessed the value of the land in dispute. It does

(4) [1901] 32 All. 59=4 I.C. 123=6 A.L.J. 972.
(5) [1919] 4 P.L.J. 700=52 I.C. 508.
(6) [1917] 3 P.L.J. 92=43 I.C. 521.
(7) [1910] 33 All. 20=7 I.C. 315=7 A.L.J. 842.
(8) [1903] A.W.N. 214.
(9) [1917] 106 P.W.R. 1917=40 I.C. 904.
(10) [1897] 20 Mad. 398.
(11) [1910] 37 Cal. 911=8 I.C. 1145.
(12) [1893] 15 All. 117=1893 A.W.N. 45.
(13) [1898] 21 Mad. 269.

not appear that the Taxing Officer exercised his mind to determine the question judicially, nor does he seem to have made any inquiry into the matter. The order sheet does not show that any opportunity was given to the Appellant to prove the value of the land, that is the subject-matter in dispute in the appeal. It is, therefore, doubtful whether his decision in the present case is in consonance with the principles enunciated above and whether his decision is final.

As set out in the beginning of the judgment the question referred to us for determination is a general one as to the jurisdiction of the Taxing Officer to decide the question relating to valuation for determining the amount of Court-fee payable by the Appellant, and I would answer the question in the affirmative. I confess that I felt considerable difficulty in deciding this question. The difficulty felt by me was so insurmountable that I was almost inclined to say that the question raised by the Division Bench and referred to us for decision was incapable of solution, and it is after a long and careful consideration that I have tried to give effect to the plain words of the statute in S. 5 of the Act. The Act is so inartistic and unscientific that upon every question of importance it hardly affords sufficient solution. For instance, there is no provision in the Act whereby the principles enunciated in S. 7 for the determination of the class applicable to suits and memoranda of appeals in the subordinate Courts can be applied to the memorandum of appeal filed in the High Court. Under S. 7 (5) the Court-fee payable is not upon the market value of the subject-matter of the land but upon the revenue assessed upon the land if it forms an entire estate or a definite share of an estate paying annual revenue to Government. Under S. 7, cl. (2) the Court fee is payable not upon the value of the subject-matter of the suit but upon ten times the amount of maintenance or annuity payable for one year. In other words, in certain classes of cases Court-fee is payable not upon the actual amount in claim but upon principles fixing some fictitious amount as the value of the suit. These principles are, however, in practice applied by the Stamp Reporter, the Taxing Officer and the Taxing Judge to appeals filed in the High Court whereas under the strict construction of the law the amount of fee payable in the Courts below will be upon fictitious valuation under the principles enunciated in S. 7 and in the High Court in the appeals in those cases the amount of fee payable will be payable upon the actual amount or value of the subject-matter in dispute under Sch. I., S 7 not being applicable to the High Courts but only to the subordinate Courts. The power is given only to demand an additional fee in the interest of revenue and does not in any way give relief to a suitor from whom the subordinate Courts on account of any wrong decision as to valuation have levied a higher fee than was payable upon the plaint or memorandum of appeal in those Courts, except in certain contingencies arising under S. 13 of the Act. It would appear that the Act does not purport to give any relief to a suitor from whom an improperly excessive fee has been taken in the subordinate Courts or in the High Court. Mr. Justice Mahmud, while concurring with the decision of Chief Justice Sir John Edge in *Balkaran Rai* v. *Gobind Nath Tiwari* (2), says: 'The enactment, as the learned Chief Justice has explained is most anxious to collect money from those who seek to obtain justice, but there is not one word in that statute to enable the litigant who is to be subject to these stringent rules to re-obtain the sum of money which he, by dint of a wrongful user of the powers given to the Taxing Officer, does pay as Court-fee say, for example, Rs. 3,000 instead of Rs 10, as may be the case where difficulty may arise as to whether a suit or an appeal deals with a declaratory claim or a claim including reliefs of a consequential character. I mention this on purpose, as I hope that this enactment will soon be considered fit to be amended, and that a difficulty such as has arisen in this case may not arise in future and that no plea *ad misericordiam* such as were addressed in this very case might be made the subject of consideration by the

Judges of a whole High Court established by Her Majesty's Charter. The stringency of the Act as it has been now interpreted is probably a good thing for the litigant, because it indicates the necessity of amendment in his behalf. I hold, following the views of Jeremy Bentham, that law-taxes, the more stringent they are, the less do they achieve their aim, for they are stringent not in the interest of justice but make the administration of justice difficult and in many cases impossible.

These are some of the anomalies, and I wish that the Act which is coming down from 1870 be soon placed on a scientific basis.

I have already discussed the actual question referred to us and I have indicated my answer. Accordingly, I agree with the learned Chief Justice in the answer proposed by him.

Das, J.—I adhere to the opinion which I have expressed in the order of reference. The question for consideration is whether the words employed by the legislature in S. 4 of the Court-Fees Act are of sufficient amplitude to authorize the special officer brought into existence by S. 5 to investigate a question of valuation for the purpose of determining the amount of any fee chargeable on the memorandum of appeal in the High Court. The liability of the suitor to pay the fee is determined by S. 4 ; S.5 provides for the procedure to be adopted in cases of difference between the officer and the suitor as to the necessity of paying a fee or the amount thereof. It is not open to doubt that, unless an enquiry into the question of valuation is implied in the terms of S. 4, there is no power in the officer under S. 5 to undertake that enquiry.

It seems to me that S. 4 is clear on this point. That section provides, *inter alia*, that no document of any of the kinds specified in the first or second schedule to the Act annexed as chargeable with fees, shall be filed, exhibited, or recorded in the High Court in the exercise of its Appellate Jurisdiction unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document. The memorandum of appeal in this case is undoubtedly comprehended within the terms of S. 4 ; and, as expressly provided by that section, it is necessary for the suitor to pay a fee of an amount not less than that indicated in one or other of the schedules as the proper fee for the memorandum of appeal, before the memorandum of appeal can be filed in this Court.

This is not denied. What is denied is that the special officer can correct the valuation and require the suitor to pay the fee on the corrected valuation. I shall presently deal with the problem whether it is possible for the special officer to investigate the question of valuation in the absence of machinery enabling him to decide such a question. I am more concerned at the present moment to show that the authority to hold such an investigation is denied by the terms of S. 4.

Now I attach some importance to the words "such document" in the last clause of S. 4. In my opinion, these words clearly refer to the document sought to be filed, exhibited or recorded in the High Court. Can it be said that the document as corrected or rectified by the officer is "such document," within the meaning of S. 4 in respect of which the officer is entitled to claim a fee from the suitor ? In this case, the Appellants tendered a memorandum of appeal, valuing the subject-matter of the appeal at Rs. 70. The valuation is part of the document as tendered by the Appellants ; and, if I am right in the view which I have taken, all that the officer had to do was to refer to the tables of rates of *ad valorem* fees in the Act and ascertain the fee payable by the appellants. But this is not the course which was adopted by the officer. He read the plaint and made the discovery that the Appellants, who were the Plaintiffs in the action, had claimed Rs. 70 per year as mesne profits due to them. He concluded that the appeal was under-valued, and he thought that the appeal should be valued at eighteen times the yearly profit. He directed the valuation to be corrected and he called upon the

Appellants to pay the fee on the memorandum of appeal as corrected by him.

In my opinion, there was no authority in the officer to adopt this course. To assent to the procedure adopted by the officer is to say that there is authority in the officer to rectify the document sought to be filed, exhibited or recorded in the High Court. For this view, I can find no justification in the terms of S. 4. In my opinion, the words "such document" (in respect of which the suitor is to be taxed) mean the document sought to be filed, exhibited or recorded, not the document as corrected or rectified by the officer.

A consideration of some of the provisions of the third chapter, lends strong support to the arguments advanced on behalf of the Appellants. That chapter deals with the question of fees payable in Courts other than the High Courts and Courts of Small Causes at the Presidency Towns. Now the terms of S. 6 are identical with those of S. 4 and must, in my opinion, receive the same construction. If the words, "fee of an amount not less than that indicated by either of the said schedules" in S. 4 mean such fee as is payable, not on the memorandum of appeal as sought to be filed, but after an investigation of the question of valuation, then those words in S. 6 must receive the same interpretation, and would authorize the Court under S. 6 to deal with the question of valuation for the purpose of determining the amount of any fee chargeable. But this was clearly not the intention of the legislature, for there is a special provision, contained in S. 12, which specifically deals with the question of valuation. If the interpretation put on the statute on behalf of the Crown be right, then it was wholly unnecessary to enact the first paragraph of S. 12, with the exception of the words, "and such decision shall be final as between the parties to the suit," for an enquiry as to valuation has already been provided for in S. 6. A construction which will lead to such a conclusion ought to be avoided. I have no doubt that the subject to which Ss. 3 and 6 apply is different from that to which S. 12 applies. Ss. 3 and 6 vest the officers with power to decide the amount of fee payable on the document sought to be filed. S. 12 vests the Court with power to hold a judicial enquiry into the question of valuation for the purpose of determining the amount of fee chargeable. The function to be performed under Ss. 3 and 6 is ministerial; the function to be performed under S. 12 is to be performed by the Court and is purely judicial.

But it will be objected that there is no provision corresponding to S. 12 in the second chapter of the Act; and that consequently, if the arguments on behalf of the Appellants are to prevail, there are no means of compelling the suitor to pay so much additional fee as would have been payable, had the High Court the power to decide the matter. In my opinion, the second paragraph of S. 12 gives the High Court complete power in this respect. That paragraph runs as follows:—

"(*ii*) But whenever any such suit comes before a Court of Appeal, for Reference or Revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided and the provisions of S. 10, para. (*ii*) shall apply."

The words in S. 12, para. 2 are general, and in my opinion, they authorise the High Court to require the suitor to pay an additional fee both on the plaint and on the memorandum of appeal in the High Court. Let me illustrate my meaning by a concrete example. A suitor files a suit in the Munsif's Court and values the subject-matter of the suit at Rs. 216-12. He pays Rs. 16-8 as the fee due on the plaint. His suit is dismissed, and he files an appeal, paying Rs. 16-8 again on the memorandum of appeal. His appeal is dismissed and he presents a second appeal to this Court, paying Rs. 16-8 again on the memorandum of appeal in this Court. This Court considers that the question of valuation was wrongly decided to the detriment of the revenue and comes to the conclusion that the subject-matter should

have been valued at Rs. 1,406-12. Now this Court has complete power to require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided. Now had the question been rightly decided, Rs 100 would have been payable by the suitor both on the plaint and on the memorandum of appeal in the Court below, and Rs. 135 would have been payable on the memorandum of appeal in this Court. The total loss to the revenue, amounting to Rs. 282-8, has flowed from the circumstance that the question was wrongly decided in the Court of first instance. In other words, had the question been rightly decided, an additional fee of Rs. 232-8 would have been payable by the suitor, and, in my opinion, the High Court, under the express provision of S. 12, para. 2, can require the suitor to pay the additional fee of Rs. 282-8 and stay the appeal until the additional fee has been paid.

I suggest that this is a far more reasonable interpretation of the statute than that which is suggested on behalf of the Crown. The enquiry by the Stamp Reporter into the question of valuation can only be on speculative lines, since the legislature has not provided him with the machinery appropriate to such an enquiry. A critical examination of the Act will show that whenever the legislature has given any power to the appropriate authority to hold an enquiry into the question of valuation, it has also given it the power to examine witnesses and take evidence in the matter. Under S. 12 every question relating to valuation for the purpose of determining the amount of any fee chargeable under the third chapter has to be decided by the Court in which the plaint or memorandum of appeal, as the case may be, is filed. S. 9 provides the Court with the machinery appropriate to such an enquiry and empowers the Court to issue a commission to any proper person directing him to make such local or other investigation as may be necessary and to report thereon to the Court. S. 19H (2) deals with applications for Probate or Letters of Administration in the High Court. The fifth paragraph of S. 19H authorises the Court to hold an enquiry into the value of the property of the deceased, and the sixth paragraph empowers the Court to authorize a person to hold the enquiry and for that purpose to examine the Petitioner on oath and to take such further evidence as may be produced to prove the true value of the property. It will be seen that the legislature has shown some anxiety to secure a judicial enquiry into the question of valuation, and I cannot regard the absence of such provision in connection with the power vested in the officer under Ss. 4 and 5 as a mere omission to be supplied by the Court on an equitable construction of the Court fees Act. It is well established that judicial function cannot be deligated without statutory authority, and I can find no authority in the Court Fees Act in support of the proposition that the officers under Ss 4 and 5 can embark upon a judicial investigation for the purpose of determining the value of the subject-matter. The High Court has all the powers of the primary Court, and undertakes the investigation under S. 12 (2) of the Act. But no express power has been given to the Stamp Reporter or to the Taxing Officer to take evidence or to direct a local enquiry and I do not see how it is possible for those officers to decide a question of valuation except on speculative lines. In this case the Stamp Reporter thought that as the suitor had claimed Rs. 70 a year as mesne profits due to him, he should have valued the subject-matter of the suit at eighteen times the yearly profit. But the suitor valued his land at Rs. 70. It is obvious that either his valuation was wrong or he had exaggerated his claim for mesne profits, and I do not see how the Stamp Reporter could possibly have proceeded on the mesne profits claimed since it was not decided that the claim was well founded. We are entitled to expect the most scrupulous fairness in a proceeding between the Crown and the subject, especially in a proceeding to tax the subject, and I cannot assent to the method adopted by the officers for determining the value of the land.

But if this method is not to be pursued by the officers, there is no other method available to them. I regard the omission on the part of the legislature to provide the officers with a machinery appropriate to an enquiry into valuation as deliberate and as marking an intention not to vest them with a judicial function. It has been suggested that though no express power has been given to the officers to take evidence or to direct a local enquiry, such a power must have been given to them by implication, since, where a statute is passed for the purpose of enabling something to be done but omits to state in terms some detail which is of great importance (if not actually essential) to the proper and effectual performance of that which the statute has in contemplation, the Courts are at liberty to infer that the statute contains that detail by implication. But there is high authority for the view that, if there be admissible in any statute, what is called an equitable construction, such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute. See *Partington* v. *Attorney-General* (14). We are therefore not entitled to read into the Act words which are not there so as to hold that there is power in the officers under Ss 4 and 5 of the Act to take evidence or to direct a local enquiry for the purpose of deciding a question of valuation. If this be the right view, then it is difficult to see how the legislature could have intended that these officers should decide a question of valuation, especially when it is remembered with what scrupulous care the legislature has secured a judicial enquiry into the question of valuation whenever it has in express terms given power to undertake such an enquiry. It is a general rule of construction of statutes that, unless you are obliged to do so, you must not suppose that the legislature intended to do a palpable injustice, see *Ex parte Corbett* (15). There is no question that a palpable injustice has been done to the suitors, if the legislature has authorised those officers to decide a question of valuation for the purpose of taxing the subject without giving them the power to hold a judicial enquiry.

I would answer the question put to the Full Bench as follows:—The Taxing Officer has no jurisdiction to decide a question relating to valuation for the purpose of determining the amount of court-fee payable by the Appellant either on his plaint or on his memorandum of appeal, and, if he assumes jurisdiction to decide such a question, the Court may ignore it

Foster, J.—I concur with the judgment of the learned Chief Justice. Any attempt to displace the generally accepted view must, I think end only in conclusions which still remain open to reasonable controversy. The Court Fees Act is, I believe, about to be reconstructed; if so, the present question, in so far as it is a question of law, is of transitory importance.

Reference answered in the affirmative.

(14) [1869] L.R. 4 H.L. 100=38 L.J. Ex. 205 21 L T. 370.
(15) [1880] 14 Ch. D. 122.

✱ 1925 PATNA 408

ROSS AND KULWANT SAHAY, JJ.

Jagarnath Therani—Petitioner.

v.

The Commissioner of Income Tax, Behar and Orrissa—Opposite party.

M. J. C. Nos. 64 and 66 of 1924, decided on 15th January, 1925.

✱ (a) *Income-Tax Act (1922) Ss. 30 and 31—Income unassessed originally cannot be assessed in appeal.*

An assistant Commissioner of Income Tax when hearing an appeal under Ss. 30 and 31 of the Indian Income Tax Act cannot assess a source of income which was not assessed at all by the Income Tax Officer. [P. 409, C. 1]

✱ (b) *Income Tax Act (1922) S. 10—Embezzled sums and boarding expenses etc., of servants are deductible.*

Sums embezzled should be excluded from assessment. The boarding expenses of servants, and payment to a servant of his expenses incurred in going to his home from the place of employment and back again are likewise deductible. These are not in any sense gratuities and there is no charitable element in these payments. These payments are made to servants in order to retain their services for the benefit of the business and to increase their efficiency.

[P. 409, C. 2, P. 410 C. 1]

K. P. Jayaswal, Rai Guru Saran Prasad and *Anand Prasad*—for Petitioner.

L. N. Singh—for the Crown.

Ross. J.—Babu Jagarnath Therani carried on business at Kishanganj in the district of Purnea and had branches in Calcutta and Jalpaiguri. He used to make returns of his income in all three places and the income tax authorities in Calcutta and Jalpaiguri reported their findings to the Income-tax Officer at Purnea who then combined the figures and made an assessment to income tax. In the year under consideration, . 1922-23, the Income tax Officer at Purnea made the assessment without waiting for the reports from Calcutta and Jalpaiguri. It appears from the order of the Assistant Commissioner of Income Tax that after making his assessment he noted that assessment would be made on receipt of the reports from the Income Tax authorities at Calcutta and Jalpaiguri as heretofore.

The assessee appealed against the assessment to the Assistant Commissioner, who, while reducing the assessment on the business at Purnea, enhanced the assessment as a whole by including the income derived from the branch businesses in Calcutta and Jalpaiguri. Three items were included in arriving at this enhanced sum: *viz.*, a sum of Rs. 25,000 which had been embezzled by a *Gomashta* in Calcutta, a sum which was excluded from assessment by the Calcutta authorities, and two sums of Rs. 2 939 and Rs. 361 on account of *Basa kharach* and *Bidagri* respectively which had also been excluded in Calcutta.

The Commissioner of Income Tax has stated a case to this Court on four points: (1) whether an Assistant Commissioner of Income Tax when hearing an appeal under Ss. 30 and 31 of the Indian Income Tax Act can assess a source of income which was not assessed at all by the Income Tax Officer; (2) whether the sum of Rs. 25,000 embezzled by the *Gomashta* of the assessee can be deducted from the assessable income; (3) whether the expenditure called *Basa kharach* is an admissible allowance; and (4) whether *Bidagri* is an admissible allowance. The case on the last three points was stated by the Commissioner under the directions of this Court on the application of the assessee.

I shall deal first with the last three points as they are of minor importance. Under the provisions of S. 10 of the Act tax is payable by an assessee under the head 'Business" in respect of the profits or gains of any business carried on by him: and, in computing such profits or gains allowance is to be made *inter alia* in respect of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains. The practice in England seems to be well settled that sums embezzled are excluded from assessment: see Sanders' Income-Tax and Super Tax, Second Edition, page 191:

"Loss from embezzlement is deductible".

Murray and Carter's Guide to Income Tax Practice, Ninth Edition, page 263:

"A loss by reason of embezzlement by an employee used to be looked upon as a loss by stratagem, and not one connected with, or arising out of, trade, and it used to be said that the amount could not be deducted. Such a loss, however, is now for Income Tax purposes deemed an expense of the year in which it is written off in the books"; and Shelling's Dictionary of Income Tax and Super Tax Practice, Fifth Edition, page 231:

"If a loss by embezzlement can be said to be necessarily incurred in carrying on the trade it is allowable as deduction from profits. In an ordinary case it springs directly from the necessity of deputing certain duties to an employee, and should therefore be allowed".

In my opinion, this was not a loss in the nature of capital expenditure but was a loss incidental to the conduct of the business and allowance should be made on this account.

Basa kharach is stated by the Commissioner of Income Tax to be the boarding expenses of servants, and *Bidagri* to be payment to a servant of his expenses incurred in going to his home from the place of employment and back again. These do not seem to me to be in any sense gratuities and it cannot be assumed

that there is any charitable element in these payments. These payments are apparently made to servants in order to retain their services for the benefit of the business and to increase their efficiency. In my opinion these payments are made solely for the purpose of earning profits or gains and allowance should be made on account of these sums.

With regard to the principal question, the learned Counsel for the assessee contends that the jurisdiction to assess income tax upon the businesses in Calcutta and Jalpaiguri was exercisable by the Income Tax Officer, and the passage quoted from the judgment of the Assistant Commissioner shows that this jurisdiction had been reserved by the Income Tax Officer to himself and that he intended to exercise it. It would appear from the provisions of S. 64 that as Purnea is the principal place of business, the assessment should be made by the Income Tax Officer of that district, the authorities in Calcutta and Jalpaiguri reporting to him. It is argued that the so called enhancement made by the Assistant Commissioner on appeal is illegal on three grounds: (1) S. 34 expressly provides for the assessment of sources of income that have escaped assessment by the Income Tax Officer; and, where there is an express provision of law applicable to the circumstances of the case, that procedure ought to have been followed. (2) By the procedure adopted by the Assistant Commissioner in assessing on appeal the income from the businesses at Jalpaiguri and Calcutta the assessee has lost the right of appeal on questions of fact relating to these sources of income (3). By S. 31 the Assistant Commissioner in disposing of an appeal may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment. It is contended that the "assessment" means the assessment made by the Income Tax Officer which itself under S. 23 is based upon a return; but, in the present case, there was no such assessment so far as the business in Jalpaiguri and Calcutta was concerned and, consequently, the so-called enhancement made by adding these new sources of income was not an enhancement of the assessment made by the Income Tax Officer.

In reply to these arguments the learned Government Pleader contended that the terms of S. 31 (3) (a) are general and give power without qualification to enhance the assessment. Now this section relating to appeals is enacted for the benefit of the subject and also, to the limited extent therein stated, for the benefit of the Crown. But the subject matter of the appeal is the assessment and the scope of the appeal must in my opinion be limited by the subject matter. The appellate authority has no power to travel beyond the subject matter of the assessment and, for all the reasons advanced by the appellant, is in my opinion not entitled to assess new sources of income To do so would not in reality be enhancing the assessment to the old, the subject matter being different

I would therefore answer the points stated by the Commissioner of Income Tax in the manner indicated above. The petitioner is entitled to his costs. Hearing fee three gold *mohurs*.

The petitioner is entitled to the cost of the printing of the paper book and to the refund of the deposit which he made before the Commissioner of Income Tax.

Kulwant Sahay, J.—I agree.

Reference answered.

1925 PATNA 410

DAWSON-MILLER, C. J. AND FOSTER, J.

Thakur Prasad Sahu—Plaintiff—Appellant.

v.

Mohammed Musa and others—Defendants—Respondents.

Second Appeal No. 183 of 1922, decided on 16th January, 1925, from a decision of the Sub. J., Monghyr, D/- 9th November, 1921.

Civil P. C., O. 6, R. 3—Evidence has no place in pleading.

O. 6, R. 3 states that every pleading shall contain and contain only a statement in a concise form of the material facts on which

the party pleading relies for his claim or defence as the case may be but not the evidence by which they are to be proved.

[P. 412, C. 1.]

Sultan Ahmed and *Murari Prasad.*—for Appellant.

S. M. Mullick and *N. N. Sen.*—for Respondents.

Judgment—The dispute in this case is between the plaintiff Thakur Prasad Sahu and the second party defendants, both of whom claim to have purchased the same property from the first party defendants who may be referred to as the vendors. The two *kebalas* were executed on the same day, namely the 9th September 1919, in one of which the plaintiff purchased from the vendors 7 *kathas* 4½ *dhurs* of homestead land with the buildings thereon, and in the other of which the second party defendants purchased from the same vendors the same property. The case for plaintiff was that on the 8th September he entered into a written agreement in the form of a *baibeyana-nama* with the vendors for the purchase of the property which he now claims and that on the following day, a *kebala* was executed in respect of the same property in his favour that the defendants second party hearing of this induced the vendors, by an offer of a larger sum, to sell the same property to them and they accordingly obtained a *kebala* of the same. Applications were made to register all three documents. At first the Sub-Registrar merely registered the plaintiff's *baibeyana-nama* of the 8th September and the defendants' *kebala* of the 9th but on submitting the matter to the District Registrar he ordered registration of the plaintiff's *kebala* also. The defendants' case was that they had been in negotiation for the sale of the property for a long time; that in August a *kebala* had in fact been drafted, but not finally executed, and although it is not clearly stated in the judgment, I assume that they contended that they had no notice of the negotiations with the plaintiff and were not aware afterwards when their *kebala* was signed, that the document of the 8th September had been executed in favour of the plaintiff.

The trial Court came to the conclusion that the plaintiff had made out his case and accordingly passed a decree in his favour for possession of the land claimed. On appeal the Subordinate Judge of Monghyr took a different view and came to the conclusion that the plaintiff was not entitled to priority by virtue of his *kebala* and the document of the 8th September which he thinks was not executed prior to the *kebala* of the defendants second party. From that decision the plaintiff has appealed and he challenges the decision of the Subordinate Judge mainly on the ground that in arriving at his conclusion of fact he has misdirected himself and has allowed his judgment to be influenced by matters which he was not entitled to take in consideration. After reading the judgment, I must confess that this criticism of the learned Judge's judgment is amply justified. He has, I think, allowed himself, in the first place, to misconstrue the *baibeyana-nama* upon which the plaintiff relies, and influenced by that misconstruction he has treated certain action on the part of the plaintiff as very suspicious, whereas had he construed the document rightly there was no reason for attaching any suspicion at all to the plaintiff's action. The document which in the earlier part purports to be a contract for the sale of the property states that the vendors shall execute a *kebala* in favour of the purchaser in respect of the said land within a week. As a matter of fact the *kebala* was executed on the following day. There is nothing in that document to prevent the execution of the *kebala* on the following day. A week was provided as the extreme limit within which the vendor was to carry out his undertaking to execute the *kebala*, and therefore there is nothing surprising or suspicious in the fact that the *kebala* was executed within a week and in fact on the following day. Nevertheless the learned Judge has considered that the fact that the *kebala* was executed on the following day is contrary to the provision in the document itself which, he thought, meant that the *kebala* was not to be executed until after the expiry of a

week. This precipitate action, contrary, as he thought, to the terms of the *baibeyana*, was in his opinion a very suspicious circumstance and showed that the plaintiff was hurrying in order to gain some undue advantage over the defendants second party.

Now, the next matter in which the learned Judge mis-directed himself was this:—he says "plaintiff No. 1 has deposed that both the *kebala* and the deed of agreement were executed in the presence of Muhammad Ismail and that he had told that fact to the Vakil who had drafted the plaint. But we do not find mention of this fact in the plaint." That again he considered a very suspicious circumstance. I regret to say that the learned Judge has fallen into an error which countenances and encourages a practice amongst pleaders in the mofussil Courts which is entirely contrary to the rules of procedure which deal with the preparation of pleadings. The fact that the deed of agreement was executed in the presence of Muhammad Ismail who was a well known and respected pleader in Mongnyr, was perhaps important evidence in support of the plaintiff's case that the transaction entered into was genuine and above all suspicion. But it was evidence only, and it was not only unnecessary to enter that fact in the pleading but it was altogether contrary to the express provisions of Order 6, rule 3 which provides what a pleading shall contain. The rule states that every pleading shall contain and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be but not the evidence by which they are to be proved. If you find a person in the position of a Subordinate Judge encouraging this unfortunate practice which prevails of entering in one's plaint or written statement not merely a short statement of the facts upon which the parties rely in support of their case but also the evidence by which they propose to prove those acts, it is not surprising that one finds so many of these pleadings which come from mofussil Courts extremely prolix, containing a vast quantity of matter which is entirely irrelevant for the purposes of pleading. The learned Judge, however, has fallen into a grave error in supposing that, because some of the evidence upon which the party relied did not find a place in his pleading that is a reason for disbelieving that evidence entirely.

Another matter, perhaps not of so much importance, which impressed the learned Judge was that in the *baibeyana* document upon which the plaintiff relies and which purports to have been executed on the 8th September, the figure 8 is capable of being read as 9. Well, that may or may not be the fact; but the learned Judge considers that this was also a very suspicious circumstance. It is perfectly clear that, although there may be two possible readings of the document, there is nothing suspicious in the fact that the figure 8 might possibly be read as the figure 9, because any alteration of the document could not be an alteration in favour of the plaintiff by whom that document is produced but an alteration which went against his own case. It is also perfectly clear that the figure is 8 as written in the language in which the document is written, but owing to a stroke above the line and above the word immediately to the left of the figure 8 it is possible that the figure 8 may be read as 9.

Another matter upon which the learned Judge misdirected himself was this. As I have already indicated one of the points in the case was, whether this document was written on the 8th or 9th. The document itself which purports to have been written on the 8th acknowledges receipt of the sum of Rs. 25/-. The receipt of this money is proved by the document itself, and the payment of the money, I should mention, is not disputed by the vendors. That is a matter which they admit in the written statement. There was therefore no reason whatever why the plaintiff should number up the case by filing with his plaint further evidence of the payment of this money in addition to the document itself, having regard to the fact that there was no dispute with the vendor as to the payment of the money. Nevertheless, the learned Judge con-

sidered that it was a suspicious circumstance that the *gola bahis* of the plaintiff had not been filed to show the exact date upon which this money was paid. The matter arose in cross-examination of one of the plaintiff's witnesses who was asked whether his books would show the payment of the money on the 8th September. He answered that his books were not at that time in Court and they had not been exhibited with the plaint; but as soon as the matter was raised the books were sent for and they were tendered with a petition to the Court as evidence in the case. No further notice appears to have been taken of them; although tendered by the plaintiff they were not put in evidence by the defendants to support their suggestion. In these circumstances it seems to me that the learned Judge was not entitled to draw any adverse inference against the plaintiff on the ground that these books had not been filed with the plaint, because, in the first instance, there was no necessity to exhibit them at that stage and in the second instance when their importance became manifest they were tendered for inspection.

There are other minor matters arising in the judgment but I have said enough to show that the decision of the learned Judge which after all was a decision on the question of which of the two sides should be believed, must have been seriously influenced by the matters which I have already mentioned. How far he was influenced by these matters it is impossible for us to tell, but the decision arrived at in such circumstances seems to me to amount clearly to what would be, if it were the verdict of the jury, a misdirection. The learned Subordinate Judge has misdirected himself.

I think the case ought to go back to the lower Appellate Court for rehearing, bearing in mind the matters which I have already referred to. But before sending the case back there are two further matters which I think must be noticed. One question which undoubtedly arose at the trial, but about which there was no specific issue framed, was whether the defendant, by which I mean the defendant purchaser, had notice of the *baibeyana* executed in favour of the plaintiff on the 8th September, if in fact it was executed on that date, before he obtained his *kebala* on the 9th. The *baibeyana* has been so far taken as a contract to sell and not apparently as a contract of sale. But if the defendant had notice of that then it must necessarily make a difference in considering how far he is entitled under his *kebala* of the 10th September.

In considering the evidence afresh the learned Judge must come to a decision upon that question namely whether the defendant had notice of the contract entered into with the Plaintiff at the time when the *kebala* in his favour was executed.

A further matter was raised before us on behalf of the appellant which I gather has not been the subject of a decision in either of the lower Courts. It was contended that the document of the 8th September was in fact not merely a contract to sell but in itself an absolute sale of the property. The question is one of construction and the matter is, in my opinion, not altogether free from difficulty. It may be that there is some evidence in the case, we cannot say, which may be material in considering the proper construction of that document; and therefore as the case is going back, I do not think that it will be right for us at the present moment to pass any opinion as to what the proper construction is. It is undoubtedly open to the parties to contend upon this document that it is a sale and not merely a contract to sell. It is true that only an eight annas stamp had beem placed upon it and to that extent it appears to have been treated as a contract to sell; but that defect can be cured by paying the proper duty. At the same time I think that the plaintiff is not entitled to rely upon it, as a contract of sale, as distinguished from an executory contract unless the proper duty payable on a contract of that nature is first of all paid.

There are two other matters which it will be necessary for the learned Judge to consider for I do not think they have considered in the judgment now on appeal. The first is whether

there was an executory contract entered into in August between the defendant first party and the defendants second party. Some suggestion of that was put forward but the allegation may merely be that a draft of a sale was prepared on that occasion. I am not sure that the allegation goes so far as to assert that an actual contract, that is an executory contract, was come to that time. That matter however will have to be considered upon the evidence. A further point also which may in one event become important is, which of the two documents of the 9th September, that is the two *kebalas* executed in favour of the rival claimants, was executed first. It may not of course be necessary to decide it; but in one event it may become an important matter.

The decree of the learned Judge is set aside and the case is remanded for rehearing upon the evidence already on the record.

The appellant is entitled to the costs of this appeal. The costs of the hearing before the Subordinate Judge will be dealt with and determined according to the decision come to on the rehearing. The costs of this appeal are to be recoverable from the defendents second party who alone have opposed the appeal. As this is a case of old standing instituted in 1919 it should be expeditiously dealt with by the lower appellate Court.

Case remanded.

✱ 1925 PATNA 414

MULLICK AND BUCKNILL, JJ.

Saiyid Mohiuddin — Accused—Petitioner.

v.

King Emperor—Opposite party.

Criminal Rev. No. 663 of 1924, Decided on 27th January, 1925, against the decision of the J. C. Chota Nagpur, D/- 31st October, 1924.

✱ (*a*) *Penal Code. Ss. 405 and 409—Public servant entrusted with money to buy building materials.—Obtaining them free and appropriating money is offence.*

A public servant who being entrusted with Government funds for the purpose of constructing a building obtains the materials free of costs from somebody and appropriates a certain amount to himself as their price, is guilty of Criminal breach of trust. [P 416 C 1]

(*b*) *Criminal P C., S. 342—Written statement by accused may be accepted in lieu of oral statement.*

S. 256 of the Code directs the Court to accept a written statement and it is intended that the Court should read it; and if an accused states that he will file a written statement, the writing is to be accepted in lieu of his oral statement. [P 417 C 1]

Where after the examination-in-chief of the Prosecution witnesses, the accused was examined and afterwards the prosecution witnesses were cross-examined and re-examined and the accused was asked as to whether he had anything to say, and the accused also filed a written statement,

Held: that the fact that the accused was asked whether he had anything more to say, after the cross-examination and re-examination of the prosecution witnesses made it unnecessary to apply the principle of *Mitrajit Singh* v. *Emperor* (1921) 2 P L.T. 520.

Held: further that even if the Magistrate had not taken the precaution to examine the accused orally as said above the written statement filed by the accused after the cross-examination of the prosecution witnesses would have relieved the Magistrate from the necessity of examining him orally in reference to the matters elicited in the cross-examination, and re-examination of the prosecution witnesses.

(*c*) *Criminal P. C., Ss. 428 and 342—S. 342 does not apply to S. 428* (1)—Per Bucknill J.—*Fresh opportunity to accused to make statement may be essential in some cases—Criminal P.C., Ss. 342 and 428.*

In S. 428 of the Code there is no provision that the accused should be examined after the prosecution evidence is taken and as the examination of witnesses after remand may be made even in the absence of the accused the provisions of S. 342 do not apply to it.

Per Bucknil, J.- The Code itself does not contemplate or provide for the examination of the accused after fresh evidence is taken for the prosecution on remand. However, no hard and fast rule can be laid down with regard to when the provisions of S 342 are and are not properly complied with; in conceivable cases where fresh evidence on a remand has been taken the applicant ought to be given an opportunity of making a statement, *i.e.*, in effect of being examined by the Magistrate; but provided the accused has in fact had a reasonable and substantial opportunity of exercising the privilege accorded to him by the provisions of S. 342, that is of either orally or in writing saying what he wishes to say in explanation of what has been alleged against him, a technical failure or omission in the procedure ought not to be regarded as rendering a trial, wholly nugatory Should such omission or failure be shown to have prejudiced the accused the matter assumes a different aspect and should be remedied, but not otherwise.

[P 420 C 2]

(*d*) *Criminal P. C., S. 342 — Deviation—No prejudice to accused — Trial is not vitiated — Principles elaborately discussed.*

Principle requires that the accused shall not be convicted without being given an op-

portunity of explaining the allegations against him. Experience shows that judicial questioning must not become inquisitorial. If these essentials are secured, the trial cannot be impeached. The trial is not vitiated from any deviation from the section unless the accused has been prejudiced in his defence. (Principles discussed historically and elaborately.) [P 417 C 2]

(e) Criminal P.C., Ss. 439 and 360—Non compliance with S. 360 cannot be raised for first time in revision.

The question as to whether the provisions of S. 360 Criminal P. C. have been duly complied with or not is a question of fact and unless it has been raised in the Court of fact it cannot be raised for the first time in the High Court in revision. [P 419 C 2]

(f) Criminal P.C., S. 360 - Violation—Accused not prejudiced - Trial is not vitiated.

When the question arises, whether the violation of S. 360 will vitiate the trial, the test will be whether the accused has been prejudiced. If the accused is not prejudiced, nothing short of an illegal or irregular exercise of jurisdiction would vitiate the trial. [P 419 C 1]

Yunus—for Petitioner.

H. L. Nandkeolyar—for the Crown.

Mullick, J.—The petitioner was a Writer Head Constable in the Palkote Police Station in the Chota Nagpur Division. It is alleged that on or about the 1st October, 1923, the petitioner was entrusted as a public servant with a sum of Rs 200 for the purpose of building some quarters at the Police Station. A sum of Rs 2,600 had been sanctioned by the Police Department and monies had from time to time been spent by the petitioner's predecessor, Writer Head Constable Shafiuddin, but progress being unsatisfactory, the petitioner was sent in September, 1923, to relieve Shafiuddin of the work and was directed to complete the work under the supervision of the Sub-Inspector. On the 3rd October, 1922, the petitioner submitted an account to the Sub-Inspector in which it was stated that a sum of Rs. 75 had been spent on the purchase of 125 *Sal* posts from one Rajkishore, that Rs. 20 had been spent on the purchase of certain building frames and that a sum of Rs. 1-8-0 had been paid as wages to 6 coolies at 4 annas per cooly. On the 12th October, 1923, the petitioner made an application to the Superintendent of Police for a further advance of money, but in the meantime the Suprintendent, being dissatisfied with the petitioner's work, had directed that disbursements were no longer to be made by the petitioner but were to be made in the presence of the Sub Inspector. In December, the Superintendent personally visited the Police Station and in the following month he caused an inquiry to be made by Mr. Creed, Assistant Superintendent of Police, with the result that it was discovered that the petitioner had been guilty of criminal breach of trust and falsification of accounts.

The petitioner was put upon his trial before the Sub-divisional Magistrate of Gumla and was convicted of criminal breach of trust in respect of the following sums. Rs. 75 falsely alleged to have been paid to Raj Kishore for 125 *Sal* posts; Rs 20 falsely alleged to have been paid to Nageshwar Ram for building frames; and Rs. 0 12-0 falsely alleged to have been paid to 6 coolies. It was found that Raj Kishore supplied not 125 but a much smaller number of *Sal* posts and that he gave these from his jungle at the request of the Writer Head Constable without payment. With regard to the coolies, it was found that the Writer Head Constable had paid them not at the rate of Rs. 0-4-0 but at the rate of Rs 0-2 0 and while charging Government Rs. 1-8-0 he had really spent only Rs. 0-12-0

The Deputy Magistrate framed charges under S. 409 and 477-A, I.P.C. and he found the petitioner guilty on all counts and sentenced him to rigorous imprisonment for one year and a fine of Rs. 100 for an offence under S. 409 and to rigorous imprisonment for one year for an offence under S. 477-A and ordered that the sentences of imprisonment should be concurrent. On appeal the Judicial Commissioner of Chota Nagpur found that the record was incomplete and by his order dated the 27th August, 1924, he directed the Deputy Magistrate to take further evidence. That evidence was taken and upon the return of the record the Judicial Commissioner upheld the conviction in regard to the sums alleged to have been paid to Raj Kishore and the coolies but

acquitted the petitioner in regard to the sum of Rs. 20 alleged to have been paid to Nageshwar. In the result he affirmed the sentences.

In revision it is urged that the petitioner was not entrusted with the money alleged to have been embezzled; that the person entrusted by the Superintendent of Police to spend the money was the Sub-Inspector and that the petitioner was the latter's agent.

The evidence, however, is, and the learned Judicial Commissioner finds, that the Inspector under the orders of the Superintendent of Police directed the Sub-Inspector to be personally responsible and that the Sub-Inspector was authorized to entrust the accused with the price of the materials required for the building and for the wages of the labourers. The petitioner's predecessor Shafiuddin had been working on the same principle but he was removed because progress was slow and the only change made when the petitioner took charge was that the responsibility of the Sub-Inspector was emphasised with greater clearness. After the 9th October the trust appears to have been revoked and the Sub-Inspector was directed to pay out the sums himself; but there can be no doubt that on the 1st October there was a trust reposed in the petitioner as a public servant and it was his duty to account truly for all the monies he received from the Superintendent of Police. It is admitted that he received a sum of Rs. 200 and it is established that no part of the Rs. 75 alleged to have been paid to Raj Kishore was in fact paid, and that the labourers were paid a sum of annas 12 only although in his accounts the petitioner charged Rs. 1-8-0.

It has been contended that if by some private arrangement the petitioner was able to induce Raj Kishore to deliver the *Sal* posts free of cost, he has committed no breach of trust. The reply is that the trust was not to obtain the posts but to buy the posts; and, therefore, if the petitioner was able to get posts free of cost, it was his duty to refund the unspent balance to Government. With regard to the coolies, they have been examined and their statement that they were paid only half the sum charged has been accepted. The embezzlement, therefore, in respect of Rs. 75-12-0 has been proved.

It is contended, however, that there has been a violation of the provisions of S. 342 Cr. P.C. and that the trial is bad.

Now it appears that after the prosecution witnesses had been examined-in-chief, a charge was framed on the 7th April 1924, for an offence under S. 409 I. P. C. Thereafter on the 29th April, one more prosecution witness was examined and the charge under S. 477-A was framed. The petitioner was examined on the 7th April, before the charge under S. 409 was framed, and again on the 29th April before the charge under S. 477-A was framed. Between the 29th April and the 3rd May 1924, the witnesses for the prosecution were cross-examined and re-examined and the case was adjourned till the 22nd May, for hearing the defence witnesses. There were several adjournments after that date and on the 16th June 1924, the petitioner declined to call witnesses and asked for an adjournment for one day. On the 17th June, arguments were heard and on the 23rd June, the Magistrate delivered judgment. It appears that in his statement of the 29th April the petitioner stated that he would file a written statement and this he filed on the 16th June It also appears that on the 17th June he was again examined by the Magistrate and was asked whether he had anything further to say and he replied in the negative.

The argument that there has been an omission to comply with the provisions of Section. 342 is put in this way.

Relying upon *Mitarjit Singh* v. *The King-Emperor* (1) the learned Counsel for the petitioner contends that the petitioner should have been again examined after the cross-examination and re examination of the prosecution witnesses. If it had been necessary to do so, we might perhaps have been inclined to make a reference to the

(1) [1924] 2 P.L.T. 520=83 I.C. 825=22 Cr. L. J. 697.

Full Bench as to the correctness of the decision cited above for the reasons given in *Verisai Rowthes* v. *Emperor* (2) where *Mitarjit Singh's* case (1) has been expressly dissented from and it has been held that where the accused has been examined after the examination-in-chief of the prosecution witnesses and before he enters upon his defence it is not again necessary to examine him after the cross-examination and re-examination of those witnesses.

But here there is no room for the application of the ruling in *Mitrajit's* case (1) at all, for the petitioner was asked on the 17th June whether he had anything more to say.

Again on the 16th June the petitioner filed a long written statement explaining the circumstances against him, and even if the learned Magistrate had not taken the precaution to examine the accused orally on the 17th June, this written statement would have relieved the Magistrate from the necessity of examining him orally in reference to the matters elicited in the cross-examination and re-examination of the prosecution witnesses.

It is contended that a written statement cannot be a substitute for an oral examination; but section 256 of the Code directs the Court to accept a written statement and it is intended that the Court should read it; and if an accused states that he will file a written statement, the writing, in my opinion, is to be accepted in lieu of his oral statement.

Then it has been urged that the accused should have been re-examined after the examination of the witnesses fo the prosecution was taken on remand. The answer to this is that in section 426 of the Code there is no such provision and as the examination of witnesses after remand may be made even in the absence of the accused the provisions of section 342 do not apply to it. It was open to the learned Judicial Commissioner to direct further examination of the accused, but he did not choose to do so and there was no irregularity or illegality on the part of the Sub-divisional Magistrate who was not called upon to do more than what was ordered.

The result therefore is that, in my opinion, there has been no evasion of the provisions of section 342.

In any event the objection is based on the purest of technicalities and has neither principle nor experience to support it. Principle requires that the accused shall not be convicted without being given an opportunity of explaining the allegations against him; experience shows that judicial questioning must not become inquisitorial. If these essentials are secured, the trial cannot be impeached. In this respect there has been no material variation in the successive Criminal Procedure Codes in this country, namely, Act XXV of 1861 (the first Criminal Procedure Code), Act VIII of 1869, Act X of 1872, Act X of 1882, Act V of 1898 and Acts XII and XVIII of 1923. While the language of the earlier Codes is that the Court *may* examine the accused the Code of 1882 prescribes among the general provisions applicable to all trials that the Court *shall* examine him after the prosecution witnesses have been examined and before he is called upon to enter into his defence, but this has made no material difference. And the Select Committee on the Bill of 1882 state their object and reasons thus:

"We think that the present law gives too great a latitude to the Courts with regard to the examination of an accused person. The object of such an examination is to give the accused an opportunity of explaining any circumstances which may tend to criminate him, and thus to enable the Court, in cases where the accused is undefended, to examine witnesses in his interest. It was never intended that the Court should examine the accused with a view to elicit from him some statement which will lead to his conviction. We have therefore limited the power of interrogating the accused by adding to the first paragraph the words, 'for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.' We think the accused should always have this

(2) [1923] Mad. 609=45 Mad. 449=14 M.L.J. 537=24 Cr. L.J. 547=17 M.L.W. 722=32 M.L.T. 385=(1923) M.W.N. 477 (F.B.)

opportunity of explaining and we have, therefore required the Court to question him generally for the purpo e before he enters on his defence."

It is obvious that the legislature in India has from the outset deliberately departed from the Codes prevailing in most countries on the continent of Europe and has adopted with modifications the law of England. On the continent of Europe the interrogation of the accused by the Judge is not only the first but also the most important part of the whole trial. The Accused is cross-examined with the utmost severity and every opportunity is taken to obtain an admission of guilt from him. In England the Court has from the earliest times been prohibited from puting questions to the accused; but it could not for that reason be said that the accused's mouth was shut. On the contrary, as he could not be defended by Counsel in cases of felony and as the prosecution evidence operates as so much indirect questioning his only chance of obtaining an acquital was to cross-examine and to speak for himself. After the Revolution of 1688, the law was considerably amended and the result now is that in inquiries before commitment the prisoner at the close of the evidence for the prosecution is asked by the Magistrate or justices whether he wishes to say anything and is warned that if he chooses to do so what he says will be taken down and may be given in evidence on his trial. With this exception it may be generally said that the prisoner is protected against all judicial questioning before or at the trial ; but he may whether defended by counsel or not, always make a statement to the Judge though Judges have not always been agreed as to the state at which the prisoner is to make the statement, some holding that it should be before and some after the address of the prisoner's Counsel It is the duty of the Judge, when the prisoner is not defended by counsel, to inform him of his right to cross-examine the witnesses, to address the jury, to give evidence on his own behalf or to make an unsworn statement; but omission to give this information does not invalidate the conviction. *R.* v. *Saunders* (3). Since the Criminal Evidence Act of 1898, 61 and 62 Vic. C. 36, the prisoner has the right to give evidence in his own behalf but the omission on his part to give evidence cannot be commented upon by the prosecution.

These provisions clearly indicate that the object of the legislature is to give the prisoner every opportunity to lay his case before the Court and to protect him against anything in the nature of cross-examination by the Judge.

In my opinion the present law in India has the same principle in view. The prisoner is not yet permitted to give evidence in his own behalf, but the judicial questioning which the Code enjoins is intended within limits to take its place. It is not necessary that the purport of the evidence of each prosecution witness should be explained to the prisoner, he is himself present at the trial and has heard what the witnesses have said. What is necessary is that he should be given an opportunity before entering upon his defence as in England to state generally what are the real facts in reference to the complaint. If he is defended or if he files a written statement, judicial questioning will generally add but little to the Court's knowledge, nor will a violation of any rule as to the stage at which he is to be examined make much difference, If he has not been prejudiced the error ought not to vitiate the trial.

It is, however, contended that the provisions of S. 342 have not been enacted solely for the benefit of the accused and that it is part of a scheme for the punishment of crime any deviation from which renders the trial null. I am unable to comprehend the precise import of this contention. Every contravention of the Code in a matter of procedure is a deviation from the scheme ; but the law does not on that ground make the consequences fatal to the trial. If it is contended that the Court cannot do justice unless it hears the accused speak and, as has been said elsewhere, the examination is a solemn

(3) [1898] 63 J. P. 24—15 T. L. R. 104.

proceeding between the Court and the accused into which Counsel do not enter, the reply seems to me to be that the principle of the Indian law is that the accused should be convicted not upon his statement but upon independent evidence. The accused cannot be questioned in order that gaps in the prosecution case may be filled up, and if the Court is already in possession of his version of the case the oral examination cannot make much difference. Therefore if he is defended by Counsel who advises him not to speak, or instead of making an oral statement he chooses to file a written statement the scheme has no chance of operating. The Code itself provides for this evasion in cases in which the personal attendance of the accused is dispensed with either under S. 205 or S. 540-A.

The result is that in every case the test is whether there has been prejudice to the accused by reason of the absence of judicial questioning and whether the defect is cured by S. 537 of the Code. It is said that an express violation of the terms of the Statute must always vitiate the trial, and reliance is placed on *Subramania Ayyar* v. *The King-Emperor*. (4) But the observations of their Lordships of the Privy Council in that case must be read with reference to the particular facts before them. Their Lordships held that a misjoinder of charges is as fatal in a criminal trial as in a civil trial because the defect goes to the root of jurisdiction. If the Statute debars a Court from trying more than a certain number of charges, the violation is not an irregularity but is an usurpation of jurisdiction. In other words the constitution of the suit is such that the Court is not permitted to try it. The principle, however cannot apply to a violation of the provisions of S. 342.

Finally it has been contended that there has been a violation of the provisions of S. 360 of the Code because the depositions of the witnesses were not read over as required by that section. The ground taken in the petition before us is put very generally and runs thus :

" For that the provisions of Ss. 342, 360 and 428 Criminal Procedure Code have not been complied with."

It is not stated whether the omission took place in regard to all or only some of the witnesses ; nor what was the precise nature of the defect. The point really involves a question of fact and it was never raised before the Judicial Commissioner either at the first or the second hearing before him. In the circumstances, we must assume that the witnesses did actually say what was recorded in the depositions upon which the Judicial Commissioner affirmed the conviction of the accused. It was open to the petitioner to show that the record of the depositions was wrong, but no attempt to do so was made. The Judicial Commissioner who was a Court of fact was the proper authority for investigating the charge.

We cannot therefore accept the objection in regard to the depositions. Here also the question arises, whether the violation, if any, of S. 360 will vitiate the trial ; the test again will be whether the accused has been prejudiced. If the accused is not prejudiced, nothing short of an illegal or irregular exercise of jurisdiction should vitiate the trial.

The result is that the conviction will be affirmed and having regard to the fact that the petitioner is a public servant and that he has not only committed embezzlement of public money but has been guilty of an illegal exaction, I do not think that the sentence is unduly severe.

Bucknill, J.—I have only a few observations to add.

Firstly as to the suggestion that if the applicant succeeded in getting the timber given to him for nothing, he could rightly pocket the money with which the Government had supplied him for the purchase of the timber. I think this suggestion is fallacious. The applicant is in a fiduciary position to the Government and any advantage of any good bargain obtained by him in any transaction in which he acted on behalf of the Government must enure to the Government and not to the applicant.

(4) [1901] 25 Mad 61=28 I.A. 257=11 M.L.J. 233=3 Bom. L. R. 540=5 C. W. N 866= 10 M. L. J. 147 (P. C.)

If A hands B (his agent) Rs. 100 and instructs B to buy for him (A) an article and B succeeds in purchasing the article for Rs. 20 can it possibly be seriously contended that B can conceal that fact from A and pocket the balance of Rs. 80? To my mind the suggestion is really an absurd one and, in the present case, the applicant was clearly guilty of criminal breach of trust in acting as he did.

Secondly as to S. 342 of the Criminal Procedure Code, the applicant was undoubtedly examined on April 7th and again on April 29th; on that latter day he intimated he would file a written statement and he did so considerably later, namely, on the 16th June. He declined to call any witnesses but asked for one day's adjournment and on June 17th the Magistrate asked him if he had anything more to say, to which he said 'No'. Then the matter went to and was remanded back by the Judicial Commissioner of Chota Nagpur: the Judicial Commissioner ordered the remand so that further witnesses should be examined.

Now there are two points urged here: (1) that the provisions of S. 342 were not complied with at the trial; and (2) that they were not complied with after the remand. As to the first point, on April the 7th the prosecution witnesses had been examined-in-chief; and on that day the charge was framed and the applicant was formally examined; after that examination a new charge was drawn up by the Magistrate. The applicant was also examined on the 29th when he said he would file a written statement; and after that second examination a further new charge was added by the Magistrate. After this, the prosecution witnesses were cross-examined and then on the 16th June the applicant filed his written statement; he then intimated at the same time that he would call no witnesses but merely asked for one day's adjournment. This was granted and on the following day, that is to say on the 17th, he was then asked by the Magistrate if he had anything to add, presumably, to his written statement. He replied in the negative.

It is contended that this procedure would not satisfy the requirements of S. 342. I am of the opinion that this procedure was sufficient and I have recently in another case expressed my view that if at the close of the prosecution case an accused states that he is going to file a written statement and does so, he need not be really asked anything further by the Magistrate. I agree with my learned brother that the written statement here was rightly taken in place of a further oral statement; but here the position was even better than that, for he was asked, after he had filed his written statement, if he wanted to say anything in addition.

Then secondly as to what took place when the Magistrate took the evidence on remand, it is said the applicant should again have been cross-examined by the Magistrate; but as my learned brother has pointed out the Code itself does not contemplate or provide for this.

I am not prepared to say, however, that any hard and fast rule can be laid down with regard to when the provisions of S. 342 are and are not properly complied with; I am ready to admit that even in conceivable cases where fresh evidence on a remand has been taken the applicant ought to be given an opportunity of making a statement *i. e.* in effect of being examined by the Magistrate; but I do consider that, provided that accused has in fact had a reasonable and substantial opportunity of exercising the privilege accorded to him by the provisions of S. 342, that is of either orally or in writing saying what he wishes to say in explanation of what has been alleged against him, a technical failure or omission in the procedure ought not to be regarded as rendering a trial wholly nugatory. Should such omission or failure be shown to have prejudiced the accused, the matter of course assumes a different aspect and should be remedied; but not, in my view, otherwise.

Lastly as to the provisions of S. 360 of the Criminal Procedure Code, I have no doubt from that is told me at the Bar that the provisions of this section are but complied with some-

what meagrely and that a really strict compliance presents some difficulties. Nevertheless it is very easy to allege irregularities but if they are alleged they must be proved as facts; for on such proved facts alone could any legal argument that the non-compliance with the provisions of this section should affect adversely the validity of the trial be based. This Court in its Revisional Jurisdiction does not appear to me to be, where there already is a decision of the Subordinate Appellate Court, the proper tribunal for the consideration of such a matter. If there was in fact a non-compliance with the provisions of the section it might indeed with advantage be then and there drawn to the attention of the trying Court. At any rate it certainly should be raised and proved before the Subordinate Appellate Court: but if no attempt is made to do so there, I do not think it can well be raised for the first time here.

Once more I wish to guard against laying down here any hard and fast rule; for I feel that should serious prejudice be shown to have been occasioned to the accused by any failure or irregularity in carrying out the procedure of S. 360, then this Court might still think fit to interfere; but not on such generalisations as

"the provisions of S. 360 were not complied with"

but only on substantive and clearly authenticated statements.

I agree that this application should be rejected and bearing in mind that the applicant is a Government servant and a Police Officer, I do not think that in view of the fact that the accused was handling Government money the sentence is altogether too severe.

Application rejected.

1925 PATNA 421

DAWSON MILLER, C.J. AND FOSTER, J.

W. W. Broucke—Appellant.

v.

Sri Panch Rani Chhatar Kumar Devi

Plaintiff—Respondent.

First Appeal No. 42 of 1921, Decided on 5th January, 1925, against the decision of the Offg. Sub. J., Muzafarpur, D/- 20th July, 1920.

(a) *B. T. Act, (VIII of 1885) S. 74—Stipulation to pay embankment cess, costs of acquittance etc. is void though items have been totalled into annual jama.*

All impositions upon the tenants under the denominations of abwab, mathat or other like appellations in addition to the actual rent are illegal and all stipulations and reservations for the payment of such are void. They cannot legally be exacted nor can the tenant legally bind himself by contract to pay them. [P 426 C 2]

Where, along with the rent (malguzari) and road cess, a lessee bound himself to pay:—

Embankment cess, Costs of acquittance *Dashora, Chait nawami farmaish, Tika betti guru bheti, Batchha pi jangala isimnavisi, Kathiari, Dewani dastur* and *Mahal Uprohili,*

Held: that though all the items were totalled up into an annual jama, the items other than rent and road cess were illegal abwabs and not recoverable by a landlord from his tenants, and stipulations for their payment were by S. 74 of the Bengal Tenancy Act, void. (Case law discussed.) [P 423 C 2]

(b) *B. T. Act (VIII of 1885) Ss. 74 and 179—Illegal abwabs — No distinction lies between raiyats and intermediate tenants.*

As regards the imposition of illegal abwabs over and above the rent for the lands, no distinction is made in the Act between a raiyat and any intermediate tenant except in the case of a permanent mukarrari lease as provided in Cl. 3 of S. 74 and in S. 179 of the Act. [P 429 C 2]

(c) *B. T. Act, S. 66—T. P. Act, S. 117 — T. P. Act S. 117 should be liberally interpreted—Intermediate tenant — Direct cultivation of some lands—Other factors — Lease was held agricultural.*

In construing the T. P. Act and B. T. Act it must be remembered that although the Bengal Tenancy Act is later in time, there were somewhat similar provisions in the Bengal Rent Acts, of 1859 and 1869 and it was probably the intention of the Legislature in exempting leases for agricultural purposes from the operations of Chap. V of the Transfer of Property Act to retain in force the special provisions relating to the class of leases dealt with in those Acts, which may be compendiously described as leases for agricultural purposes. Therefore a liberal interpretation should be given to the words of S. 117. [P 431 C 1,2]

P. C. Manuk and A. B Mukherjee — for Appellant.

S. M. Mullick, A. P. Upadhya and N. C. Ghosh—for Respondent.

Dawson-Miller, C. J.—In this case there is an appeal by the Defendant

and a cross-objection by the Plaintiff from a decision of the Officiating Subordinate Judge of Muzaffarpur. The Plaintiff is Rani Chhatar Kumari Debi, widow of the late Raja Mohan Bikram Shah and proprietor of the Ramnagar Raj. The Defendant is the lessee of 36 villages of the Raj under a lease granted by the late Raja and dated the 22nd May 1911 The suit was instituted in July 1919 by the Respondent claiming certain reliefs which may be summarised as follows:-

(1) Rs. 20,119-5-6 being arrears of rent together with interest of 24 per cent per annum for the years 1324 to the Chait kist of 1326 F. after giving credit for sums paid during those years.

(2) Rs. 3,826-8-0 arrears of produce rent calculated at Rs. 3 per maund of paddy and interest at 25 per cent. by way of damages for the years 1325 and 1326 F.

(3) Rs. 4,051-2-3 compensation with interest for the use and occupation of the land after Chait 1326 F. to the date of suit.

(4) Rs. 3,641-4-4 being the Plaintiff's proportion of the costs of survey together with interest at 12 per cent. per annum payable by the Defendant under cl. 21 of the lease.

(5) Recovery of possession of the leasehold property by ejectment of the Defendant on the ground that he has incurred forfeiture by failure to observe the terms of the lease.

(6) Damages as stipulated in the lease together with interest at 24 per cent. for breach of certain covenants as follows:—

	Rs.
(*a*) failure to provide bullock carts	1,785-9-6
(*b*) failure to supply thatching grass	1,071-6-0
(*c*) failure to file *jamabandis*	535-3-6

The Defendant pleaded :—

(1) That the sum claimed as cash rent included various items which were not recoverable but were *abwabs* and after deducting these the total rent and road-cess payable up to 1326 F. amounted to Rs. 39,201-3-0 of which Rs. 30,349-10-0 has been paid leaving a balance of Rs. 8,851-9-0 due.

(2) That the price of paddy claimed as produce rent, namely, Rs. 3 per maund, was excessive and that by a compromise between the parties in a previous suit the future rate has been agreed at Rs. 2 per maund and at the latter rate the sum payable was Rs. 2,061 and not Rs. 3,090 with interest as claimed. He also pleaded tender and paid into Court with his written statement the sum of Rs. 10,911-9-0.

(3) That the cost of survey was not payable by the defendant under cl. 21 of the lease.

(4) That the Defendant was not liable to ejectment.

(5) That the stipulation to provide bullock carts, thatching grass and *jamabandis* or the price thereof was void and unenforceable, the stipulation being for payments in the nature of *abwabs*, and further that he did in fact supply *jamabandis* up to 1326 F.

(6) That interest was recoverable only on arrears of rent and by law the rate is 12½ per cent. only, and that stipulations to pay interest at 2 per cent. per mensem were by way of penalty.

The Judge of the trial Court found:-

(1) That the annual cash rent payable under the lease was Rs. 15,581-5-0 as claimed by the plaintiff and that no portion of this should be deducted as illegal *abwabs*. He awarded interest however, at 12½ per cent. and not at 24 per cent. as claimed.

(2) That the price of paddy (produce rent) recoverable was Rs. 2 per maund and not Rs. 3 as claimed by the Plaintiff. He also awarded as damages 25 per cent. of the amount due without interest.

(3) That the Defendant was liable for the cost of survey together with interest at 12 per cent. per annum as claimed.

(4) That compensation was payable by the Defendant for the use of the land from Chait 1326 F to the date of suit at the rate stipulated as the annual *jama* together with interest at 12½ per cent.

(5) That the Defendant was liable for damages for failure to supply *jamabandis* which he assessed at Rs. 432 without interest.

(6) That the claim for damages for failure to supply carts and thatching

grass could not be sustained, these items being in the nature of *abwabs*.

(7) That the Plaintiff was not entitled to immediate possession by ejectment of the Defendant. He however, passed a decree under Sec. 66 of the Bengal Tenancy Act ordering ejectment unless within 15 days the amount due for rent should be deposited in Court.

In accordance with these findings a decree was passed in favour of the Plaintiff for a sum of Rs. 15,951-12-11 being the balance due after giving credit for the amount paid into Court by the Defendant. From this decree the Defendant has appealed and the Plaintiff has entered a cross-objection.

The Appellant contends in the first place that the annual rent found payable under the lease includes certain items amounting to Rs. 2,540-4-0 which are illegal *abwabs* and not recoverable. This question depends upon whether the stipulation in the lease whereby the tenant covenants to pay certain items there named in addition to the rent but included in the total *jama* payable is void under S. 74 of the Bengal Tenancy Act, the material part of which provides as follows :—

(1) All impositions upon tenants under the denomination of *abwab*, *mathat*, or other like appellations, in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void . . . . . .

(3) Nothing in this section shall be deemed to affect the terms of a permanent *mukarrari* lease granted by a proprietor or holder of a permanent tenure in a permanently settled area."

The lease in so far as it is material for determining this point reads as follows :—

"I have let out 16 annas of the following 36 villages as per boundaries given below . . . . . at a consolidated annual *jama* of Rs. 15,581-5-0 being the rent (*malguzari*) road and embankment cesses, dues of priests (*mahal uprohiti*) and expenses for obtaining acquittance receipts (*farag kharach*), etc., in addition to 515 maunds of paddy specified below payable annually at a uniform rate under a *thika patta*, the terms whereof are given below, and on receipt of a *kabuliyat*, to Mr. W. W. Broucke,'

At the end of the document is a schedule giving a list of the 36 mauzas and stating in the case of each mauza the total annual *jama* and details of how it is made up. One instance will suffice. The first mauza is *thath mitia*. The particulars thereunder shew first of all that the term is for 15 years from 1319 to 1333 F. Then follows a list of payments in respect of that mauza as follows :—

		Rs.
Rent (malguzari)	...	673-2-0
Road Cess	...	40-8-0
Embankment Cess	...	10-2-0
Costs of acquittance	...	24-4-0
Dasahra and *chait nawami farmaish*	...	12-0-0
Tika bheti guru bheti	...	5-0-0
Batchha pi jangala-isimnavisi	...	7-0-0
Kathiari	...	4-0-0
Dewani dastur	...	24-14-0
Mahal Uprohiti	...	5-0-0
TOTAL	...	805-14-0

Paddy 35 maunds.

The total of Rs. 805-14-0 thus arrived at is then treated as the jama *eksala* and is divided into four kists of Rs. 201-7-6 payable in Asin, Pous, Chait and Jeyth. The words jama *eksala* in the column showing the total have been translated "annual rental" but the words actually used are jama *eksala*. It is necessary to bear this in mind as reliance is placed by the Appellant upon the use of the words jama and malguzari in this document, the contention being that jama although frequently used as synonymous with rent literally means total, and is the only word which could be used for that purpose where as malguzari has a more specific meaning and indicates the actual rent payable as distinguished from the other items included in the jama.

It was hardly disputed, and there can be no doubt that it is the fact, that all the above items, except the first two, making up the total of Rs. 805-14-0 are illegal abwabs and not recoverable by a landlord from his tenants, and stipulations for their payment are by S. 74 of the Bengal Tenancy Act, void. The evidence of

Bhabun Prasad, a Munshi of the Ramnagar Raj, explains the nature of these items and from his evidence it is clear that they are abwabs. It is also undoubtedly the fact that such abwabs are frequently demanded and perhaps almost as frequently acquiesced in by the tenants. A reference to cl. 26 of the kabuliyat executed by the Defendant shows that in the present instance such exactions were by custom realised from the tenants and the ticcadar undertakes to get them collected and not to put any interference in the way of their realization. Cl. 26 reads as follows :—

"That mahal *mahapatiri* and other *Rajunks* are realized according to custom prevailing from former times from the tenants and *banyas*. I, the ticcadar shall get the said *rakams* realized, and shall not interfere in any way in the realization of the same. If any loss is caused then the amount lost shall be realised from me, the ticcadar."

In the corresponding clause of the patta these impositions are dignified by the name of royalties.

The ticcadar no doubt expected that there would be no difficulty in realising them from the raiyats and undertook in his kabuliyat to pay them in any event to the landlord. It would be his own fault if he failed to collect them. For some years no difficulty arose but in 1917 as the result of the advent of Mr. Gandhi to North Bihar the tenants refused to pay these exactions any longer to the ticcadar, and there can be no doubt that they were fully justified in this attitude. Trouble arose and in some cases agrarian riots resulted. The Government appointed a Commission known as the Agrarian Commission to consider the tenants' grievances. The Commission made a report to the Local Government. An extract from the Bihar and Orissa Gazette, dated the 8th October 1917, dealing with this report has been proved in evidence and is marked Ex. F. in the case. It contains the following passages :—

"13. The Committee next deal with the exaction of abwab by the ticcadars of the non-indigo concerns under the Bettia and Ramnagar Estates and by the proprietress of the latter estate. The Committee remark that until recently these exactions have given rise to little complaint, and that not a single suit has been brought under S. 75 of the Bengal Tenancy Act which provides the legal remedy. They observe that the orders issued by the Court of Wards, when the facts were brought to its notice in the course of the recent settlement operations, have been effectual in stopping the practice in the Bettia Estate. In the Ramnagar Estate the advice of the local officers was ignored, but the Court of Wards has recently declared the proprietress disqualified under S. 6 (*a*) of the Bengal Court of Wards Act (Act IX B. C. of 1879) and proposes to take action similar to that which has already proved successful in the case of the Bettia Estate.

14. The Lieutenant-Governor in Council proposes in addition to cause all the tenants in this tract to be informed that the taking of abwab is entirely illegal, and is not in any way countenanced either by the management of the estates or by Government.

The Committee's report is then set out in which the following passages occur :—

"The syestematic levy of abwab still prevails in the Ramnagar Estate. In one lease produced before us certain abwabs are specified as payable by the ticcadar to the estate and in addition there is a clause binding him to assist in collecting certain dues which are realised from the tenants and *banias* according to the ancient custom. The *abwabs* realised by the *ticcadars* bear many names most of which are of old standing, but the full development of the system seems to be comparatively recent and does not go back beyond the last quarter of the nineteenth century. It took the form of an amalgamation and an enhancement of the old *abwab* and the consolidated levy thenceforth passed under a single name, usually *salami* or *painkharcha* (irrigation due)."

Amongst the recommendation of the Committee it was suggested that "Government should issue a proclamation informing all landlords and raiyats that both *abwab* and the *dasturi* taken by landlords's servants are illegal and must be stopped. The

names of the principal *abwabs* brought to the Committee's notice are mentioned. These include most of those set out in the schedule to the present lease.

I refer to this notification in the Gazette to shew that the question of exacting *abwabs* had become acute in 1917 and that the Local Government was determined as far as possible to put a stop to it.

Ever since the East India Company took over the administration of this province in the eighteenth century it has been the policy of the Government for the time being to protect the raiyats from exactions of this nature which, although firmly established by custom at the time of the Permanent Settlement, were considered a source of oppression to the cultivating classes. An opportunity, however, was given to the landlords by rules passed in 1789 and 1790 to re-adjust in concert with the raiyats, their rents upon the basis of existing rents added to the customary *abwabs* then paid, the whole being consolidated into one specific sum as rent. A period was fixed for this purpose within which new pattas in a prescribed form were to be granted to the raiyats under the supervision of the Collector. Thereafter all additional exactions by the landlords in the nature of *abwab* or *mathat* in addition to the rent payable were forbidden under heavy penalty. These rules were re-enacted with some amendments by Reg. VIII of 1793, Ss 54 to 61, and Reg. IV of 1794. In 1812 by Reg. V of that year the restrictions as to the form of patta were removed, but the prohibition against the exaction of arbitrary and indefinite cesses even if stipulated in the lease was kept in force. S. 3, after rescinding so much of the former regulations as required the pattas to be in a particular form and subject to revision by the Collector, enacted as follows:—

"The proprietors of land shall henceforward be considered competent to grant lease to their dependent talukdars, under-farmers and raiyats, and to receive correspondent engagements for the payment of rent from each of those classes, or any other classes of tenants, according to such form as the contracting parties may deem most convenient and most conducive to their respective interests:

Provided, however, that nothing herein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mathat* or any other denomination.

All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void: but the Courts shall notwithstanding maintain and give effect to the definite clauses of the engagements contracted between the parties, or, in other words, enforce payment of such sums as may have been specifically agreed upon between them."

Again by the Rent Acts of 1859 and 1869 the exaction of any sum in excess of the rent stipulated in the pattas of an under-tenant or a raiyat, or payable under the provisions of the Act, was declared to be illegal. An exhaustive account of the history of the imposition of these cesses and the legislation respecting them will be found in the judgment of O'Kinealy, J., in *Radha Prosad Singh* v. *Bal Kowar Koeri* (1).

Different views have been taken from time to time by the Judges of the Calcutta High Court as to the interpretation of the above regulations. One view was that stipulations to pay such cesses, provided they were fixed in amount and not arbitrary or indefinite, were enforceable as being a part of the consideration for the lease. See *Pudmanund Singh Bahadur* v. *Baij Nath Singh* (2), *Radha Charan Ray Chowdhury* v. *Golak Chandra Ghose* (3) and *Kunwar Kalanand Singh* v. *Eastern Mortgage Agency Co., Ltd.* (4). The other view was that only such sums as were agreed to as rent were recoverable but any stipulation to pay even a fixed and definite sum for any cesses not included in the *asal jama* was void. See *Chulhan Mohton* v. *Tilukdari Singh* (5), *Radha Prosad Singh* v. *Bal Kowar Koeri* (1) and *Bijoy Singha Dudhuria* v. *Krishna Behari*

(1) [1890] 17 Cal. 726 (F.B.)
(2) [1888] 15 Cal. 828.
(3) [1904] 31 Cal. 834=8 C.W.N. 529.
(4) [1913] 18 C.L.J. 83=19 I.C. 701.
(5) [1885] 11 Cal. 175.

Biswas (6). We are not directly concerned to determine which of these views is correct as the present case depends not upon the construction of the Regulations but upon the construction of S. 74 of the Bengal Tenancy Act. From the nature of things, however, it seems to me that the mischief aimed at could hardly be put an end to if it only required a stipulation in the lease to pay a fixed and definite sum under the name of *abwab* in order to legalize the imposition. The landlord was as a rule all powerful. The tenants were, for the most part, accustomed to acquiescence and in this country old customs die hard. Further it seems to me that the proper criterion for deciding the question under the Regulations was not, as has sometimes been stated, whether the payment of *abwab* was a part of the consideration for the lease. If the obligation depends upon contract, as distinguished from custom, stipulations in the contract to pay *abwabs* in addition to rent are just as much a consideration for the use and occupation of the land as a covenant to pay rent. Nevertheless stipulations of such a nature were prohibited by the Regulations in all future contracts. It may also be pointed out here that Ghosh, J,. who had been a party to the decision in *Padmanund Singh Bahadur* v. *Baij Nath Singh* (2) took occasion to point out two years later in *Radha Prosad Singh* v. *Bal Kowar Koeri* (1) where a different view was taken, that it was not intended in the earlier case to hold that anything which is not arbitrary and indefinite is recoverable, although it may not be part of the rent, and further stated: "I am however bound to say that having, since, more carefully considered the subject I have come to the opinion that we were not right in holding that the items of *tehwari* and *salami* were part of the rent stipulated to be paid under the lease. They were, I now think, *abwabs*." Again in 1917 in *Bijoy Singh Dudhuria* v. *Krishna Behari Biswas* (6) one of the latest cases decided under the Regulations, Chatterji, J., took care to explain that in the case of *Upendra Lal Gupta* v. *Atanla* (7) to which he was also a party in the previous year, it was not meant that any consideration for the lease mentioned in the *kabuliyat* is rent and not *abwab* and added: "Any sum agreed upon to be paid as rent is consideration for a lease, but for the purpose of deciding the present question every consideration for a lease is not necessarily rent within the meaning of S. 3 of the Regulation, and anything which is prohibited by statute cannot be said to be lawfully payable."

I have referred to the cases decided under the Regulations not as affording any direct authority for interpreting the Bengal Tenancy Act, but because the view occasionally expressed that a definite stipulation to pay a fixed sum even for *abwabs* may be enforced, or that any agreement forming a consideration for the lease must be regarded as outside the operation of the Regulations has influenced, I think, some of the later decisions dealing with cases governed by the Bengal Tenancy Act.

Whatever difficulty may have arisen in the interpretation of the Regulations the law as it now stands under S. 74 of the Bengal Tenancy Act appears to me to present no ambiguity. All impositions upon the tenants under the denomination of *abwab*, *mathat* or other like appellations in addition to the actual rent are illegal and all stipulations and reservations for the payment of such are void. They cannot legally be exacted nor can the tenant legally bind himself by contract to pay them. It was contended, however, that on the proper construction of the lease the disputed items were in reality a part of the rent and payable as such. The argument in support of this contention is based on the fact that the total sum payable including the disputed items is described in the documents as the consolidated *jama* and that as the parties were contracting at arm's length and knew what they were about, no question of coercion or imposition arises. Evidence was given by both parties as to the circumstances under which the lease was granted. Such circumstances cannot alter the plain mean-

(6) [1917] 45 Cal. 259=41 I.C. 561=21 C.W.N. 959.

(7) [1916] 21 C.W.N. 108=36 I.C. 404.

ing of the written contract but evidence of them may be admissible to explain any latent ambiguity, if such exists in the document. The object of this evidence was no doubt to explain the sense in which the word *jama* had been used, and, although I have some doubt as to its admissibility, I shall refer shortly to the evidence upon this point. The witness Bhabun Prasad, the Raj Munshi already referred to, stated that the total sum of Rs. 15,581-5-0 was agreed to as the annual *jama* by Mr. Broucke before any talk of *abwabs* took place, and that the details were only entered in the *patta* for the Rajah's convenience so that he might know how much he might get under the different heads and regulate his expenditure on those items accordingly. He goes the length of saying that the *jama* included no *abwabs* and that the *abwabs* named in the patta had never been realised previously by the Raja from the tenants. Their inclusion in the *patta*, he said, was suggested by a mosaheb of the Raja named Deo Narain Singha, but Deo Narain was not called to corroborate this. This story, although contradicted by Khodadin Khan, the Defendant's tahsildar, seems to have found favour with the learned Judge, but after considering all the evidence it seems to me absolutely incredible. The Defendant's tahsildar, on the other hand, deposed that the disputed items of *abwab* used to be realised from the tenants before the current lease, and during the negotiations the lessor said it would be difficult for him to realise them separately from the raiyats if the villages were leased to a ticcadar and so the items were entered in the patta as payable by the ticcadar to the lessor and were to be realised from the tenants by the ticcadar. The reasons why the story of the Plaintiff's witnesses on this part of the case does not seem to me acceptable are, first, that the lease itself contradicts it. Cl. 26 as already pointed out shews that the *abwabs* or *rajunks* were by custom paid by the tenants and the ticcadar stipulates that he will do nothing to interfere with this custom. The object of this clause can only be that the lessor's supposed customary right should not be allowed to fall into desuetude lest at the termination of the lease he might find a difficulty in reviving it. Secondly, the detailed particulars given in the schedule of the amount of *abwabs* payable in each village could only have come from the Raj accounts and *jamabandis* and the lessor must have known, without any statement in the lease, exactly how he stood in the matter and how much he might conveniently spend, if anything, under the different heads. Moreover the Munshi himself admits that there was no rule as to the amount to be spent under these heads; it depended on the will of the Raja and the Rani. Thirdly, it seems to me quite incredible that the lessee should agree to pay a fixed annual sum without first obtaining full particulars of the rent and other collections, if any, which he might expect to realise from the tenants No man of any business capacity would act in such a way. A number of tenants were called on behalf of the Defendant to prove that they paid these *abwabs* before 1917. They also stated that the printed rent receipts did not show these payments but *katcha* receipts were given for them. A tenant called Chandi Kinkar was also called by the Plaintiff presumably to prove that he never paid the disputed items of *abwab* and in fact he said so, but he afterwards qualified it by saying that before the recent revisional survey he paid Rs. 3 per bigha as *pain kharcha* (a sort of consolidated levy) in each of the two villages in which he had a holding. In my opinion, it is clear beyond any reasonable doubt that *abwabs* such as those mentioned in the lease had been collected from the tenants long before the lease was executed and were regarded as having the sanction of custom. I am also of opinion that on the proper construction of the lease the Defendant undertook to pay them under the different denominations of *abwab* as set out in the schedule and as indicated in the body of the lease and not as part of the rent which is described as *malguzari*. Each side complains that the other had not produced the *jamabandis* or accounts relating to the collections, but other documents in the case, and particularly Exs. C and C-1. which are rent

receipts granted by the lessor to the lessee in respect of certain of the villages for the year 1324 F, shew that the payment of the actual rent and the *abwabs* were kept separate. Ex. C is a receipt for the *uprohiti mahal* of five villages. Ex. C 1 is a receipt for the rent and other items for the same five and one other village for that year. The translation of the document printed with the record is defective. The words translated "*abwabs* on account of (illegible)" are "*abwab babat bandt beheri*," that is, "*abwab* on accoun of embankment cess. "hTe word translated "costs" is "*kharcha*" which includes all the emaining items of *abwab* except *uprohiti mahal*. In the details given at the bottom of the page the word "income" should be "embankment cess" or "*bandbeheri*." The word "costs" again is "*kharcha*" which includes the *farag kharcha* and remaing *abwabs* except *uprohiti Mahal*. The arrangement that the ticcadar should pay a fixed sum for each of these cesses and take the risk of collecting them from the tenants, a risk at that time slight, was no doubt come to for the convenience of the landlord who might have a difficulty in making a separate collection, but at the same time care was taken to have these sums definitely described as what they in fact were, namely, something in addition to the actual rent. The fact that the total of these payments was described as the consolidated *jama* was inevitable. There was no other word to describe it and I am unable to give this fact a signification which, as I think, it was not intended to bear. In *Kalar Singh* v. *Mathura Prasad* (8) decided by Sir Lawrence Jenkins, C. J. and Mookerjee, J., in 1913 somewhat similar features were present. The *nagadi* rent was stated to be Rs. 42-8-0 in the *kabuliyat*. Then followed an undertaking to pay annually a cartload of husk or its value, Rs. 6. The whole was referred to as the said rent and in the schedule the annual *jama* was said to be Rs. 48-8 0. It was held by the Court that the husk was not a part of the rent but an *abwab* and not recoverable. It does not seem to have been argued in that case that the husk might have been recoverable as produce rent. Again in *Sree Kanta Pershad Hajari* v. *Irshad Ali Sarkar* (9) a case under the Bengal Tenancy Act there was a stipulation to pay Rs. 360 as fixed rent and an additional sum of Rs. 17-4-0, the equivalent of presents and unpaid labour, and the whole was described as the total rent. This fact, however, was regarded by the Court as inconclusive and on the construction of the document as a whole it was held that the Rs. 17-4-0 was an illegal *abwab* and not recoverable. Fletcher and Richardson, JJ., on the other hand, in *Nagendra Lal Chowdhury* v. *Hamdoo Mia* (10) where certain *abwabs* were added to the rent and the total amounting to Rs. 13 was described as consolidated rent and payable by instalments, held that the whole including the *abwabs* was recoverable, apparently for the reason that "the tenant in consideration of having the grant of the land to him undertook to pay the Rs 13 by these particular instalments." No other reason is assigned and the Bengal Tenancy Act was not referred to in the judgment. With respect to those learned Judges although their decision may have been justified I am unable to accept the reason stated for their decision as adequate. Two other cases decided in this Court were relied on by the learned Vakil for the Respondent, namely, *Sadanand Tewari* v. *Debnath Manjhi* (11) and *Rudreshwari Prasad Singh* v. *Dhana Mohto* (12). In the former it was held by Mullick and Atkinson, JJ., that where, upon the contract entered into by the Defendants, it was clear that the consideration for the use and occupation of the land was a certain amount of rent in cash and the price of certain quantities of paddy and ghee and that the total of these items was to constitute the whole rent or *jama*, there being no indication that the price of paddy and ghee was intended to be an imposition independent of the rent, such sums were recoverable as

(8) [1913] 19 C. L. J. 402—25 I. C. 47.

(9) [1912] 16 C. L. J. 225—17 I. C. 173.
(10) [1916] 37 I. C. 965.
(11) [1916] 3 P. L W. 270—37 I. C. 980—(1917) P. H C. C. 287.
(12) [1919] 52 I. C. 119.

part of the rent I can find nothing in that decision which conflicts with the view I have already expressed. I may add that it was a case falling under the Chota Nagpur Tenancy Act and the Rent Act (X of 1859), and the Bengal Tenancy Act was not considered. The second case was a decision of Das, J., sitting singly and although entitled to great respect it is not binding on this Bench. The Defendant there covenanted to pay Rs. 167-7-0 as mal jama, but it appeared from the kabuliyat that about Rs. 11 of that sum was made up of items which would ordinarily fall under the denomination of abwabs. The learned Judge, reversing the decision of the two lower Courts, found that the Defendant had agreed to pay the whole sum as rent and that the whole was recoverable. The decision may be justified on the ground that the agreement was to pay the whole as mal rent but the learned Judge in the course of his judgment went further than. I think, was necessary for the determination of the case. Although he makes it clear that the whole sum was payable under the terms of the kabuliyat as mal rent, there are dicta in the judgment which, with respect, I consider cannot be supported. They are to the effect that every item is recoverable as rent if it forms part of the consideration for the lease even if it may not have been described therein as rent.

Each case must be decided, I think, upon the construction of the particular lease in question and the construction of one document is not necessarily of much assistance in considering another. I recognise that the parties in this case were contracting on equal terms and I confess I have no sympathy with the Defendant, but it appears to me that the arrangement come to had the ultimate object of keeping in force the exaction of illegal payments from the *raiyats*. I am also aware that it is essentially desirable to refrain as far as possible from interfering with the freedom of contract and only considerations of public policy or express statutory enactment can justify it. But in the present case the statute is clear and prohibits such a contract. The motive underlying this enactment is also one of public policy. No distinction is made in the Act between a *raiyat* and any intermediate tenant except in the case of a permanent mukarrari lease as provided in cl. 3 of S. 74 and in S. 179 of the Act. The wisdom of extending the prohibition to tenure-holders as well as *raiyats* is exemplified by the present case. The ticcadar who contracts to pay abwabs has a strong motive for enforcing similar exactions from the *raiyats* and so the objectionable system is kept alive, but if he is prohibited from so contracting the motive is removed

I hold that the only items recoverable under this lease apart from the produce rent are the first two named in the schedule, namely. rent and road-cess, and that the decree should be varied by disallowing the other items.

The next point taken by the Appellant is that the sum of Rs. 3,641-4-11 allowed by the decree as the costs of survey is not recoverable under the terms of cl. 21 of the lease. The clause reads as follows:—

"If the survey is made of the aforesaid villages either privately or by the Government underany law in force for the time being, the said thikadar shall make honest and proper *pairvi* and bear the costs of the same, and he shall till (the end of) the term of thika abide by the loss and gain arising therefrom"

A survey of the Champaran District, in which these viliages are situated, took place under the Bengal Tenancy Act and was completed in 1917. The costs incurred by the Government in such cases are by law recoverable in certain proportions from the landlords and the tenants. It is the Plaintiff's proportion of such costs which are claimed in the present suit. The parties interested, however, who appear before the Survey and Settlement Officers to protect their own interest incur expenses in so doing. If there is much dispute between the parties concerned these costs may be considerable. By cl. 21 of the lease the ticcadar undertook to look after the interests of his landlord as well as his own and to bear the cost of so doing. Their interests, as against those of the

raiyats, would no doubt be identical. The learned Judge of the trial Court considered that the obligation of the ticcadar under cl. 21 was not merely to protect the interest of the landlord by making *pairvi* and to bear the cost of so doing, but also to pay the landlord's proportion of the Government's costs of survey. In my opinion the clause will not bear that interpretation. The costs referred to in the clause seem to me upon a proper construction to refer solely to the costs incurred by the ticcadar in proper *pairvi*, and, according to his diligence or remissness in so doing he was to enjoy the profit or suffer the loss caused thereby. The learned Judges thought that according to the terms of the lease all the costs of survey were to be borne by the lessee and that cl. 21 made it quite clear, but it seems to me that had it been intended that the ticcadar should bear the landlord's proportion of the Government's expenses of conducting the survey, the clause would have been much more specific in that respect. In my opinion the costs which the ticcadar undertook to bear under cl. 21 were the costs of proper *pairvi* and nothing else, and sum awarded in the decree under this head is not recoverable.

Although the Defendant appealed against that part of the decree which allowed Rs. 432 as damages for failure to deliver jamabandis the matter was not pressed and no argument was addressed to us on that part of the appeal.

The Defendant also appealed from that part of the decree which ordered ejectment under S. 56 of the Bengal Tenancy Act if within 15 days the rent found due should not be deposited. The learned Judge, it should be mentioned, had found that S. 155 of the Bengal Tenancy Act would have been applicable to the present case but for the fact that the conditions as to notice mentioned in the section had not been complied with. He found however that S. 66, which relates to ejectment in the case of non-payment of arrears of rent, was applicable and passed a decree under that section. The contention of the Defendant before us was that if he was not liable for the abwabs there was no rent due. If upon a proper calculation of the rent payable as directed in this judgment it should appear that at the time of suit, after giving credit for the sums paid and the amount deposited in Court before trial, no further rent was due, then a decree for ejectment under S. 66 of the Bengal Tenancy Act would be wrong. As the amount decreed has been deposited by the Defendant in pursuance of the decree, no ejectment has in fact taken place. The question is therefore of academic interest only. The Defendant, however, will be entitled to recover from the Plaintiff, if he has been paid, or from the amount deposited in Court under the decree, as the case may be, the excess, if any, over and above his liability under the present judgment.

The cross-objection by the Plaintiff was confined to three points: (1) That the Transfer of Property Act and not the Bengal Tenancy Act was applicable to the present lease and that under the former Act the Defendant was liable to ejectment by reason of his breach of the conditions of the lease, which entitled the lessor to reenter as provided in S. 111 (g) of that Act; (2) that the claim for damages for failing to supply carts and thatching grass ought to have been allowed by the learned Judge; and, (3) that the learned Judge ought to have assessed the price of the produce rent at Rs. 3 and not Rs. 2 per maund. The second and third points were abandoned in the course of argument and it is necessary only to deal with the first.

If the lease in question is a lease for agricultural purposes, then by S. 117 of the Transfer of Property Act the other provisions of that Chapter including S. 111 have no application. The learned Judge found that the lease was one for agricultural purposes, and further that the Defendant's status being that of a tenure-holder as defined in S. 5 of he Bengal Tenancy Act, the provisions of that Act were applicable.

It was contended that the lease was not a lease for agricultural purposes and in support of this contention the case of *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry* (13) was relied on. It was there held that a putni interest

(13) [1901] 28 Cal. 744.

in a share in a zemindari was not a lease for agricultural purposes within the meaning of S. 117 of the Transfer of Property Act. The objects for which the lease was granted were referred to in the judgment and do not appear to include direct cultivation by the tenant of any part of the land. In the present case there were *zerait* lands as well as lands settled with *raiyats* and the lease contemplates the direct cultivation of the former by the tenant. The facts are therefore to some extent dissimilar in this case. Sir Francis Maclean, C. J., who decided the case above cited, affirmed on appeal the later decision of Mitra, J., in *Babu Ram Roy* v. *Mahendra Nath Samanta* (14) where it was held that a lease of homestead lands granted by an occupancy *raiyat* in favour of an under-*raiyat* was governed by the Bengal Tenancy Act and not by the Transfer of Property Act, although the land leased was not agricultural land but homestead land. The suit was one to eject the under-*raiyat*. One of the grounds of the decision was that although the purpose of the tenancy granted to the sub-tenant was not agricultural nevertheless as the Bengal Tenancy Act provides for the benefit of under-*raiyats* as well as raiyats, the provisions of S. 49 of the latter Act ought to be applied. In the present case the land was undoubtedly agricultural land to which the Bengal Tenancy Act applies. The Defendant was also a tenant within the meaning of the Act and his status was that of a tenure-holder. Such a case comes within the express provisions of the Bengal Tenancy Act and the benefit of S. 66 must operate in favour of the lessee, unless it can be said that the Transfer of Property Act deprives him of such benefit. In construing the two acts it must be remembered that although the Bengal Tenancy Act is later in time, there were somewhat similar provisions in the Bengal Rent Acts of 1859 and 1869 and it was probably the intention of the legislature in exempting leases for agricultural purposes from the operations of Chap. V of the Transfer of Property Act to retain in force the special provisions relating to the class of leases dealt with in those Acts and which may be compendiously described as leases for agricultural purposes. I consider therefore that a liberal interpretation should be given to the words of S. 117. There is no doubt that under the present lease the lessee would have a considerable area of the villages under his own cultivation. He was also to pay a produce rent in addition to the cash rent and in case of dispossession he was to get half the crop grown on the *zerait* lands, the other half going to the landlord. Lands left vacant or abandoned were to be brought into direct cultivation or settled with other tenants. He had also certain obligations to see that the lands were cultivated in a proper manner. He was to take care of the existing boundaries *bandhs* and *pynes* and was not to allow the water from the *pynes* to be taken into other *elakas*. All these matters point to the conclusion that the lease was one for agricultural purposes. I do not think it can be said that the main purpose of the lease was merely to collect rents. It was, I think, a lease for agricultural purposes. The cross objection, in my opinion, fails and should be dismissed with costs.

The Appellant is entitled to the costs of the appeal. The decree will be varied in accordance with the directions stated in this judgment. The costs in the trial Court will follow the result of the calculation of the Defendant's indebtedness as directed above The parties will have liberty to apply for further directions as to costs in the lower Court, if necessary, when the figures have been ascertained.

Foster, J.—I agree. Judging by the pleadings in the written statement the term *abwab* is used as meaning, in the circumstances of this particular lease, both an imposition upon the *raiyats* in addition to their actual rents and an imposition upon the *ticcadar* over and above his actual rent. In the latter case S. 74 of the Bengal Tenancy Act would directly bar the claim to the *abwabs*; and in the former case I think, the Defendant's special contract to realize *abwabs* from the tenantry and pass them on to the proprietor would be void and illegal

(14) [1904] 8 C. W. N. 454.

as opposed to public policy. These two distinguishable pleadings in defence, set out in paras. 2 to 5 and in paras. 6 to 8 respectively of the written statement, are I think fully substantiated.

In para. 27 of the document of lease it is clearly stated that the *ticcadar* shall pay embankment cess over and above the rent. Embankment cess is an unlawful imposition. Exs. C-1 and C, the printed forms of receipt used in the Raj, when compared with the tabulated Schedules of the *patta* and *kabuliyat*, show that payments by the *ticcadar* were acknowledged under five heads, (1) rent, (2) road and public works cess, (3) *abwab* on account of embankment cess (*bandbehari*), (4) *kharcha*, (5) *uprohiti mahal*. The last was collected separately, and was appropriated to the Raj priests. The fourth item *kharcha* is the aggregate of most of the *abwabs* tabulated from *farag kharcha* (charge for granting receipts) down to Dewani *dastur* (payment of the upkeep of the Estate office). Some of these *abwabs* are uniform throughout the villages, others vary. The receipts, though printed in brief in parts of the Paper Book are all in fact in the form described In Para. 26 of the document of lease it was stipulated and agreed that *Raj-unks* (the abwabs) payable by custom shall be collected by the ticcadar from the tenants and Banyas on behalf of the Raj, and the ticcadar shall be responsible for any loss, an expression which seems to mean collections in deficit. So these abwabs were, it is clear, impositions of a pecuniary responsibility and liability over and above the ticca rent, properly so called, standing under the denomination of abwabs, Raj *Angs*, *Rakam Dastur* and other like appellation.

The evidence in my opinion clearly shows that these collections were also abwabs over and above the raiyat's rent; and I think that Para. 26 of the lease, the stipulation that they shall be realised from the tenants and Banyas, is an illegal contract. I do not wish in this judgment to make more than supplementary remarks, but I would like to point out that the tax on weights and measures (*bat chappi*) falls on the Banyas of the villages, as is deposed by Plaintiff's witness No.12. This explains why Banyas as well as tenants are mentioned in Para. 26. I regard the Plaintiff's explanation of the insertion of these items in the lease not only as mendacious but even as puerile. There is plenty of credible oral and documentary evidence to show that these abwabs came originally from the cultivator's pockets and were passed on to the proprietor.

There is one other point. It was urged that S. 117 of the Transfer of Property Act did not avail to remove this case from the provisions of Chap. V of that Act. In my opinion the decision of this case must rest entirely on the provision of the Bengal Tenancy Act, because there is everything to show that this was a lease for agricultural purposes. Looking at the kabuliyat I note the following points; (*a*) part of the rent is produce rent: (*b*) the ticcadar is to have the zairat lands cultivated and to enjoy the crops (Paras. 25 and 51; (*c*) the ticcadar is not to cut down certain trees (Para. 8) nor grow indigo (Para. 11) nor make new water courses (Para. 17); (*d*) the ticcadar is to settle lands with tenants at proper rental (Para. 15), and he is to take waste lands of tenants into the landlord's zerait (Para 16). Then looking at the oral evidence. we find in the statements of Defendant's witnesses Nos. 1, 3, 4, 8, 24 and Plaintiff's witnesses No. 12 enough to show that the ticcadar had cultivation in his own control, including fields of thatching grass (kher, translated correctly in the kabuliyat, but incorrectly as "straw" elsewhere). Lastly looking at the pleadings, I would invite attention to Para. 5 and 9 of the plaint, the statement of breaches of convenants, which show clearly how the Plaintiff regarded the case; the tenant was not to settle trees and orchards, but keep them: he was to take under his own cultivation and keep lands vacated by tenants; and he was to render a fixed amount of thatching grass. It seems to me to be clear, therefore, that this is a lease for agricultural purposes and that S. 74 and also Ss. 66 and 155 of the Tenancy Act apply to this case.

Appeal allowed.

1925 PATNA 433

ROSS AND KULWANT SAHAY, JJ.

Lachmi Narayan Tewari and others—Plaintiffs—Appellants.

v.

Ramsaran Tewari and another—Defendants—Respondents.

First Appeal Nos. 119 and 147 of 1923, Decided on 8th January, 1925, against the decision of the Sub. J., Muzaferpur, D/- 27th March, 1923 and 4th May, 1923.

(a) *Civil P. C., S. 2 (2)—Preliminary decree must not deal with matters proper only for final decree.*

In a partition suit, what the plaintiffs are required to do is to plead their title to and possession of and share in he property that is to be partitioned. It is not necessary for the plaintiffs to plead that particular lands purchased by the defendants at a sale in execution were liable to partition. The Court cannot direct in the preliminary decree for partition that since the plaintiffs have not claimed the lands they must be allotted to the defendants at the time of making the partition. That question must be left to be dealt with at the time of drawing up the final decree. If the preliminary decree contains such direction it will be deleted in appeal. [P. 433 C. 2]

(b) *Civil P. C., S. 2 (2)—Suit cannot be dismissed after preliminary decree.*

The Court has no jurisdiction to dismiss the suit after a preliminary decree has been passed in a partition suit merely because there has been delay in producing the commissioner's fee. [P. 434 C. 1]

(c) *Civil P. C. O., 9 R. 8—Dismissal after preliminary decree is revisable.*

An order dismissing a suit for want of prosecution, made after the passing of the preliminary decree is not appealable but is open to revision. [P. 434 C. 1]

Shivshwar Dayal—for Appellants.

Parmeshwar Dayal and *Jadubans Sahay*—for Respondents.

Ross, J.—First Appeal No. 119 of 1923 is an appeal by the plaintiffs in a suit for partition. There is no contest now that a partitian ought to be decreed nor is there any dispute about the shares of the parties. The portion of the preliminary decree to which the plaintiffs take objection is the direction made by the learned Subordinate Judge that in making the partition the plots Nos. 493, 500, 500-963 506, 508 and 509 will be allotted to the *patti* of the defendant No. 1. It appears that these plots were purchased by defendant No. 1 in execution of a decree which, in the written statement, is said to have been a decree for rent but which the plaintiffs say was a decree for money, and there is a dispute between the parties as to whether these lands should be treated as *raiyati* lands of the defendant No. 1 or as *bakasht* lands to which all the *maliks* are entitled. The question, although discussed at the trial, did not properly arise at the stage of making the preliminary decree. No issue was framed on this point and evidence was not gone into. The learned Subordinate Judge has come to his decision largely on the ground that the plaintiffs did not claim the lands as *bakasht* lands in the plaint; but there was no necessity for any such pleading. All that the plaintiffs were required to do was to plead their title to and possession of and share in the property that was to be partitioned. The question which has been discussed with regard to these plots will properly arise for decision when the final decree is made. This will be considered by the commissioner at the time of making the *Raibandi* and decided by the Subordinate Judge in passing the final decree.

I would therefore allow this appeal and direct that the decree of the Subordinate Judge be modified by omitting the direction with regard to the plots specified above.

First appeal No. 147 of 1923 is directed against an order passed by the learned Subordinate Judge on the 4th of May 1923 which runs as follows:

"Plaintiff has not deposited the Commissioner's fee. His pleader says he has no instruction. Unless a commission is issued final decree for partition cannot be made. The case is therefore dismissed for non-prosecution by the plaintiff".

Now it has been decided by the Judicial Committee in *Lachmi Narain Marwariv. Balmukund Marwari* (1) that after a decree has once been made in a suit

(1) 1924 P. C. 198=4 Pat. 61=51 I. A. 321=22 A. L. J. 990=5 L. R. P. C. 171=26 Bom. L. R. 1129=40 C. L. J. 439=(1924 M. W. N. 707=47 M. L. J. 441=29 C. W. N. 391=20 M.L.W. 491=34 M.L.T. 143=5 P.L.T. 623 (P. C.)

the suit cannot be dismissed unless the decree is reversed on appeal; and where the plaintiff fails to appear and take further steps, the Court can properly adjourn the proceedings *sine die* with liberty to the plaintiff to restore the suit to the file on payment of all costs and Court fees (if any) thrown away. Similarly, in *Ranjit Sahi* v. *Maulvi Muhammad Qassim* (2) it was decided by this Court that where a preliminary decree has been passed in a suit for partition the suit cannot be dismissed altogether at a later stage. In my opinion, the learned Subordinate Judge had no jurisdiction to dismiss the suit after a preliminary decree had been passed merely because there was delay in producing the commissioner's fee. It appears that this order is not a decree and, therefore no appeal lies. But there is an application for revision which must be allowed.

The result is therefore that Appeal No. 119 of 1923 is decreed and the preliminary decree of the Subordinate Judge, is modified as directed above. Appeal No. 147 of 1923 is dismissed; but Civil Revision No. 356 of 1923, is allowed and the order of the Subordinate Judge, dated the 4th of May 1923 is set aside and the partition proceedings will continue. The plaintiffs will be entitled to their costs in these cases and the costs are assessed at three gold *Mohurs*.

Kulwant Sahay, J.—I agree.

Decree varied.

(2) 1923 Patna 342=2 Pat. 432=4 P. L. T. 257.

1925 PATNA 434

DAWSON MILLER, C. J. AND MULLICK, J.

Nathuni Narayan Singh and others—Plaintiffs—Appellants.

v

Mahant Arjun Gir and others—Defendants—Respondents.

Mis. Appeal No. 128 of 1924, Decided on 12th November 1924, from an order of the Dt. J. Gaya, D/- 5th May 1924.

Civil P. C., O. 22, R. 4—Several defts—One dying—Joint decree—Others are not exempted.

Where a joint decree is passed against several defendants but one of them has died before the passing of the decree, the decree is not a nullity as against all the defendants but fails only as regards the deceased defendant and his heirs. [P 434 C 2]

Susil Madhab Mullick and *Kailaspathi*—for Appellants.

S. P. Varma and *Hareshwer Prasad Sinha*—for Respondents.

Facts.—In this case, before the plaintiffs got their decree one of the defendants died. When the decree was sought to be executed, it was held by the Lower Appellate Court (overruling the decision of the Trial Court) that the decree was a nullity as against all the defendants and could not be executed. Hence the present appeal.

Mullick, J.—[After stating facts His Lordship proceeded :—Now there is nothing in the judgnent of this Court in *Jungli Lall* v. *Laddu Ram Marwari* (1) upon which the learned District Judge relies which precludes the planitiffs from executing the decree against the surviving judgment-debtors. Further, the Subordinate Judge had jurisdiction to make a decree against the respondents and so long as that decree subsists he cannot be heard to impeach its validity. The decree declared that the 51 defendants were all jointly liable for the decretal sum. Therefore, under S. 43 of the Indian Contract Act, each defendant was liable for the whole debt and it was open to the plaintiffs to proceed against one judgment-debtor or all according as he pleased. The fact that one of them happened to be dead at the time the decree was made cannot affect the right of the decree-holders to recover the money in execution from all or any of the survivors. What would have been the position if the decree-holders had sought to sell the entire tenure in execution is not a question that we are concerned with at the present moment. The appeal will succeed and be decreed with costs in this Court and in the Court of the District Judge.

Dawson Miller, C. J.—I agree. I merely wish to add, as I was a party to the full bench decision of *Jungli Lall* v. *Laddu Ram Marwari* (1) upon which the learned District Judge re-

(1) [1919] 4 Pat. L. J. 240=50 I. C. 529=(1919) P. H. C. C. 105 (F. B.)

lied in support of the decision at which he arrived, that that decision cannot be taken as an authority for the broad proposition which the learned District Judge appears to think it laid down. The only question in that case was whether the property of one of two defendants in the suit who had died before the decree was passed and against whom, before the decree was passed, the suit had abated, was liable to be taken in execution of that decree. It was contended on behalf of his representatives that the decree was a nullity in so far as the deceased was concerned. This Court accepted that argument and held that a decree passed against a deceased person was a nullity in so far as that deceased person was concerned but the Court never laid down the broad proposition that if one of several defendants happens to die before a decree is passed and no one is substituted in his place, the whole decree passed in ignorance of his death is a nullity even against the other defendants in the suit. I entirely agree with the judgment just pronounced by my learned brother.

Appeal allowed.

1925 PATNA 435 (1)

ROSS, J.

Rampratab Marwari—Petitioner.

v.

Sheikh Satif and others—Opposite party.

Criminal Rev. No. 421 of 1924, Decided on 14th November, 1924, from an order of the Dt. Mag. Bhagalpur, D/- 17th June 1924.

Muhammadan Law—Right to pray on another's land does not exist in absence of express or implied permission by owner.

One of the well settled rules of the Muhammadan law is that a Muhammadan cannot say his prayer on the property belonging to another without an express or implied permission of the owner of the property. [P 435, C 2]

K. P. Jayawal and *M. N. Roy*—for Petitioner.

Akbari and *Khurshaid Husain*—for Opposite party.

Judgment.—This application is directed against an order passed under S. 147 of the Criminal Procedure Code in favour of the second party. The subject matter of the litigation was a right of way claimed over land in the occupation of the first party in order that certain Muhammadans should go to worship at a grave on that land which they regarded as the grave of a Peer. The Courts below have found that they had this right of way. But in *Niadar* v. *Tika* (1) Mr. Justice Karamat Husain observed that one of the well settled rules of the Muhammadan law is that a Muhammadan cannot say his prayer on the property belonging to another without an express or implied permission of the owner of the property. Here the action of the first party in erecting a wall round the land negatives the idea that there is any permission express or implied to worship on this land.

It is contended in support of the order that the right which is now in dispute is not the right to pray at the grave, but the right to go over the land to the grave, but in my opinion, these two rights cannot be separated. It is not an independent right of way as an end in itself that is claimed, it is a right to go over the land of the first party in order to worship at the grave on that land. If the right to worship at the grave does not exist, as according to the authority above cited it does not, then the ancillary right cannot exist, and there can be no possession of it.

I therefore allow this application and discharge the order of the Courts below.

Application allowed.

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(1) [1911] 9 I. C. 45.

1925 PATNA 435 (2)

JWALA PRASAD AND KULWANT SAHAY, JJ.

Adit Prasad Singh—Petitioner.

v.

Ramharakh Ahir—Opposite party.

Civil Rev. No. 173 of 1924, Decided on 4th November 1924, from an order of the Sub., J. Shahabad, D/- 30th January, 1924.

Civil P. C. Ss. 151, 148, 149 and 114 and O. 47 R. 1—Deficit Court-fee not paid due to treachery of pleader's clerk—Plaint rejected—Application to restore, lies.

If the statute says that a thing should not be done, S. 151 cannot vest the Court with the power to direct that it should be done; but

when and where there is doublt and difficulty in applying the other provisions of the Code to the facts of a particular case, S. 151 would apply. [P 437 C 2]

The deficit court-fee demanded by the Court was paid by the plaintiff to the pleader who handed it to his clerk to put it in Court. The clerk mis-appropriated the money and filed bogus applications for time to pay the deficit Court-fee with the result that the Court, being tired of such applications, ultimately rejected the plaint. The plaintiff coming to know of the result of the suit and the deceitful conduct of the clerk filed an application in Court for revocation of the order rejecting the plaint and for restoration of the suit to its original file.

Held: the the suit must be restored to file. After having paid the money to a duly constituted agent and an officer of the Court under the Legal Practitioners Act and the rules of the High Court, whose duty it was to deposit it in Court, the responsibility of the plaintiff ceased until he was informed of the default made by the pleader or his clerk. [P 438 C 1]

S. P. Varma and Sambhu Saran—for Petitioner.

Dhanindra Nath Varma—for Opposite party.

Jwala Prasad, J.—We have heard both parties. The case appears to be a very serious one involving a serious misdemeanour and misbehaviour on the part of a clerk of a pleader in the Subordinate Court of Shahabad. The pleader's evidence clearly establishes the plaintiff's case that the deficit court-fee demanded by the Court was paid by the plaintiff to the pleader who handed it to his clerk to put in Court. The clerk misappropriated the money and filed bogus applications for time to pay the dificit court-fee with the result that the Court, being tired of such applications, ultimately rejected the plaint; the plaintiff coming to know of the result of the suit and the deceitful conduct of the clerk filed an application in Court for revocation of the order rejecting the plaint and for restoration of the suit to its original file. The Court below seems to have treated this case as a very simple case of default on the part of the plaintiff, holding that the laches on the part of the pleader's clerk amount to his own laches and that so far as this case is concerned, he is out of Court. I fail to appreciate the contention of the Court below. I am also surprised at the simplicity exhibited by the Court in dealing with such a serious case as an ordinary case of review leaving the aggrieved party to seek his remedy by a suit for compensation against the pleader's clerk, who, perhaps, is a pauper or has absconded. The result of the order of the Court below is to leave the plaintiff practically without any remedy. The Court below has tried to discuss the several provisions in the Code of Civil Procedure bearing on the subject and one by one it has disposed of them by holding that the plaintiff's application does not come under any of them.

It seems to me that the case is of such a flagrant nature that it is impossible to conceive that the Code would leave the case without providing any remedy. If the Court below has failed to find out the pertinent provision in the Code, it must have struck him that the Code is defective; but I cannot impute that lack of knowledge or experience on the part of the legislature and I am fully convinced that the case comes under the purview of the Code. The sections relevant to the point are 14 , 149, 151, Order XLVII, rule 1, read with S. 114, and the chapter relating to appeals from decrees.

The aforesaid provisions of the Code often overlap each other and therefore present sometimes difficulty in applying them to the facts of a particular case. The order rejecting a plaint amounts to a decree under the definition of the term in S. 2 of the Code of Civil Procedure. If the order in question is a decree, it is appealable, and one is apt to ask the question why the plaintiff did not appeal treating the order as a decree. If the question is asked one would find it difficult to answer. Admittedly the plaint was insufficiently stamped and the deficiency had to be made up. Admittedly the deficit Court-fee was not paid within the time fixed by the Court, and in such circumstances the imperative provision in Order 7, rule 11, must apply and the plaint must be rejected. Present this case before a Court of appeal, and the only order which the party could expect is an order of dismissal. Knowing this why would the plaintiff go to the

appellate Court? His case is that the Court acted fully within the powers vested in it but that the pleader's clerk, who is an officer of the Court, behind the back of the Court and that of the party, acted in a deceitful and dishonest manner and he withheld the payment of the money handed over to him in time to be deposited in Court. The only thing that will strike the plaintiff in such a position is to represent the matter to the Court itself which passed the decree. Therefore, although the order may be technically appealable, it is not practically appealable. Now, how to approach the Court? Ask the Court to review its order under Order 47, rule 1. or under the inherent powers of the Court, contained in Ss. 148 to 151 referred to above. Then the difficulty arises in finding out proper and sufficient grounds for a petition under Order 47, rule 1, and, therefore, the legal advisers of the party described the application under the provisions which are supposed to vest the Court with large and unlimited powers. This is the reason for putting the application under S. 151. It is not the party which has put it but the legal adviser of the party. Therefore we have to look to the substance of the petition and the petition discloses the circumstances under which the order rejecting the plaint was passed and the reason for asking the Court to exercise its powers to grant a relief to the plaintiff. It has been pointed out in several cases that the powers vested in S. 151 are indefinite, undetermined, unlimited and large, and it is difficult to define and describe such powers. The circumstances of each case will show whether S. 151 should or should not apply. There are also authorities which, in some way, limit the scope of S. 151 when there is some other provision in the Code which would give relief to the deserving party. Upon this ground it is often urged that when there is a provision for review and when the case can come under Order 47, rule 1, or can be taken in appeal, S. 151 should not apply. I myself would be loath to exercise the power under S. 151 when a party can come under any other provision of the Code. If the statute says that a thing should not be done, S. 151 cannot vest the Court with the power to direct that it should be done; but when and where there is doubt and difficulty in applying the other provisions of the Code to the facts of a particular case I do not know why S. 151 should not apply. It is in these circumstances that, where there is a doubt or dispute as regards there being any other provision in the Code, S. 151 should be invoked. Personally I would apply S. 151 to the facts of the present case although, technically speaking, the order rejecting the plaint is a decree. It is possible that Order 47, rule 1, also applies to the case. The section clearly gives an option to the party to elect to appeal or apply for review. In this case the party did not appeal but applied for review of judgment.

The plaintiff asks for permission to deposit the deficit Court fee. Virtually, therefore, the plaintiff asked for extending the time to pay the Court-fee. The Court has power to extend the time to deposit the Court-fee, even though the time originally fixed has expired, under Ss. 148 and 149.

The only difficulty created is by the final order rejecting the plaint. If that order had not been passed there certainly would have been no difficulty. In the circumstances I would not let that formal order stand in the way of giving relief to the plaintiff. The Court below held that Order 47, rule 1, does not apply and upon that view did not demand that the plaintiff should pay the deficit court fee for review. The Subordinate Judge treated this case as one not coming under the review section of the Code. Therefore there was no fault of the plaintiff if the Court-fee for review was not paid.

In the case of *Rameshwar Mahton* v. *Lala Dwarka Prasad* (1) where a Court wrongly treated an application under Order 47, rule 1 as one under S. 151 and set aside an order of dismissal of a suit under its inherent powers, Das and Ross, JJ., held that the order of the Court below was not vitiated by the aforesaid irregularity. The observation in that case to some

(1) 1925 Patna 36=3 Pat. 778.

extent applies in the present case. Therefore I would hold that the plaintiff was not out of Court and he was fully entitled to ask the Court below to set aside its decree and to restore the case to its original file whether the application be deemed as one under Ss. 151, 149, 148 and 147 or under Order 47, rule 1.

The question is whether the plaintiff was entitled on merits to have the decree set aside. The circumstances stated will clearly show that this point need not be laboured hard for the plaintiff did pay the court-fee to the properly constituted agent who also is an officer of the Court and upon that payment the plaintiff was entitled to be saved from any further harassment due to non-payment of the court fee.

I would, therefore, allow this application, vacate the order rejecting the plaint and restore the case to its original file.

The opposite party is represented by a learned vakil of this Court whom I have heard on all the points concerned, and I do not think that the case should be delayed in any way by formally asking the opposite party to show cause why the order of the Court below should not be vacated. The case rests entirely upon the unimpeachable evidence of the pleader, Babu Harnandan Prasad, whose clerk, Babu Badri Prasad, withheld the money paid by the plaintiff to be deposited in Court and misappropriated the same. The said pleader proves that the money was actually paid by the plaintiff and that the clerk was entrusted with the work of depositing it in Court, but that he mis-appropriated it and on false pretext took adjournment after adjournment, and the case was ultimately dismissed for non-payment of the court-fee. The plaintiff all along believed that the money was actually deposited in Court. After having paid the money to the duly constituted agent and an officer of the Court under the Legal Practitioners Act and the rules of the High Court, whose duty it was to deposit in the Court, the responsibility of the plaintiff ceased until he was informed of the default made by the pleader or his clerk. It is no solace to the plaintiff that he can proceed against the pleader's clerk in the civil or criminal Court. The case was dismissed on account of certain circumstances over which he had no control and for no fault of his. The order of dismissal is set aside and the suit will be restored to its original number on the plaintiff paying the deficit court-fee within three weeks of the notice of this order given to him by the Court below.

The case, however, should not rest here. An investigation into the conduct of Babu Badri Prasad is necessary.

Let notice issue upon Badri Prasad clerk of Babu Harnandan Prasad, Pleader. Arrah, to show cause why he should not be properly dealt with for having committed the offences of cheating and misappropriation and for misconduct as a pleader's clerk in connection with the deposit of the deficit court-fee in Rent Suit No. 2 of 1923

Kulwant Sahay, J.—I agree

Application allowed.

1925 PATNA 438

JAWALA PRASAD, AG. C. J. AND KULWANT SAHAY, J.

Babu Lal Sahu—Judgment-debtor.

v.

Krishna Prashad—Decree-holder.

Appeal No. 241 of 1923, Decided on 4th August, 1924, from Original Order of the Dt. J.. Monghyr.

(a) *Provincial Insolvency Act (1907) S. 44—Conditional discharge-Subsequent proof of debt is not debarred.*

A conditional order of discharge does not debar the creditor from proving his debt in insolvency. A creditor is entitled to tender proof of his debt at any time during the administration so long as there are assets to be distributed and no injustice is done to third parties. 1924 Mad. 163 Foll. [P 440 C 1]

(b) *Provincial Insolvency Act (1907) S. 28—Mortgage decree—Remedy under O. 34, R. 6 barred by limitation—Balance of debt can be proved in insolvency.*

Though the creditor's right to relief under Civil P. C. O. 34, R. 6 is barred by limitation he can still prove the unrealised balance of his debt at any time during the continuance of the insolvency proceedings, provided the debt was alive and not barred at the time when the order adjudging the debtor an insolvent was made. [P 440 C 2]

(c) *Provincial Insolvency Act (1907) S. 28—Absence of decree under Civil P. C. O. 34, R. 6 does not debar proof of debt.*

The absence of a decree under O. 34, R. 6 will not in law debar a creditor from proving his debt in insolvency proceedings. All that is necessary for the purposes of insolvency proceedings is to prove the existence of the debt. [P. 440, C. 2.]

(d) Provincial Insolvency Act (1907) S. 31 (1)—Creditor getting name removed from list is not debarred from proving for balance.

The fact of a secured creditor's getting his name removed from the list of scheduled creditors and proceeding to realise his security will not debar him, of the statutory right to prove for the balance due to him in the insolvency proceedings. [P. 440, C. 2.]

Manohar Lal—for Appellant.

Shiva Narayan Bose—for Respondent.

Facts.—The respondent was one of the secured creditors on the list in the insolvency of the appellant. He obtained a mortgage decree against the insolvent and then applied for the removal of his name from the list of scheduled creditors. Then he realised a portion of his debt by sale of the mortgaged property. A conditional order of discharge was made in favour of the appellant. Afterwards, the respondent applied to prove for the balance of the debt due to him, and to realise the same from the properties acquired by the insolvent subsequent to the conditional order of discharge. The Dt. Judge allowed the application. Hence the present appeal.

Kulwant Sahay, J.—[His Lordship stated facts and proceeded :—]

It is necessary to state at the outset that the insolvency proeeedings were commenced and the order of discharge was made in the present case under the Provincial Insolvency Act III of 1907, but at the time the present application was made by the respondent in June, 1923, the Act of 1907 had been repealed and Act V of 1920 was in force. In order to consider the effect of the discharge made on the 23rd of August, 1919, we have to look to the provisions in the Act of 1907 whereas in considering the present application of the respondent for leave to prove his debt, it is contended that we are to be guided by the Act of 1920. There is, however, no difference in the provisions of the two Acts as regards the effect of a conditional order of discharge.

The provision for discharge in the Act of 1907 is contained in S. 44 of the Act, which section corresponds with Ss. 41 and 42 of the Act of 1920. S. 44 sub-section (2) (*c*), of the Act of 1907, prescribes that the Court may grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property, which exactly corresponds with the provisions of S. 41, sub-section (2) (*c*), of the Act of 1920. Now, the effect of a discharge is to release the insolvent from all debts entered in the schedule (S. 45 of the Act of 1907; S. 44 of the Act of 1920) but a conditional discharge does not release the insolvent. S. 24 (3) of the Act of 1907 which materially corresponds with S. 33 (3) of the Act of 1920 provides that any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act and not entered in the schedule and the Court after causing notice to be served on the insolvent and the other creditors, and hearing their objections (if any) shall comply with or reject the application. Therefore, under the provisions of the Act, it was open to the respondent to apply to the Insolvency Court for leave to prove his debt at any time before the discharge of the insolvent. The discharge contemplated by S. 24 (3) of the old Act [Ss. 33 (3) of the new Act] is the final discharge and not the conditional discharge of the insolvent, the effect of such conditional discharge being that the insolvency proceedings are not terminated. S. 39 (4) of the Act of 1907 which corresponds with S. 64 of the Act of 1920 authorizes certain creditors to prove their debt before the declaration of the final dividend by the Receiver and this shows that debts can be proved even after the order of discharge in certain cases and in the present case no final dividend appears to have been made upto the date when the application was made by the respondent in June, 1923, and it does not appear from the proceedings in the insolvency proceeding that any final dividend has yet been declared. In the decision of the Madras High Court in the case of *Sivasubramania Pillai* v. *Theethiappa Pillai* (1)

(1) [1924] Mad. 163=47 Mad. 120=45 M. L. J. 166=18 M. L. W. 636=(1923) M. W. N. 895.

their Lordships, after an elaborate consideration of all the authorities on the point have come to the conclusion that the conditional order of discharge like the one in the present case, does not debar the creditor from proving his debt in insolvency and that a creditor is entitled to tender proof of his debt at any time during the administration so long as there are assets to be distributed and no injustice is done to third parties. I am, therefore, of opinion that the first contention raised by the learned counsel for the appellant cannot be sustained.

The second contention of the learned counsel for the appellant is that the debt is barred by limitation and is not provable under the Act. His contention is that the sale of the mortgaged property in execution of the mortgage decree having taken place on the 24th April, 1918, the respondent could proceed against the person and other properties of the insolvent only after obtaining a decree under Order 34, rule 6, of the Code of Civil Procedure, and that an application for a decree under Order 34, rule 6, could be made only within three years from the date of sale of the mortgaged properties, and this not having been done his debt is barred by limitation and that he could not be allowed to prove a barred debt. The answer to this contention is contained in S. 28 of the Act of 1907 which corresponds with S. 34 of the Act of 1920. This section provides that:

"All debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act."

The only limitation in sub-S. (2) of S. 28 in the Act of 1907 is that demands in the nature of unliquidated damages arising otherwise than by reason of a contract or breach of trust shall not be provable under this Act, while the limitation in clause (1) of S. 34 of the Act of 1920 is that debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be proveable under this Act. Therefore, if the debt was alive and not barred at the time when the order adjudging the appellant an insolvent was made it can be proved at any time during the continuance of the insolvency proceedings. This view is also supported by the case of *Sivasubramania Pillai* v. *Theethiappa Pillai* (1) referred to above. This contention of the learned counsel for the appellant must also be overruled.

The third objection taken on behalf of the appellant is that the respondent could not be allowed to prove the debt before obtaining a decree under Order 34, rule 6, of the Code of Civil Procedure. Now, the necessity of obtaining a decree under Order 34, rule 6. of the Code of Civil Procedure is to realize the debt by means of execution proceedings. A decree under Order 34, rule 6, does not create a debt but merely authorizes the decree-holder to realize it by means of execution in the ordinary way. The absence of a decree under Order 34, rule 6, will not in law debar a creditor from proving his debt in insolvency proceedings. All that is necessary for the purposes of insolvency proceedings is to prove the existence of the debt and, therefore, the absence of decree under Order 34, rule 6, of the Code of Civil Procedure will not debar the respondent from proving his debt in the present proceedings.

The last objection taken by the appellant is equally unsustainable. Under S. 31, clause (1), of the Act of 1907 which corresponds with S. 47, clause (1), of the Act of 1920, where a secured creditor realizes his security, he may prove for balance due to him after deducting the net amount realized. The fact of his getting his name removed from the list of scheduled creditors and proceeding to realize his security will not debar him of the statutory right to prove for the balance due to him in the insolvency proceedings.

[His Lordship finished by upholding the Dt. Judge's order. Jwala Prasad, Ag. C. J.—Concurred.]

Appeal dismissed.

1925 PATNA 441

JWALA PRASAD, AG. C, J. AND KULWANT SAHAY, J.

Mahadeo Singh and others — Plaintiffs —Appellants.

v.

Basgit Singh and others—Defendants—Respondents.

Second Appeals Nos. 1112 to 1124 of 1922, Decided on 5th August, 1924, from a decision of the Sub. J., Arrah, D/- 29th August, 1922.

Bengal Tenancy Act, S. 49—Civil P.C., O. 5 R. 17— Strict compliance with O. 5, R. 17 is essential.

The rules laid down in O. 5 of the Code of Civil Procedure relating to the service of summons will apply to notices served under S. 49 of the Bengal Tenancy Act. Perhaps R. 19 does not apply to notices issued under the Bengal Tenancy Act for the rule numbered 3 of the Government rules only says that the process shall be served in the manner provided in the Civil Procedure Code. Rule 19 relates to the proof of service by the affidavit of the serving officer or his examination on oath in Court and the decision of the Court that the service was duly made. But rule 17, relating to the mode of service, applies and if it is not complied with, the notice will be vitiated. 1924 Patna 445. Dist.

[P. 441, C, 2, P. 442, C. 1]

H. Prasad—for Appellants.

Simbhu Saran—for Respondents.

Facts.—These suits were ejectment suits on the ground of notice served on the defendants under the B. T. Act S. 49. Various issues were raised. But the lower appellate Court dismissed the suits on the following preliminary ground :—

When the defendants took notice and refused to grant receipts therefor the peon ought to have affixed a copy of the notice on the outer door or some other conspicuous part of the defendant's residence. As this was not done, the notice under S. 49 was bad,

The plaintiffs appealed.

Jwala Prasad, Ag. C. J.—[His Lordship stated facts, and after referring to the question of proper service of notice proceeded :—] There is no special rule for the service of notice to quit under clause (*b*) of S. 49 of the Bengal Tenancy Act. There is however, a rule framed by the Government under S. 189 of the Act, that is rule 3, Part I, of the Government rules in Appendix I of the Bengal Tenancy Act. That rule says that :

"Notice required to be served under this Act shall be served in the manner provided in the Civil Procedure Code for the service of summons."

Therefore the rules laid down in Order 5 of the Code of Civil Procedure relating to the service of summons will apply to notices served under S. 49 of the Bengal Tenancy Act. Rule 16 of Order 5 provides that :

"Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons."

Rule 17 provides that :

"Where the defendant or his agent or such other person, as aforesaid, refuses to sign the acknowledgement, or where the serving officer after using all due and reasonable deligence, cannot find the defendant.....the serving officer shall affix a copy of the summons on the outer door or some other conspicious part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

The serving officer is then required to submit his report and to file a report verifying the correctness of the same either by an affidavit or by examination on oath in Court. The Court then is required, under rule 19, to declare that the summons has been duly served or to pass such order under rule 20 for substituted service if it finds that the defendant is avoiding the service of summons upon him. The order-sheet in the present case, regarding the service of notice, does not record any order of the Court that the notice was duly served upon the defendants under rule 19 of the Order. Perhaps that rule does not apply to notices issued under the Bengal Tenancy Act for the rule numbered 3 of the Government rules only says that the process shall be served in the manner provided in the Civil Procedure Code. Rule 19 relates to the proof of service by the affidavit of the serving officer or his

examination on oath in Court and the decision of the Court that the service was duly made. There is no doubt as held by the Court below that rule 17, relating to the mode of service, was not complied with. In the case of *Nageshwar Bux Rai* v. *Biseswar Dayal Singh* (1) it was held, where the defendant refused to acknowledge service of summons, that the non-compliance with rule 17 regarding the affixing of a copy of the summons on the outer door or a conspicuous part of the house in which the defendant resides, does not vitiate the service of summons. In that case, however, the evidence was that the defendant, when served with notice and a copy of the plaint, retained the same and thus made it impossible for the peon to affix a copy upon the door of his house. There was in that case a further judicial declaration of the Court under rule 19 of Order 5 that the summons was duly served. In the circumstances of that case, therefore, it was held that the defendant was not entitled to have the *ex parte* decree set aside under Order 9, rule 13, of the Code upon the ground that the summons "was not duly served." It was regarded that at the utmost non-compliance with rule 17 was an irregularity and did not necessarily vitiate the service of summons when there was, upon the affidavit of the peon and the circumstances of the case such as the withholding of the copy delivered to the defendant, a finding of the Court under rule 19 that the summons was duly served. The words "duly served" occur in rule 13 under which the application of the defendant was to set aside the *ex parte* decree. These circumstances are not present in ths present case and therefore the decision is distinguishable. In the present case, which is a suit for ejecting the defendants, the Court below is right in holding that the provisions relating to the service of notice laid down in Order 5, rule 17, should be strictly complied with. It has been argued that there is some doubt as to whether notice was required to be served through the Court upon the defendants and a private notice would have been sufficient which would not have necessitated a compliance with the requirements of the rules in Order 5. This may be, but when the plaintiffs choose to have the notice served through the Court the service must be in accordance with rules prescribed for the service of notice.

It was then argued that the defendants took the notice and, therefore, were apprissed of the contents thereof that they were required to vacate the land at the end of the agricultural year next following that in which the notice to quit was served. But knowledge of the defendants is not sufficient to entitle the plaintiffs to bring suits for ejectment under S. 49. If that was so then it would have been permissible to the plaintiffs to prove that there was verbal notice served upon the defendants in a suit for ejectment. The law requires a written notice to be served and that is in the interests of the *raiyat* concerned and when a notice is required to be served it must be served in accordance with the rules prescribed for service. Therefore I agree with the view taken by the learned Subordinate Judge in these cases and dismiss these appeals with costs.

Let it be noted that inasmuch as the Subordinate Judge disposed of the defendants' appeals upon the preliminary issue he did not decide the other issues in the case raised and determined by the Munsif. These issues are, therefore, undetermined in the case.

Kulwant Sahay, J. concurred.

Appeals dismissed.

(1) 1921 Patna 446=3 Pat. 236=2 Pat. L. R 58=5 Pat. L.T. 576.

1925 PATNA 442

ADAMI AND SEN, JJ.

Rajendra Prasad Bose—Plaintiff—Applicant.

v.

Gopal Prasad Bose—Defendant—Opposite Party.

In the matter of Pauper Mis. Case No. 3 of 1923, Decided on 25th June, 1924.

(a) *Civil P. C., O. 44, R. 1 Proviso—Direction is mandatory.*

The Court is entirely precluded from admitting an application under O. 44 R. 1 unless satisfied that the decree of lower Court, is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. The direction contained in the proviso to the Rule is mandatory. [P. 443, C. 1]

(b) *Evidence Act, S. 90 — Ancient document produced from Collector's custody was held presumably genuine in the circumstances of the case.*

Though the mere fact of a certain document having been produced from a Court where it had been filed does not necessarily bring that docu-

ment within the requirements of S. 90, yet, the question depends upon the circumstances of each particular case. [P 443 C 2, P 444 C 1]

The document was 54 years old and was submitted to the Magistrate and collector with the express purpose that he might take the necessary steps in order to bring the estate under the management of the Court of Wards. The collector recorded an order which did not throw any doubt upon the genuineness of the document.

Held: that the Court was entitled to accept the document, fifty four years old, as presumably genuine under the provisions of S. 90.[P 444 C 1]

S. C. Chatterjee—for Applicants.

J. N. Bose and G. C. Roy—for Opposite Party.

Facts.—This was an application under O. 44 R. I of the Civil P. C. for leave to appeal as paupers. There was a delay of seven days in presenting the application.

Sen, J.—[After stating facts, set out as above, His Lordship proceeded as follows:—] There are therefore two points for consideration in this case. The first is whether the case satisfies the requirements of the proviso to Order 44, rule 1, of the Code of Civil Procedure, and, secondly, whether extension of time can be allowed under S. 5 of the Limitation Act.

As regards the first point, it seems to us that we are entirely precluded from admitting the application unless we are satisfied that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. Those being the express words of the section it seems to us that the direction is mandatory.

Three points have been urged by the learned Vakil for the applicants, Mr. S. C. Chatterji, in order to support his contention that the case satisfies the requirements of the proviso to rule 1 of Order, 44.

Before I enter upon a consideration of those points, it is necessary to state in brief the nature of the suit and the points of contention between the parties.

The suit was instituted by the plaintiffs for the recovery of possession of extensive properties of the value of over two lakhs as reversioners upon the death of one Allahadini Dasi in September, 1920. One Ram Prasad Bose died on the 16th of February, 1869, leaving as it is alleged by the defendants a deed of *anumatipatra* duly executed as also a Will. He died rather suddenly on the day aforementioned having been stricken with cholera. It is said that as he was very anxious to see that his line was continued after his death, he took particular care to have a deed of *anumatipatra* executed on that date. After his death on the 26th of February, his father Golak Prasad Bose, who had been in the interior of the district, hurried to Balasore, the place where his son had suddenly died, and obtained from an old and faithful servant of his son the deed of *anumatipatra* and the Will and on that date, namely, the 26th February, 1869, he deposited these two documents with the Collector of the district together with an application praying that the Court of Wards might take over charge of the whole of the estate. Thereupon, it is said, an order was passed by the Collector on that very day in the following terms:

"Two documents filed along with a petition not to be given to anybody until further orders."

These two documents lay in the Collector's office all these years and it was after repeated applications by the defendants that they succeeded in obtaining a production of these documents from the Collector's office at the trial of the suit.

It was contended by the plaintiffs at the trial that both these documents were forged and fabricated, that in point of fact Ram Prasad Bose was too ill on that day to be able to execute them, that he had no sound disposing capacity, that no adoption ever took place in pursuance of the instrument of *anumatipatra*, and that the contention that the adopted son, and since his death his son the present defendant, had been in possession of the estate was entirely a myth, the person who had been in possession being Sreemati Allahadini Dasi the widow of Ram Prasad, deceased.

Mr. Chatterji has raised three points before us: the first is that the instrument of *anumatipatra* has not been produced from proper custody and, therefore, should not have been admitted as evidence under the provisions of S. 90 of the Evidence Act. In support of this contention he cites the ruling in *Gudadhur Paul Chowdhry* v. *Bhyrub Chunder Bhattacharji* (1), where there is an observation that the mere fact of a certain document having been produced from a Court where it had been filed does not necessarily bring that document within the requirements of S. 90. As a general proposition we have no doubt that it is perfectly correct but it

(1) [1880] 5 Cal. 918.

depends upon the circumstances of each particular case. In the present instance we find that this document was submitted to the Magistrate and Collector with the express purpose that he might take the necessary steps in order to bring the estate under the management of the Court of Wards. It cannot be doubted that it is the Collector who is the person to be approached in the first instance for any such proceeding. The Collector records an order which on the face of it does not at all appear to throw any doubt upon the genuineness of the document. It is contended by Mr. Chatterji that the very fact that such an order was passed would show that the Collector doubted the genuineness of the document; but it seems to us that unless there is some evidence to that effect it is difficult to construe the order in that sense. In the above circumstances, the Court below was apparently entitled to accept the document, fifty four years old, as presumably genuine under the provisions of S. 90 of the Evidence Act.

[His Lordship then referred to the contention that the *anumatipatra* was a forged document and held that the contention was wrong].

The last objection which the learned Vakil has put forward is that even conceding that the instrument was genuine, the actual adoption of Krishna Prasad Bose was not in accordance with the *anumatipatra*, and that, on the contrary, it was in direct violation of the terms of the *anumatipatra*. The authority to adopt distinctly states that the plaintiff No. 2 known as Chemo should have the first chance of being adopted provided that there was nothing illegal in such adoption, and failing him some other boy according to the liking or choice of Allahadini Dasi might be adopted but with the opinion or approval of the father, Golak Prasad. Now it so happened that Golak Prasad died four years after the death of Ram Prasad, that is to say, in 1873, and it was not till the year 1884 that the adoption took place. It is also proved in the case that Allahadini Dasi was a mere girl, a minor of tender years, at the time when Golak Prasad died. Subsequently she found that there were troubles with regard to the estate and there were conflicting claims set up by other parties and with a view to set at rest all these disputes she thought that she would exercise the power given to her under the instrument to adopt. At that time the condition which was laid down in the *anumatipatra* that the approval and the opinion of the father should be obtained was impossible of performance. The question is whether in the circumstances the power to adopt failed altogether. The learned Subordinate Judge has held to the contrary and he has given his reasons which appear to be quite cogent and we do not see any reason to dissent from his view, unless and until all the evidence is placed before us at the time of the hearing of the appeal.

All that we are concerned with at the present moment is whether on the face of them the judgment and decree are erroneous or unjust. We feel constrained to say that we are not in a position to take that view. If the appeal is heard as an ordinary appeal it will be for the Court, before which it comes, to form its own conclusions upon all the evidence placed before it. In the view that we take, the application must be dismissed on this ground, and, therefore, we do not think it necessary at all to deal with the other matter, namely, as to the extension of time under S. 5 of the Limitation Act.

Adami, J.—I agree.

Application dismissed.

1925 PATNA 444.

ADAMI AND SEN, JJ.

Monomohini Dasi—Objector—Appellant.

v.

Hari Prasad Bose—Respondent.

Appeals Nos. 3, 5 and 7 of 1923, Decided on 8th July, 1924 from Original Decrees of the Dt. J. Cuttack, D/- 4th June, 1923.

✱ (a) *Guardians and Wards Act* (*VIII of* 1890) *S. 17—Guardian for adopted son—Natural father should not be preferred in presence of fit member of adoptive family.*

In considering the guardianship of a minor who is an adopted son, the first consideration must be with regard to the interest and the welfare of the minor, and, after that, the Court has to see how far the intentions of the adoptive father can be best carried out. Nothing should be done the effect of which will be to frustrate the wishes of the adoptive parents, by eventually leading the boy to disregard the traditions of the family of his adoption. So long as any member of the adoptive family fit to be appointed guardian is forthcoming, the Court should not appoint the natural father of the minor as his guardian. So in a competition between the adoptive pater-

nal grandmother and the natural father of the adopted boy the paternal grandmother should be preferred. 15 C. W. N. 558 Dist. [P. 445, C, 2.]

(b) *Guardians and Wards Act (VIII of 1890) S. 17 (2)—"Relation" is not relationship.*

In S. 17 (2) 'relation' does not mean relationship [P. 445, C, 2.]

Susil Madhab Mullick, Siva Narain Bose and *Satya N. Sen Gupta*—for Appellant.

J. N. Bose and *Durga Prosanna Das Gupta*—for Respondent.

Facts.—The question in this case was as to the appointment of a guardian for the person of a minor who was the adopted son of one Nand Kumar, deceased. The adoptive mother also was no more. The District Judge appointed Hari Prasad the minor's natual father as guardian. Against this order, appeals were filed by Monomohini Dasi the minor's adoptive paternal grandmother, Jagat Balav Ghose, the minor's adoptive maternal grandfather who was also one of the executors of the adoptive father's will, and by the executors of the will as such.

Adami, J.— [His Lordship set out the facts of the case and proceeded.—] Our first consideration must be with regard to the interest and the welfare of the minor, and after that, we have to see how far the intentions of the adoptive father can be best carried out.

With regard to the welfare of the minor it seems to me that there is is not much difference between the various applicants if they do their duty. It is important that the boy should be given an education to fit him for his position as a member of the family of Nand Kumar who was a man of some wealth, leaving property valued at five lakhs. It is important then that he should be sent to a good school at Cuttack, and as matter of fact since his appointment as guardian, Hari Prasad has kept the boy at the Revenshaw College with a tutor guardian appointed by the District Judge. But Monomonini or Jagat Ballav or the executors would have been able to do and probably would have done, exactly the same and as a matter of fact Jagat Ballav lives in Cuttack and had a house where the boy could be kept, while Hari Prasad lives at Bahukud and a house has to be engaged for the minor.

The next question is whether by the appointment of Hari Prasad as guardian of the minor, the full intentions of Nand Kumar are being carried out. Tho learned District Judge has relied on the case of *Gunga Prasad Bhattacharjee* v. *HaraKanta Choudhuri* (1). There one Brajo Mohan Roy died living a widow, a minor son and two daughters; the son died and the widow adopted the minor son of Hara Kanta. On the widow's death, Hara Kanta, the natural father, applied to be appointed guardian of the person and property of the minor. An executor appointed under Brojo Mohan Roy's Will opposed the application with regard to the property and two brothers of the widow and one of her two daughters opposed the application with regard to the guardianship of the person. It was argued that the natural father of the minor adopted boy was not fit to be appointed as guardian of his person since by adoption the minor was cut off from all relationships with his natural family and by leaving him in the custody of his natural father the ties with his adoptive family would be severed. Sharfuddin, J., in that case held that the natural father was properly appointed guardian of the person of the adopted boy; but that case is distinguishable from the present one, for there the two daughters who applied were both married into other families, while the brothers of the widow were not members of the family of the adoptive father, so that there was no member of the adoptive father's family alive. In the present case the paternal grandmother Monomohini is alive and ordinarily she would be the proper guardian of the boy. It appears too that in that case the learned Judge considered that the words in clause (2) of S.17 of the Guardian and Wards Act, 8 of 1890 :

"Any existing or previous relations of the proposed guardian with the minor or his property."

would cover the case of a natural father with regard to his son who had been adopted. It is clear, I think, that in that clause relation does not mean relationship. It seems that if the adopted boy is again put in charge of his natural father all the objects of the adoption are lost; he will not be likely to keep the traditions of the family of his adoption and will be brought up in the traditions of his natural father's family and will be likely, when he grows up, to repudiate all relationship with the adoptive father's family. Thus the intention of the adoptive parents would be frustrated.

(1) [1910] 15 C. W. N. 558=7 I. C. 234.

In Miscellaneous Judicial Case No. 24 of 1924, which came up before Jwala Prasad and Kulwant Sahay, JJ., in connection with the present dispute, subsequent to the order passed by the District Judge from which these appeals have been lodged, Jwala Prasad, J., said :

"The boy was six months old when he was adopted and had been living in the adoptive family up to the death of his adoptive mother in the year 1922 for a period of about 8 or 9 years. The boy had developed affection for the adoptive grandmother to such an extent that it was difficult for the District Judge to enforce his order to hand over the boy to the natural father"....."The object of adoption by Nand Kumar Bose was to affiliate the boy into his family and to disassociate himself completely from his natural father and family. The boy is to become a member of the adoptive family and to own the adoptive father and the adoptive mother as his parents and the relations of the adoptive family as his own relations. All traces of relationship with the natural parents or their relations had to be effaced."

Speaking of the tutor who happened to be appointed, Jwala Prasad, J., said :

"He should have reared up sentiments such as the adoptive father wanted to imbibe him with. The District Judge should not encourage any foreign tendencies being developed in the boy ; and when such matters are brought to his notice he should see that such sentiments are soon destroyed and not allowed to grow"..... "If the boy is not shaped from now to take his proper position in the adoptive family, after he comes of age he will be totally lost to the family and perhaps he would like to go back to the natural father and that might be the game which the natural father is perhaps now trying to play."

In my opinion, in this case, the intentions of the adoptive father would be frustrated if the boy is allowed to remain in charge of Hari Prasad.

[His Lordship then considered the evidence and doubting the disinterestedness of Hari Prasad, held that he was not a proper person to be appointed guardian. Then referring to the other applicants, His Lordship observed :—]

With regard to the application of two executors jointly, I do not think that it is proper that it should be granted. It is necessary that the person who is appointed guardian of the minor should live with him and look after him and attend to his daily needs. The two executors could not do this properly: besides there is the objection, which has been considered by the District Judge and accepted, that the two executors under the will would have the disposing power over the properties of Nand Kumar on the death of the minor. It seems that these executors, under the terms of the will, could not be said to be the presumptive heirs. There is no resonable ground before us for suspision or fear that men of the age of Jagat Ballav and Benode Lal, who have up to the present managed the property carefully and well, would have any thought of bringing an end to the life of the minor or of doing anything disadvantageous to him. Jagat Ballav Ghose is an old man of about 75 and it is not likely that he would covet in any way the property of the minor. With regard to the application by Jagat Ballav alone, the remarks I have made with regard to the two executors apply. It may be that there is little likelihood that Jagat Ballav would be moved by any interest adverse to the minor, but he is not a member of Nand Kumar's family though he is the father of the minor's adoptive mother. In my opinion it is preferable that in a case like this the same person should not be guardian both of the property and person of the minor.

We come next to the application of Monomohini and this application, I think, should have been granted by the District Judge. The objections put forward against her are merely to the effect that she is old, somewhat weakminded. and has lost all interest in worldly affairs. That she has been fond of the minor is not denied, and that he was fond of her. He had lived with her ever since Sarojini's death and had been in the house with her previous to that. The evidence as to the state of Monomohini's mind is very vague : it is merely said that she is crazy ; but the chief witness who gives evidence as to this is a Sub-Inspector of Schools who has never been posted in the Bahukud Circle and seems to have had little opportunity of forming an opinion. From the manner in which she has applied to be made guardian and her subsequent applications to be allowed to see the boy. it would appear that she is by no means of weak intellect. As I have said before, she

would ordinarily be the proper person to be appointed guardian of the person of the minor, being the paternal grand-mother. Furthermore it is quite evident from the will by which she was empowered to adopt a son to Nand Kumar on the failure of adoption by Sarojini, that Nand Kumar placed full confidence and trust in her and would have liked her to act as the mother of a boy adopted to him. She will live in Cuttack and be able to look after the boy and will have the advice and help of competent advisers. It is true that she is old but she may have many years to live yet, and I have no doubt as to her competence. In my mind she is the right person to be appointed the guardian of the person of Krishna Kumar Bose, the minor. To ensure the welfare of the minor and his interest, it will be necessary that the boy be kept at school and be properly educated at the Raven Shaw College or some other good school and that he be put in the care of a tutor guardian for this purpose. If in the opinion of the District Judge the present tutor-guardian is no longer suitable owing to his want of sympathy with Monomohini Dasi, it will be necessary to dismiss him and appoint another tutor.

[His Lordshipconcluded by allowing the appeal of Mohomobini Dasi with costs and dismissing the other appeals.]

Sen, J. agreed.

Order set aside.

1925 PATNA 447

ADAMI, J.

Jangal Singh and another—Petitioners

v,

Radha Kishun—Opposite Party.

Criminal Rev. No. 198 of 1924, Decided on 20th May 1924, from an order of the S. J., Muzaferpur, D/- 25th March 1925.

Criminal P. C., Ss. 438 and 439—Dismissa must not be lighlty disturbed.

A Court should not lightly set aside in revision an order of dismissal of complaint but should only do so when it is clear that there has been a miscarriage of justice. [P 448 C 2]

G. C. Pal—for Petitioners.

S. N. Sahay—for Opposite Party.

Judgment.—This application is directed against an order of the Sessions Judge of Muzafferpur directing further inquiry into the complaint of Radha Kishun against Jangal Singh Radha Kishun is a banker and Jangal Singh is a licensee for ferries. It appears that there is litigation between the two with regard to a ferry partnership and with regard to various funds. Radha Kishun complained that, for the purpose of admitting accounts between the two, Jangal Singh came to his bank with his clerk Lakhi Lal on the 11th November 1923, and for the purposes of adjusting the accounts Radha Kishun read out the items of account and Lakhi wrote them down on a chitha. While this was being done Jangal Singh took the chitha from Lakhi Lal and said that he wanted to look at it in better light in the verandah and having got the chitha into his hands, went out of the door on to the road way and handed the chitha to a *sowar*, who thereupon galloped away with it. Radha Kishun seeing what had happened tried to stop Jangal Singh and detained him but Jangal Singh jumped into his *tumtum*, and after his peons had pushed away Radha Kishun, drove off. A complaint was made before the Magistrate of an offence under S. 395 Indian Penal Code which is dacoity. The Subdivisional Magistrate who recorded the complaint sent the case to the police for investigation with the result that after some length of time the police reported that the case was not a true one. Radha Kishun petitioned the Subdivisional Magistrate to the effect that the police were against him, and had in the first place refused to record an information which he lodged directly after the occurrence, merely recording a Sanha, which did not amount to an information of a cognizable offence, and then conducted the investigation with a bias against him. The Subdivisional Magistrate told him that he might produce evidence. He thereupon produced himself and one witness, a pleader called Chatturbhuj Sahai. The Magistrate, after considering the police report and the evidence given by the complainant and his witness, dismissed the complaint finding that no offence had been made out. The learned Sessions Judge considered that the reasons given by the Magistrate for dismissing the complaint were not sufficient and that the complainant had not been given sufficient opportunity of proving his case before the Magistrate.

Before this Court it is argued that the Sessions Judge was wrong in upsetting the

order of the Magistrate. The learned Magistrate gave full reasons for distrusting the truth of the complainant's case. He pointed out that in the first place the information given to the police did not disclose an offence. The entry in the diary shows that Radha Kishun told the police officer that Jangal Singh had obtained from him the chitha and, that day, had refused to give it back. In that entry no mention is made of the handing over of the chitha to any *sowar*, nor is it said that Jangal Singh had forcibly taken the chitha away. The Magistrate did not think it likely that the head constable could make up a story so quickly considering that the statement was made by Radha Kishun at the police station directly after the occurrence Soon after the complaint was made in this case Radha Kishun instituted a sivil suit against Jangal Singh and in the plaint repeated the allegations as to the taking of the chitha which he had made in the complaint. The Magistrate considered that the question whether Jangal Singh had withheld the chitha would be decided in the civil case, and that it was not right to come to a finding on the point in a criminal case, which would prejudge the issse of limitation in the civil case.

Now I have read through the police report carefully and it certainly shows good reasons for distrusting the complainant's story. The police show that the witnesses contradicted each other as to facts or relied merely on heresay. The Chief witness brought before the Magistrate by Radha Kishun was the Vakil, Chaturbhuj Sahay, and he says that he saw Jangal Singh go to his *tumtum* followed by Radha Kishun but that he did not see the handing of any chitha to a *sowar*, nor did he hear the galloping of the *sowar* to which some of the other witnesses alluded before the police. His evidence would fully agree with what is shown by the police diary to have been the first statement made by Radha Kishun namely that Jangal had obtained the chitha and refused to give it back. According to other witnesses examined by the police the *sowar* was close to the *tumtum*, so if Babu Chaturbhuj Sahay saw the *tumtum* he must also have seen the *sowar*. I myself do not think that on the spur of the moment the head constable could have decided to record a note of the statement made by Radha Kishun as to convert a criminal charge into a statement that a civil wrong had been perpetrated. It has further to be noted that the complainant was told that he might bring evidence and only produced one witness. It was not then incumbent upon the Magistrate to cause other witnesses to be examined before him. The Magistrate was, in my mind, quite justified in dismissing the complaint and I do not think that there was sufficient ground for the Sessions Judge to order a further inquiry.

It is not to be taken that this Court comes to any finding as to the occurrence. Radha Kishun will have full opportunities in the civil case to prove what actually occurred. It may well be that Jangal Singh did obtain the chitha and refused to give it back to Radha Kishun and went off with it ; but this would not amount to a criminal offence, if the chitha was handed over to Jangal Singh voluntarily. It is of course unnecessary to point out that the statement of law made by the investigating police officer to the effect that because it was from Lakhi Lal that Jangal Singh received the chitha he could not be guilty of an offence against Radha Kishun is not correct.

An appellate Court should not lightly set aside an order of dismissal but should only do so when it is clear that there has been a miscarriage of justice.

In the present case the Magistrate gave good reasons for not believing the complainant's story and complainant only produced one witness before him, whose evidence failed to corroborate that part of the story of the alleged occurrence which would convert the present petitioner's action into a criminal offence. Even if the complainant's story were true it could not support a charge of dacoity and that is the charge made in the complaint. I do not think there was justification for directing further inquiry. The application will be granted and the order of the learned Sessions Judge for further inquiry will be set atide.

Order set aside.

1925 PATNA 449

ROSS AND KULWANT SAHAY, JJ.

Sheo Prasad Singh—Appellant.

v.

P. E. Lall—Respondent.

Appeal No. 142 of 1923, Decided on 11th July, 1924, from the Original Order of the Sub. J., Gaya, D/-27th February, 1923.

(a) *Civil P. C., S. 49—Consideration for assignment partly unpaid—Assignee's right to execute depends on parties' intention.*

The question as to whether the non-payment of a part of the consideration money would debar the assignee of a decree from executing the decree would depend on the intention of the parties as to when the title was to pass to the transferee. [P. 449, C. 2.]

(b) *Civil P. C, S. 49—Assignee, benamidar for some judgment-debtors—Equities against these do not bind assignee.*

The right of the assignee of a decree to execute the decree cannot be made conditional upon equities which the mortgagor judgment-debtors may have against the mortgagee judgment-debtors for whom he is said to be the benamidar. [P. 450, C. 1.]

(c) *Civil P. C., S. 47 and O. 21, R. 16—Execution by assignee—Objection as to assignee's title can be raised.*

When a decree is sought to be executed by the assignee thereof, it is competent to the Court to entertain, at the instance of the judgment-debtors and the Original decree-holder, objections to the execution of the decree on the ground that the title to the decree has not passed to the assignee. [P. 450, C. 1.]

Monohar Lall, Guru Saran Prasad, Raghunandan Prasad and *Ram Chandra Bhaduri*—for Appellant.

K. P. Jayaswal and *Kailaspati*—for Respondent.

C. C. Das—for Judgment-debtors.

Facts.—P. Lall was the original mortgage decree-holder. He assigned his decree to the appellant for Rs. 23,200 odd. When the appellant tried to execute the decree, objections were raised by the original decree holder and by the judgment-debtors. The lower Court held that Rs. 6,200 and odd out of the consideration for the assignment remained unpaid and that till it was paid the assignee could not take out execution of the decree. The lower Court further held that the assignee was a benamidar for Idal Singh and Govind Prasad Singh who were mortgagee judgment-debtors and that the assignee could execute the decree subject to the equities which the mortgagor judgment-debtors had against the said mortgagee-judgment debtors. The assignee then appealed to the High Court.

Kulwant Sahay, J.—[His Lordship discussed facts and held on the evidence that Rs. 6,200 and odd out of the consideration had not been paid. Then His Lordship went on as follows:—]

The question then arises as to whether the non-payment of a part of the consideration money would debar the assignee from executing the decree. It has been contended by Mr. Manohar Lal that the transfer was complete on the execution and registration of the deed and that if any sum was due to the transferor on account of the consideration money his remedy lies by a regular suit and that he could not object to the transferee executing the decree. Now this would depend on the intention of the parties. If it was intended that the title should pass on execution and registration of the deed even if a portion of the consideration had not been paid, then no doubt the assignee is entitled to execute the decree: but, on the other hand, if the intention of the parties was that the title should pass only after payment of the full amount of the consideration money, then the assignee is not entitled to execute the decree so long as the balance of the consideration money is not paid. Upon the evidence and the circumstances of the case I am clearly of opinion that the intention of the parties was that title should not pass until the entire amount of the consideration had been paid.

[After discussing evidence His Lordship observed :—]

The authorities are conclusive on the point that the question is one of intention and has to be decided upon the evidence in each case.

The next point raised is that the assignee is not a benamidar for Idal Singh and Govind Prashad Singh. It is unnecessary to decide this point because it is conceded before us that even as such benamidar he is entitled to execute the decree.

As regards the direction of the learned Subordinate Judge that the assignee can be only allowed to execute the decree subject to such equities as the original mortgagor judgment-debtors may have against the transferee judgment-debtors, I am clearly of opinion that such a direction is not warranted by law. S. 49 of the Code of Civil Procedure provides that every transferee of a decree shall hold the same subject to the equities, if any

which the judgment-debtor might have enforced against the original decree holder and, therefore, in the present case, all that the mortgagor judgment-debtor can insist upon is that whatever equities he had against Mr. P Lall shall still be enforced against the transferee; but he cannot insist that whatever equities the mortgagor judgment-debtor may have against the mortgagee or purchaser judgment-debtor can be enforced against the purchaser of the decree. We are not in a position to say what these equities are. It is conceded by Mr. C. C. Das who appears for the objecting judgment-debtor, that the decree must be executed as it stands and the properties sold according to the directions contained in the decree.

Lastly, it has been contended that the objection as regards non-payment of a part of the consideration money and as regards the transferee being a benamidar for some of the judgment-debtors cannot be raised in the present proceedings. I see nothing in law to prevent these matters being raised in the present proceedings. Order 21, rule 16, provides that the decree shall not be executed at the instance of the transferee without notice of the application being given to the transferor and the judgment-debtor, and the object of such notice is to enable the transferor and the judgment-debtor to raise such objections as regards the assignment as may be available to them. The question whether title passed under the assignment is clearly a question which can be taken by the assignor as well as the judgment-debtor. Reliance has been placed upon the provisions of S. 47 of the Code and it has been contended that only such questions can be allowed to be raised as may arise between the parties to the suit or their representatives and relating to the execution, discharge or satisfaction of the decree; and it has been argued that the question raised here is not between the parties to the suit but between one of the parties and his transferee. This may be so as between the transferor and the transferee; but the transferee is clearly a representative of the decree-holder and as such the question can be raised as between him and the judgment-debtor.

I am therefore of opinion that the appellant cannot be allowed to execute the decree so long as he does not pay the balance of the consideration money to the original decree-holder. Subject to the variations in the order of the Subordinate Judge as regards the right of the judgment-debtor to enforce any equities which he may have as observed above, the order of the learned Subordinate Judge must stand. The appeal must be dismissed with costs.

Ross, J.—I agree.

Appeal dismissed.

1925 PATNA 450

ADAMI AND BUCKNILL, JJ.

Guhi Mian and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Rev. No. 541 of 1924, Decided on 17th November 1924, from an order of the S. J., Monghyr, D/- 3rd September 1924.

Criminal P. C., S. 162 — Witness making statement in Court can be asked whether he had made that statement to the police,

The provisions of S. 162 do not prevent the prosecution, after a witness has made a statement, from asking him simply whether he made that statement to the police, or when a witness has made a statement in his evidence, from asking the Police Officer whether in fact the witness had made that statement to him. [P 451 C 1]

C. M. Agarwala for *Muhammad Yunus*—for Petitioners.

Sultan Ahmed—for the Crown.

Facts.—Two constables were on duty at 3-30 A. M. near a certain railway station. They saw six men coming along with bundles. They became suspicious and challenged them. The men began to walk away rapidly and then the constables turned their lanterns towards them. One of the constables recognised the three petitioners and another man and suspected them. The constables gave chase. Two of the men were arrested. But there was a scuffle. In the end, the thieves ran away, leaving some property. The constables took the property to the police station and there they made a report at 4 o'clock in the morning. When the police officers at the police station were examining the property recovered from the men who had run away, they found a visiting card of a pleader, Bindeshari Prasad in the pockets of a coat. So the Sub-Inspector went to Bindeshwari Prasad and asked him whether there had been any theft at his house. Bindeshwari

Prasad said that there had been, his house having been broken into and his property taken away. A first information was drawn up and on the statements of the constables as to the names of the men they had seen, the petitioners in this case were arrested and put upon their trial.

The Deputy Magistrate believed the constables and on the basis of their statements, as also because a coat, which had been found in the petitioner Guhi's house where it was searched, fitted Bindeshwari Prasad, he convicted the petitioners. On appeals being made to the Sessions Judge he decided that it was necessary to call for additional evidence to clear up some points. The defence story was that the head constable had grudge against the petitioners as being his brother's enemies and that he made the constables say that the men who had escaped were the petitioners. The Prosecution witnesses Nos. 4, 5 and 17 supported this defence story by stating that it was the head constable who had given out the names of the men who had been seen. P. Ws. 4 and 5 were declared hostile and were cross-examined as regards the alleged discrepancies between their depositions and their previous statements to the Sub-Inspector on this point. However, P. W. 6 the Sub-Inspector was not asked whether or not they made these statements. The Sessions Judge wanted that this defect should be removed. Also P. W. 17 made a statement in Court in cross-examination as regards the jamadar having mentioned the names of the thieves to the constables. This witness was not declared hostile and was not cross-examined by the prosecution on this point. In the Sessions Judge's opinion it was necessary to determine whether this witness made this statement to the Sub-Inspector or whether it was a subsequent addition to his evidence. The Sessions Judge held that P. W. 17 should be examined further on this point by the lower Court and his statements to the Sub-Inspector should be proved in so far as they were admissible in evidence. Also, the Sessions Judge held that the Sub-Inspector should be examined to prove these statements to the same extent.

The Sessions Judge also remarked that there were two points on which he wished to have the Magistrate's report. One of these points was whether a coat which had been said in the judgment to have fitted Bindeshwari Prasad was tried on him in Court or not. Therefore the Sessions Judge remanded the case to the lower Court in order that P. Ws. 4, 5, 6 and 17 might be further examined on these points.

After remand, the Deputy Magistrate took evidence and submitted it to the Sessions Judge. The Sessions Judge pointed out in his judgment that some of the evidence of the Sub-Inspector taken after remand was not in accordance with the provisions of S. 162 of the Criminal P. C. and so certain portions of the statement of P. W. 17 which had been proved after remand by the Sub-Inspector were not admissible. It was held by the Sessions Judge that the fact that the witness did not mention to the Police certain statements made by him in Court was admissible under the present law. The Sessions Judge held that the evidence of the P. Ws. 4, 5 and 17 was unreliable. He further held on the evidence of the two constables and P. W. 3 that the convictions should be maintained.

Adami, J. — [His Lordship stated facts and referring to the contention on behalf of the petitioner that the remand by the Sessions Judge was illegal and that parts of the evidence taken on remand were not admissible, proceeded :—]

Now it is quite true that under S. 162 statements made to the police by witnesses can only be used by the defence for the purpose of contradicting the prosecution witnesses ; but in this case it is quite clear that after a witness had made some statement before the Deputy Magistrate he had asked if he had made that statement to the police and thereafter when the Sub-Inspector was examined he was asked whether the witness had made that statement to him. Neither the witness nor the Sub-Inspector were asked what statements they made and no statement was introduced into the evidence as having been made by the witness before the Sub-Inspector. I agree with the learned Government Advocate that the provisions of S. 162 do not prevent the prosecution, after a witness has made a statement, asking him simply whether he made that statement to the police, or when a witness has made a statement in his evidence from asking the Sub-Inspector whether in fact the witness had made that statement to him. In doing this there is no use of the statements recorded by the police during their investigation; the witnesses or

the Sub-Inspector are merely asked as to a certain fact. I therefore think that there was nothing wrong in the questions which were put to the witnesses or the Sub-Inspector.

There is no doubt that it was open to the Court under S. 428 to call for additional evidence. Mr. Agarwala argues that the section is not intended for the purpose of curing bad evidence or enabling the prosecution to make up for carelessness during the trial. The intention of the section is that the Court should be enabled to do justice, and in this case I think the learned Sessions Judge was justified. He has rightly discarded the evidence which the Deputy Magistrate had allowed to enter into the record on remand and has ruled it to be inadmissible.

Mr. Agarwala also argues that though under S. 428 the Sessions Judge may call for additional evidence he is not enabled by that section to call for a report from the Magistrate as to what happened in Court. This contention is quite true; but in the present case the result of the report was all in favour of the petitioners and on the basis of that report the Sessions Judge refused to give any weight to the evidence as to the finding of the coat in the house of the petitioner Guhi. Furthermore it is to be remarked that no protest was lodged either in the Court of the Sessions Judge or in the Court of the Deputy Magistrate against the order of remand. The defence in fact took advantage of the order in producing five further defence witnesses. I do not think that at this stage, under the circumstances, they are entitled to come forward and object to the remand as a whole.

As the case comes to us on revision, it is not fit for us to look into the facts, and the points I have mentioned are the only points which have been urged before us.

The Courts below have both found as a fact that the constables recognized the petitioners and have believed a third witness; they have disbelieved both the story of enmity on the part of the head constable and the story of his having prompted the constables as to the persons whom they were to name.

On these findings as to the points of law there is no reason to interfere in the case, and the application must be rejected.

Bucknill, J.—I agree.

Application rejected.

1925 PATNA 452

KULWANT SAHAY, J.

Mt. Ram Kumari—Defendant—Petitioner.

v.

Deonandan Singh—Plaintiff—Opposite Party.

Civil Rev. No. 527 of 1924, Decided on 23rd March, 1925, against an order of the Dt. J., Darbhanga, D/- 22nd September, 1924.

Civil P. C., S. 115, O. 47, R. 1 and S. 151—Lower Court competent to extend time on a review application — Extension granted on application for extension is valid.

If Court has jurisdiction to extend time upon an application for review there is no reason why his order should be disturbed because he made the order upon an application for extension and not upon an application for review. [P 453, C 2]

B. N. Mitter and *G. Mukerjee*—for Petitioner.

S. N. Ray—for Opposite Party.

Judgment.—This is an application in revision on behalf of the Defendant in the suit against an order passed by the District Judge of Darbhanga, dated the 22nd September 1924, whereby he extended the time for depositing a certain sum of money ordered to be deposited under the decree passed in appeal. The circumstances under which the order came to be passed are shortly as follows.

The Plaintiff brought a suit in the Court of the Subordinate Judge to recover possession of certain lands on a declaration of his title on the basis of a deed of sale executed by one Damodar Raut.

The Defendant was the widow of Damodar Raut and her defence was that the *kobala* set up by the Plaintiff was not executed by her husband and that there was no passing of consideration under it.

The learned Subordinate Judge held that the *kobala* had been executed by Damodar Raut but that the Plaintiff had failed to prove the passing of consideration, and he accordingly dismissed the suit. On appeal the learned Judge decreed the suit on condition of the Plaintiff depositing in Court for payment to the Defendant a sum of Rs. 400 within three months from the date of the judgment. The judgment was passed by the District Judge on the 27th March 1924 but the decree was prepared and signed by him on the 2nd April 1924. The

Plaintiff deposited the amount required under the decree on the 30th June 1924, that is, three days beyond the three months directed by the decree. He filed an application subsequently saying that he was misled by the fact that the decree had been signed on the 2nd of April and that he was under the impression that the money was to be deposited within three months from the 2nd of April. The learned District Judge has accepted the deposit and has directed the Plaintiff to deposit interest for the three days from the 27th of June to the 30th of June. Against this order the Defendant comes in revision to this Court, and it is contended on her behalf that the learned Judge had no jurisdiction to extend the time upon the application made by the Plaintiff.

Now, the decree did not direct that the suit would stand dismissed on failure of the Plaintiff to deposit the amount within three months. The decree runs thus :—

" It is ordered that the appeal be and the same is hereby allowed, the decree of the Court below is set aside and the Plaintiff's suit is decreed in this way that the title of the Plaintiff as purchaser on the strength of the *kobala*. Ex. 1, is declared and that the Plaintiff is declared to recover possession of the properties in suit subject to his paying the sum of Rs. 400 with interest running thereon from 29th June 1921, the date of the *kobala*, at the rate of one rupee per cent. per month within 3 months from to-day and it is also declared that Defendant as widow of Damodar holds a lien by way of charge on the properties sold until such time that she is paid off the above dues. The Plaintiff-Appellant will get half the costs throughout and the Defendant will bear her own costs."

The learned District Judge who passed the decree is the Judge who has extended the time by his order of the 22nd September 1924 and he is the best person to construe his own decree. He has construed that decree to mean that there was no order passed by him to the effect that the suit was to be dismissed in case the deposit was not made within three months from the date of the order. That he had jurisdiction to extend the time in any event on an application for review of his judgment is not denied. What is contended is that the time could not be extended upon the application of the Plaintiff without an application for review, That may be so, but if the learned Judge had jurisdiction to extend the time upon an application for review, there is no reason why his order should be disturbed because he made the order upon an application for extension and not upon an application for review. In *Rameshwar Mahton* v. *Lala Dwarka Prasad* (1), it was held by a Division Bench of this Court that although a Court has no inherent jurisdiction under S. 151, Civil Procedure Code, to do that which is prohibited by the Code, but where a suit was dismissed on a preliminary ground and the Plaintiff applied under S. 151 to the Court to set aside the decree under its inherent powers, and the Court granted the prayer, and an application in revision was made to the High Court to set aside the order, it was held that inasmuch as a prayer for review under Or. 47, r. 1, if made, could have been granted by the Court, the mere fact that the Plaintiff, instead of applying as he should have done, under Or. 47. r. 1, had applied under S. 151, was no ground for interference in revision. The principle laid down is applicable to the present case.

The application must, therefore be dismissed with costs.

Application dismissed.

(1) 1925 Patna 36=3 Pat. 178.

✱ 1925 PATNA 453

BUCKNILL AND ROSS, JJ.

Gaya Singh—Appellant.

v

Emperor—Opposite Party.

Criminal Appeal No. 142 of 1924, Decided on 26th November 1924.

✱ *Criminal P.C., S. 422—Appeal cannot be admitted on ground of sentence only.*

The practice of admitting appeals only on the the question of sentence is incorrect. 41 Cal. 406 Foll. [P 455, C 1]

Muhammad Yunus and *Reyasat Hussain*—for Appellant.

Sultan Ahmed—for Opposite Party.

Facts.—In this appeal, on 28-7-24 Adami and Macpherson, JJ. made the following order. " This appeal will be heard on the question of sentence only. Issue notice and send for record." When the matter came before Kulwant Sahay,

J., as vacation Judge the question as to the legality of the order passed by Adami and Macpherson, JJ. was raised. The vacation Judge ordered the appeal to stand over until the re-opening of the Court as he thought that the point raised should be decided by a regular Bench.

Bucknill, J.—[His Lordship stated facts and proceeded as follows :]— So far as my short experience in this Court is extended, I must say that it seems always to have been the practice in this Court ever since I have been upon this Bench to admit appeals on the question of sentence only. I myself have passed many such orders. As a matter of fact in many cases where such orders admitting an appeal on this limited ground have been passed, the appeals have been preferred by prisoners in jail. Of course, on the other hand, many cases in which such orders have been passed, are appeals which have come before the Bench in the ordinary course. Now it is stated at the Bar by the learned Counsel who appears for the appellant in this case, that, in the early days after the establishment of this Court, it was the practice to admit appeals without limitation. At any rate that would seem to have been the practice in Allahabad ; but, in the Calcutta High Court, there certainly was the practice in existence of admitting appeals upon the question of sentence only. In 1913, however, the matter came before the Calcutta High Court in a substantive fashion and was dealt with very decisively in the case of *Nafar Sheikh* v. *Emperor* (1). In that case a man had been convicted of attempting to commit rape. He was sentenced to five years' rigorous imprisonment. He appealed and Harington and Coxe, JJ., admitted the appeal only on the ground of the severity of the sentence. The appeal came for hearing before a Bench consisting of the Chief Justice (Sir Lawrence Jenkins) and Sharfuddin, J. Their attention appears to have been called to the admission of the appeal coupled with a limitation of the ground upon which it was admitted, and their Lordships then definitely held that an appeal could not, having regard to the wording of S. 422 of the Criminal Procedure Code, be properly admitted on a limited ground. The appeal was accordingly ordered to be heard without any limitation of the grounds. Their Lordships ordered that fresh notice of the appeal should be given to the Crown and that the case should in due course come before a Bench.

Now the matter in due course accordingly came up for hearing before Mookerjee and Beachcroft, JJ. Mookerjee, J. in the course of his judgment writes as follows : " The appellant, Nafar Sheikh, has been convicted of an offence under S. 376 read with S. 511 of the Indian Penal Code, and sentenced to imprisonment for five years. The jury unanimously found him guilty, but recommended a light sentence on the ground that he is a young man and has got a young wife. The Sessions Judge accepted the verdict of the jury, but did not give effect to their recommendation for a light sentence. The appeal to this Court was in the first instance admitted by Harington and Coxe, JJ., for consideration of the sentence only, in view of the representation of the jury. The appeal thus admitted came to be heard by the Chief Justice and Sharfuddin, J., who held that in view of the provisions of S. 422 of the Criminal Procedure Code, 1898, the appeal could not be admitted on a limited ground, and directed the scope of the order of admission to be enlarged. As the direction thus given was not formally recorded, it is desirable to draw attention to the terms of Ss. 421 and 422 of the Criminal Procedure Code. Sub-S. (1) of S. 421 lays down that on receiving the petition of appeal accompanied by a copy of the judgment or order appealed against or a copy of the heads of the charge in cases tried by a jury, under S. 419 or S. 420, the appellate Court shall peruse the the same and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily. S. 422 then provides that if the appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader and to such officer as the local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the ground of appeal. It is plain that the appeal which has thus to be heard is the whole appeal; consequently, all the grounds taken in the petition of appeal are open for consideration at the final hearing, and the appellant cannot be restricted to any

(1) [1914] 41 Cal. 406—14 Cr. L. J. 485—18 C. L. J. 582—20 I. C. 741—18 C. W. N. 147.

selected ground out of those specified in his petition. A restrictive order for admission is clearly not contemplated by S. 422 and must be deemed *ultra vires*. This view is strengthened by a consideration of the terms of S. 423. It is worthy of note that a similar view has been taken by this Court with regard to appeals under the Civil Procedure Code [*Lakhi Narain Serowji* v. *Sri Ram Chandra* (2)]. Fresh notice of the appeal has been given to the Crown and the appeal has been argued before us on behalf of the accused and the Crown. Beachcroft, J., did not in his judgment mention this point, but I take it that he must be regarded as having acquiesced in Mookerjee, J's decision.

I have come to the conclusion that their Lordships of the Calcutta High Court are correct in their construction of the material sections of the Criminal Procedure Code. The practice of admitting appeals only on the question of sentence appears to me to be incorrect. No doubt it was a course which was very convenient; but, I fear, that the provisions of the law do not permit the admission of an appeal on a limited ground. It has been suggested, and, indeed, it occurred to me that the phraseology of the order: "The appeal will be heard on the question of sentence only" might possibly be regarded merely as loose and inappropriate; and that what was really meant was that whilst the appeal was rejected the Court intended to express the opinion that the question of sentence might be brought before the Court which might revise that sentence in the exercise of its revisional jurisdiction. This looked as if it might have been one way of getting over what at first sight appears to be a real difficulty; but, I do not think, that such a direction or such a course is capable of being legally adopted by this Court. As has been pointed o ' by my learned brother the severity of a sentence is in itself a ground of appeal; and, if the effect of the order, 'the appeal will be heard on the question of sentence only' could be loosely construed to mean that the appeal was dismissed, but that the sentence would be heard in revision. It is obvious that when an appeal, in which the question of severity of sentence, is one of its grounds, has been rejected, the matter could not come before the Court again in its revisional jurisdiction. The practical difficulty which no doubt animated the Court in issuing orders admitting appeals on limited grounds was to avoid the possibility of a lengthy dissertation upon the facts when an appeal came to be heard; facts upon which the Court, at the application for admission, had in effect already arrived at a conclusion. This fear, although perhaps it may in some cases be real enough, will, I think in practice, be found not to be so formidable as it at first sight appears. At any rate, following the decision of the Calcutta High Court to which I have already made reference, I have come to the conclusion that the practice of admitting appeals on limited grounds should in this Court cease. The appeals, if they are to be admitted at all, must be admitted in accordance with provisions of the appropriate sections of the Criminal Procedure Code. They cannot be admitted on the ground of sentence only however convenient and practical that course, which has hitherto been adopted, may appear. In this particular case the appeal having been admitted on this limited ground, the Crown has had no notice with regard to the facts of the case. There must therefore, as was done in the case in the Calcutta High Court to which I have referred, be fresh notice to the Crown. After fresh notice has been given to the Crown, the appeal will come up for hearing in the ordinary course.

Ross, J.—I agree.

(2) [1911] 15 C. W. N. 921=11 I. C. 212= 14 C. L. J. 146.

1925 PATNA 455

DAWSON MILLER, C. J. AND MULLICK, J.

Radhakishun Chamaria—Petitioner.

v.

Zalim Singh—Opposite Party.

Civil Rev. No. 264 of 1924, Decided on 14th November 1924, against an order passed by the Sub. J., Patna, D/- 2nd May 1924.

Civil P. C., O. 34, Rr. 2 and 4—Judgment not giving special direction for payment of interest between institution of suit to decree—Decree granting such interest is correct—Judgment granting interest from decree to payment—Decree granting such interest beyond expiry of period of grace and up to actual payment is correct.

In a suit on mortgage the plaintiff in his plaint claimed that an account be prepared of

the principal amount and interest due under the mortgage bond and that a mortgage decree be passed for Rs.....besides costs and future interest till the day of realization at the rate of interest entered in the bond. The material part of the judgment in which the plaintiff's suit was decreed was as follows:—

"Hence it is ordered that the suit be decreed with costs.....As the interest has swelled to an abnormal amount I do not allow future interest at the bond rate. Interest at 6 per cent per annum from this date till the date of payment." The preliminary decree and the final decree which were prepared in accordance with the judgment allowed interest at the bond rate from the institution of the suit to the date of the decree and interest at 6% from the decree to the actual realisation of the money by the decree-holder.

Held: that with regard to the interest between the date of institution of the suit and the date of the decree, the plaintiff having succeeded in the suit was entitled to interest at the bond rate and, the decree in such circumstances was properly drawn up allowing such interest even without any special order to that effect in the judgment and also that the decree was properly drawn up in allowing interest at 6% not only up to the expiry of the days of grace but also subsequently up to the date of the actual realisation of the money by the decree-holder. (The old law and the present law on the subject discussed and compared.)

H. Imam, *M. Prasad* and *D. C. Varma* for Petitoner.

N. C. Sinha for Opposite Party.

Dawson Miller, C. J.—This is an application in revision asking to set aside an order of the Subordinate Judge of Patna dated the 2nd May 1924. The petitioner is the decree-holder in a mortgage suit. The opposite party, Zalim Singh, is one of five defendants in the suit who represent the original mortgagor. They did not defend the suit and judgment was pronounced against them *ex parte*. There were two other defendants who were interested in part of the mortgaged property and who appeared and claimed certain priorities with respect to that property. Having failed in their defence as to one of the properties they appealed to the High Court where they were successful. The decree with regard to that portion of the property was accordingly modified but in other respects it was affirmed. The amount found due under the preliminary decree not having been paid within the period of grace allowed, the final decree was passed on the 14th September 1921 and the mortgaged property was ordered to be sold. When the petitioner proceeded to obtain execution of his decree the opposite party applied to the Subordinate Judge for amendment of both the preliminary and final decrees partly on the ground of clerical or arithmetical mistakes in the decrees and partly on the ground that the decrees did not carry out the directions in the judgment. Three points were taken before the Subordinate Judge, (1) that owing to a miscalculation in the schedule to the plaint an excessive amount of interest had been claimed and that this mistake had been reproduced in the decree with the result that the total balance claimed as due for principal and interest at the date of the suit was more than the plaintiff was entitled to, (2) that interest *pendente lite* had been awarded by judgment, and, (3) that interest at 6 per cent upon the amount found due had been awarded by the decree from the expiry of the days of grace until realisation whereas on the true construction of the judgment no such interest had been allowed.

With regard to the first point it is admitted by Mr. Hasan Imam on behalf of the petitioner that an arithmetical mistake has crept into the preliminary decree but has pointed out that although in the item in question one year's interest has been calculated in excess of that due, in the next item one year's interest too little has been calculated and that there are other slight mistakes elsewhere. In these circumstances the parties have agreed that the decree shall be amended by making a proper calculation which has been done. In the result it is agreed that the balance due to the plaintiff for principal and interest at the date of the institution of the suit is Rs. 12,663-8-5 instead of Rs. 14,451 as stated in the plaint and in the decree. The costs will also be reduced proportionately.

With regard to the second and third points it becomes necessary to consider what directions were given in the judgment and whether the decrees as drawn up properly represent the effect of the judgment pronounced. First it is necessary to bear in mind that the plaintiff in his plaint claimed that an account be prepared of the principal amount and interest due under the mortgage bond and that a mortgage decree be passed for Rs. 14,451, besides costs and future interest till the day of realisation at the rate of interest entered in the bond. The material part of the judgment in which

the plaintiff's suit was decreed is as follows :—

"Hence it is ordered that the suit be decreed with costs. There will be an *ex parte* decree against the absent defendants. Defendants to pay up the decretal amount within six months. In default the mortgaged property will be sold subject to the incumbrance mentioned above. As the interest has swelled to an abnormal amount I do not allow future interest at the bond rate. Interest at 6 per cent. per annum from this date till the date of payment." The preliminary decree as drawn up in pursuance of that judgment was, in so far as it is material, as follows :—

"It is ordered and decreed that the suit be decreed with costs and that *ex parte* decree be passed as against the absent defendants, that the absent defendants should pay the decretal amount within six months and that in case of non-payment the mortgaged properties entered in Sch. 2 be sold at auction and as the interest has accumulated to a very great amount so future interest has not been awarded at the rate entered in the bond. Future interest may be calculated from this day to the date of realisation at the rate of 6 per cent. per annum, and as per bond Rs. 3,467 may be awarded to the plaintiff as *pendente lite* interest and that the sum of Rs. 1,247-2-6 be paid by the defendants to the plaintiff on account of the costs of this suit with interest thereon at the rate of 6 per cent. per annum from the date to the date of realisation." The *pendente lite* interest mentioned in the decree is interest at the bond rate from the institution of the suit to the date of the decree. The final decree passed in September 1921, after reciting that the decretal amount has not been paid within the period of grace and ordering the mortgaged properties to be sold and the money brought into Court, further orders "that the plaintiff do get Rs. 19,165-2-6 payable under the said preliminary decree with Rs. 25-7-3 as costs in this case as detailed below and also interest up to the date of realisation at the rate of 6 per cent. mentioned in the aforesaid decree and the costs including costs of this application be given to the plaintiff." It was contended that interest at the bond rate between the date of the institution of the suit and the date of the decree ought not to have been allowed in the decree as there was no specific direction in the judgment that any interest for that period should be awarded It was further contended that although the judgment allowed interest at 6 per cent.per annum from the date thereof until the date of payment this must be taken to mean interest only up to the date ordered for payment, that is up to the expiry of days of grace, and that the preliminary decree and the final decree were both inaccurate in allowing interest at 6 per cent. from the date ordered for payment up to the date of actual realisation. The learned Subordinate Judge considered that his predecessor by whom the judgment had been delivered had not allowed any interest *pendente lite* and that this ought not to have been awarded in the decree. He also considered that the learned Judge in using the words "date of payment" meant not date of realisation but the date fixed for payment that is when the days of grace expired, and ordered the decrees to be amended accordingly. He relied upon the case of *Tikait Krishna Prasad* v. *Surendra Mohan Kundu* (1) for the proposition that such words as "date of payment" or" date of realisation" used in a preliminary decree in a mortgage suit as the termination of the period for which interest is awarded must mean the date ordered for payment. The learned Judge does not appear, however, to have considered how this restricted meaning came to be applied to such expressions in a preliminary decree in a mortgage suit nor does he appear to have considered the effect of the provisions of order 34 of the Civil Procedure Code which superseded the provisions of Ss. 86 to 90 of the Transfer of Property Act and which laid down rules to be followed by the Court in drawing up mortgage decrees. According to the law in force when these sections of the Transfer of Property Act were applicable it was provided with regard to mortgage suits that in a suit for sale if the plaintiff succeeds the Court shall pass a decree to the effect mentionod in the first and second paragraphs of S. 86 and also ordering that in default of the defendant paying as therein mentioned the mortgaged property or a sufficient part thereof should be sold and applied in payment of the amount found due. Now S. 86 shows the nature of the decree which the Court shall pass if the plaintiff succeeds and provides that such decree

(1) [1920] 5 Pat. L. J. 598—58 I. C. 223.

shall order that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage and for his costs of the suit if any, awarded to him on the day fixed for payment or declaring the amount so due at the date of such decree and nothing is said about any future interest after the period of grace has expired. The Court may have had discretion in awarding interest after the expiry of the days of grace but it is clear from the section that unless a special order was made to that effect in the judgment such interest could not be awarded by the decree. Order 34 of the Code of Civil Procedure rules 2 and 4 show nature of the preliminary decree which must now be passed. Under those rules where in a suit for sale the plaintiff succeeds the Court shall pass a decree either ordering an account to be taken of what will be due to the plaintiff for principal and interest on the mortgage and for his costs, if any, awarded to him up to the expiry of the days of grace or must pass a decree declaring the amount so due and further the decree must direct that in default of payment within the period of grace the mortgaged property be sold and the proceeds after defraying expenses of the sale applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent costs. The reason why the Courts held under the old law that directions in the preliminary decree awarding interest up to the date of realisation or the date of payment must be taken to mean upon the day fixed for payment was because the sections of the Transfer of Property Act directed that the decree should award interest only upto that date. Under the present law, however, Order 34 Rules 2 and 4 provide that the decree shall direct not only payment of the principal and interest on the mortgage up to the expiry of the days of grace but also payment of subsequent interest, that is to say interest up to the date when the property is sold and the claim realised. In the present case the judgment ordered that the suit be decreed with costs and had it ended there that would, in my opinion have been sufficient to enable a decree to be drawn up awarding the plaintiff the amount found due for principal and interest at the bond rate up to the expiry of the days of grace. With regard to future interest after that date the matter lies in the discretion of the Court although it is usu to allow interest until actual realisation at 6 per cent. but in the absence of any express direction such interest would not be entered in the decree. In the present instance the learned Judge, exercising his discretion refused by his judgment to allow interest at the bond rate between the date of his decree and the expiry of the days of grace and ordered interest only at 6 per cent. per annum from the date of his decree till the date of payment. He was clearly entitled under the rules to order interest at 6 per cent. from the expiry of the days of grace until actual payment and in using the expression "day of payment" I have no doubt that he meant what he said and intended that interest should run at 6 per cent. until the date of actual payment and not merely, as would be presumed under the old law, up to the day fixed for payment. With regard to the interest which has been referred to as interest *pendente lite* that is between the date of institution of the suit and the date of the decree, the plaintiff having succeeded in the suit was entitled to interest at the rate and, in my opinion, the decree in such circumstances was properly drawn up allowing such interest even without any special order to that effect in the judgment. It may even be doubted whether under the rules as they now stand the learned Judge was entitled to reduce the rate of interest between the date of the decree and the expiry of the days of grace from the rate stipulated in the bond to six per cent. as he did, but as no question was raised about this on behalf of the plaintiff either by appeal or otherwise the matter is not one with which we are concerned. In my opinion except as to the first point which has now been agreed between the parties the learned Judge was wrong in amending the decree.

The question was raised whether we were entitled under our powers of revision or otherwise to interfere with the order of the learned Subordinate Judge. The learned Judge in acting as he did purported to act under Ss. 151 to 153 of the Civil Procedure Code. If he was entitled under those sections to set the matter wrong it seems to me that we are equally entitled under the same sections to set it right. The order of the learned Judge will be set aside and the decrees as originally drawn will be restored subject to the

correction of the mistakes in calculation of the amount due at the date of the institution of the suit. The petitioner is entitled to his costs here and before the Subordinate Judge.

Mullick J.—I agree. It is now settled that in a mortgage suit the plaintiff is entitled to interest at the bond rate from the date of the suit till the date fixed for payment unless the Court for any special reason thinks fit to reduce the interest during this period. It is also settled that on default the decree-holder is entitled to the Court rate of interest from the date fixed for payment till the date of actual realisation. In the present case we are bound, if possible, to construe the judgment of the 20th April 1916 on the assumption that the Court intended to comply with the law, and, therefore, I think it would be right to hold that the expression "future interest" in the judgment means interest from the date of the decree and that the words "date of payment" mean the date of actual realisation.

With regard to interest between the date of the suit and the date of the judgment, it is true that there is no express order; but I think the order is implied in the opening words of the judgment which are "hence it is ordered that the suit be decreed with costs". This means that the suit as laid in the plaint is decreed with costs. If the judgment had ended there, the plaintiff would have been entitled to charge interest and compound interest till the date of actual realisation; but the judgment proceeds to restrict the claim in regard to interest by the subsequent directions which have been noticed above. Whether the Court was right in reducing the interest from the date of the judgment till the date fixed for payment is a point which has not been argued before us. All that we are called upon to decide is whether the Court intended to give interest *pendente lite* at the bond rate, and I think the answer is in the affirmative. The final decree therefore allowing interest at the bond rate up to the date of the judgment and at 6 per cent. from the date of the judgment till the date fixed for payment is in full conformity with the judgment. Similarly with regard to interest at 6 per cent. from the date fixed for payment till the date of actual realisation, there is no variance between the judgment and the decree.

Petition allowed.

1925 PATNA 459

JWALA PRASAD AND KULWANT SAHAY, JJ.

Sheo Sahay—Judgment-debtor — Appellant.

v.

Jamuna Prasad Singh—Decree-holder —Respondent.

Appeal No. 94 of 1924, Decided on 12th November 1924, from Appellate order of the Addl. District Judge, Patna, D/-30th April, 1924.

Limitation Act, Art. 182—*Objection filed by judgment-debtor — Examination of witness by decree-holder is step-in-aid.*

The decree-holders examined a certain witness in order to resist an objection filed by the judgment-debtor to the execution of the decree.

Held: that the action on behalf of the decree-holders was a step-in-aid of execution as contemplated by Art. 182. 21 Cal. W. N. 868; 22 Cal. W. N. 1027, and 2 Pat. L. J. 5 Foll. [P. 459, C. 2.]

Noresh Chandra Sinha and *Nitai Chandra Ghosh*—for Appellant.

Shivanandan Rai—for Respondent.

Judgment:—The only point raised in this appeal relates to limitation. It is said that the application of the decree-holder made on the 12th of May, 1923 is barred by limitation, the last execution being of 9th August, 1919. On behalf of the decree-holders it is urged that their application for execution is not barred, inasmuch as they had taken proper steps to further the execution of their decree on the 15th May, 1920. The Court below has accepted the contention of the decree-holders and has allowed the execution to proceed. The view taken by the Court below seems to be correct. On the 15th May, 1920 the decree-holders examined a certain witness in order to resist an objection filed by the judgment-debtor to the execution of the decree. That action on behalf of the decree-holders is certainly a step-in-aid of execution as contemplated by Art. 182, Sch. I, of the Limitation Act. This view is supported by various authorities: [vide *Kedar Nath Dey Roy* v. *Lakhi Kanta Dey* (1), *Brojendra Kishore Roy Chowdhury* v. *Dil Mahmud Sarkar* (2), *Surajmal* v. *Sarjoog Prasad Singh* (3), and the unreported decision of this Court

(1) [1917] 21 C. W. N. 868=40 I. C. 1005=26 C. L. J. 115
(2) [1918] 22 C. W. N. 1027=44 I. C. 604.
(3) [1917] 2 Pat. L. J. 5=3 Pat. L. W. 208=38 I. C. 540=(1917) P. H. C. C. 54.

in *Rai Bahadur Kashi Nath Singh* v. *Syed Kabiruddin* (4)]. The latter case was cited by Mr. Noresh Chandra Sinha on behalf of the judgment-debtor appellant. The learned Chief Justice, however, held that an application need not be in writing and that a verbal application is sufficient to extend the period for execution of the decree provided it is a definite application in order to oppose an application of the judgment-debtor to set aside the execution proceedings. There can hardly be any doubt that the decree-holders are entitled to regard any step taken by them to remove the obstacle thrown by the judgment-debtor in their way to the realization of their decree as a step-in-aid of execution.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(4) M. A. 281 of 1923.

✱ 1925 PATNA 460

DAS AND ADAMI, JJ.

Chakradhar Jha and others — Defendants—Appellants.

v.

Shabkant Misra and others—Plaintiffs—Respondents.

Appeal from Appellate Decree No. 257 of 1922, Decided on 17th February 1925, against a decision of the Dt. J., Darbhanga, D/- 10th December 1921.

✱ *Hindu Law— Stridhan — Widow entering upon property as widow and holding adversely that property—The acquisition is not stridhan.*

A Hindu widow is not a tenant for life but has a widow's estate in her deceased husband's estate and if possessing as a widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as stridhan but he makes them good to her husband's estate. 1924 P. C. 121 Foll. [P. 460, C. 2]

L. K. Jha—for Appellants.

S. K. Mitter—for Respondents.

Adami, J.—The Plaintiff in this case sought for a declaration of his title to a 1/6th share of certain properties and for joint possession of the same on the ground that the said properties were *stridhan* properties of his maternal grand-mother. His case was that his maternal grand mother had acquired these properties under a deed of sale. The lower appellate Court found that the *kobala* relied upon by the Plaintiff was not a genuine document, but found however that the maternal grand mother had been in possession of the properties for more than twelve years and that that possession had been adverse to her step-son. The learned District Judge held that this being so, the properties acquired by adverse possession became the *stridhan* of the Plaintiff's maternal grand mother and therefore descended to the Plaintiff. The Plaintiff's suit was therefore decreed,

The only question which arises in this appeal is whether the finding of the lower appellate Court that the property in this case was the *stridhan* of the maternal grand-mother is correct. Mr. Jha has relied on the case of *Musammat Lajwanti* v. *Safa Chand* (1) decided by their Lordships of the Privy Council. There it was held that a Hindu widow is not a tenant for life but has a widow's estate in her deceased husband's estate, and that if possessing as a widow she possesses adversely to any one, as to certain parcels, she does not acquire the parcels as *stridhan* but she makes them good to her husband's estate. That decision seems to conclude the present case. But Mr. Mitter on behalf of the Respondents argues that the case I have just cited relates only to a case in which the widow takes possession as a widow and holds adversely. He argues that in the present case the husband's step-son was alive and therefore the maternal grand-mother had no widow's estate but was only entitled to her maintenance and that if a woman is in possession of property not as a widow but otherwise and obtains a title by adverse possession, that property will not be taken to form part of her husband's estate, but will become her *stridhan*. In the present case, however, it is clear from the judgment of the lower Court that the maternal grand-mother did enter upon the property in suit as the widow of her husband, for we find that she approached the landlord and had her name substituted for her husband's name in his *sherista* after the death of the husband. This proves to our satisfaction that the maternal grand-mother did as a matter of fact take possession of the land

(1) 1924 P.C. 121=5 Lah. 192=51 I.A. 171=22 A.L.J. 304=34 M.L.T. 87=5 L.R.P.C. 94=20 M.L.W. 10=28 C.W.N. 960=6 P.L.T. 1=(1924) M.W.N. 442=2 Pat. L.R. 245=26 Bom. L.R. 1117=47 M.L.J. 935 (P.C.)

as widow of her husband and that being so, it is clear that the decision of their Lordships of the Privy Council to which I have referred above must hold good and the property cannot be held to be *stridhan* of the maternal grand-mother.

This appeal must therefore succeed and the decrees of the lower Courts must be set aside and the suit be dismissed with costs in all the Courts.

Das, J.—I agree.

Appeal allowed.

1925 PATNA 461

KULWANT SAHAY, J.

Suraj Narain Misser and others—Petitioners.

v.

Hardwar Singh and others — Opposite Party.

Civil Rev. No. 2 of 1925, Decided on 17th March 1925, against an order of the Dt. J., Monghyr, D/- 31st October, 1924.

(a) *Civil P. C., S. 115 — New point involving question of fact and law cann t be raised.*

A new point raising questions both of law as well as of fact cannot be entertained for the first time in an application in revision. [P. 461, C. 2]

(b) *Civil P.C., O. 21, R. 90—Purchaser of part of non-transferable occupancy can apply.*

A purchaser of a part of a non-transferable occupancy holding has an interest in the holding sufficient to entitle him to apply after an execution sale, to have the sale of the holding set aside. 2 *Pat. L.J.* 457 *Dist.* 42 *Cal.* 172 *Foll.* [P. 462, C. 1]

(c) *Civil P. C., O. 21, R. 90—Material irregularity in sale proclamation — Inadequate price realised—Setting aside of sale was held to be right.*

Where there was collusion between the judgment-debtors and the decree-holders; there had been material irregularity in the sale proclamation; the value of the property as stated in the sale proclamation was grossly inadequate and the price fetched at the sale was also inadequate,

Held: that the setting aside of the sale was right. [P. 462, C. 1]

Abani Bhusan Mukerjee and *B. C. Dey*—for Petitioners.

N. N. Sinha and *B. P. Sinha*—for Opposite Party.

Judgment.—The petitioners obtained a rent decree and in execution, thereof proceeded to sell the holding. The sale took place on the 25th of October, 1922 and the petitioners themselves were the purchasers. On the 30th October, 1922 an application was made by the opposite party for setting aside the sale under the provisions of Order 21, rule 90 of the Code of Civil Procedure. The opposite-party are the purchasers of a portion of the holding from the original tenant by a private sale.

The Munsiff before whom the application was made dismissed the application for setting aside the sale. On appeal the learned District Judge has allowed the application and has set aside the sale. Against this order of the learned District Judge on appeal the petitioners have come up in revision to this Court.

The first point taken by the learned Vakil for the petitioners is that the application under Order 21 rule 90 of the Code of Civil Procedure was not maintainable at the instance of the opposite-party inasmuch as they were the purchasers of a portion of a non-transferable occupancy holding and, therefore, they were not persons whose interests were affected by the sale. This question does not appear to have been raised either in the trial Court or in the Court of appeal below. There is no allegation in the application for revision filed in this Court to the effect that the holding was a non-transferable occupancy holding and it is too late for the petitioners to raise this point for the first time in revision in this Court. It raises questions not only of law, but also of fact and, as the question was not raised in the court below, it can not be entertained for the first time in the present application in revision. Reliance had been placed by the learned Vakil for the petitioners on the decision of the Special Bench in *Mahadeo Lal* v. *Langat Singh* (1), but that was a case which depended on the construction of S. 170 Clause (3) of the Bengal Tenancy Act and not on the construction of the provisions of order 21, rule 90 of the Civil Procedure Code. The learned Chief Justice in the course of his judgment in that case at page 459 observed as follows :—

"Both sides have in this case admitted the correctness of the propositions laid down by the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy Chowdhry* (2) and it may be conceded that as held in that case a purchaser without the landlord's consent

(1) [1917] 2 Pat, L.J. 457=1 Pat. L.W. 504=40 I.C. 257=(1917) P.H.C.C. 169 (F.B.)

(2) [1914] 42 Cal. 172=18 C.W.N. 971=27 I. C. 61=20 C.L.J. 52 (F.B.)

of a part of a non-transferable occupancy holding has an interest in the holding sufficient to entitle him to apply after an execution sale, as a representative of the *raiyat*, to have the sale of the holding set aside on the ground of fraud, but the question which we have to decide is whether such a person has an interest in the holding 'voidable on the sale' within the meaning of S. 170 of the Act."

The decision of the Special Bench, therefore cannot be of any help to the petitioners in the present case.

The next point taken is that it being found by the learned District Judge in concurrence with the trial Court that the sale proclamation was duly served and that the processes were not suppressed, the mere finding that the price fetched at the sale was inadequate was not sufficient in law to entitle the learned Judge to set aside the sale. Now the learned Judge has found that there was collusion between the judgment-debtors and the decree-holders, that there had been material irregularity in the sale proclamation, that the value of the property as stated in the sale proclamation was grossly inadequate, and that the price fetched at the sale was also inadequate. On those findings the learned District Judge was perfectly competent to set aside the sale. There is no question of want of jurisdiction involved in the present case; and this application must be dismissed with costs. Hearing fee two gold *mohurs*.

Rule discharged.

1925 PATNA 462

MULLICK AND KULWANT SAHAY, JJ.

Mt. Ramdulari Kuer and others—Defendants—Appellants.

v.

Upendra Nath Basu—Plaintiff—Respondent.

Second Appeals Nos. 615 and 677 of 1922, Decided on 25th February, 1925.

T. P. Act, S. 52—Suit terminating in consent decree—Plaintiff paying money to defendant to obtain his consent to the compromise—Execution sale pending suit—S. 53 applies.

The doctrine of *lis pendens* will apply to a purchase during the pendency of a suit which terminates in a consent decree, 17 C. W. N. 413 Foll. [P 464, C 2]

The fact that payment was made by plaintiff to the defendant in order to obtain the consent decree will not affect the doctrine of *lis pendens*. 14 *C. W. N.* 322 *Foll.* The doctrine of *lis pendens* applies to an execution sale. [P 464, C 2]

S. Sultan Ahmad, N. K. Prasad II, Ali Imam, G. S. Prasad and *N. C. Ghosh*—for Appellants.

S. M. Mullick, Siva Narayan Bose, S. M. Mullick and *S. N. Bose*—for Respondent.

Kulwant Sahay, J.—These appeals arise out of a suit brought by the plaintiff-respondent for declaration of his title to and recovery of possession of four annas share in the eight annas *purwari takhta* of mouza Garua. Both the Courts below have decreed the suit. Appeal No. 615 is by the defendant No. 2, and appeal No. 677 by the defendant No. 1.

The facts giving rise to the suit are shortly these:—

Mouza Garua in Mahal Rampur Mafi, Touzi No. 6758, in the District of Gaya is divided into two *takhtas* of eight annas each known as the *purwari takhta* and the *pachhiari takhta*. Four annas out of the eight annas *pachhiari takhta* belonged to the plaintiff and the father of the defendant No. 4. The remaining four annas was wakf property. Defendant No. 3 Reyaz Ali Khan was the owner of the entire *purwari takhta*. He, however sold one anna share to a third person and he had seven annas of the *purwari takhta* left to him. The four annas share belonging to the plaintiff and to the father of the defendant No. 4 in the *pachhiari takhta* was held in lease by the defendant No 3. In 1915 a rent suit was brought by the plaintiff and the father of the defendant No. 4 against the defendant No. 3, and a decree was passed against the defendant No. 3 on the 23rd November 1905. In execution of this decree the defendant No. 3's four annas share in the *purwari takhta* was attached on the 5th of June 1907 and it was sold in execution on the 19th September 1907 and was purchased by the plaintiff and the father of the defendant No. 4. The sale was confirmed on the 26th November 1907 and a sale certificate was granted and delivery of possession was formally given to the auction purchasers on the 12th June 1908. It is alleged by the plaintiff that he and the father of the defendant No. 4 applied for mutation of their names by right of the purchase in the execution sale; but they discovered that in the Collector's register the name

of the original defendant No. 2 Rai Bindeswari Prasad stood recorded by right of purchase under a deed of sale dated the 16th November 1907 executed by the defendant No. 3 in favour of Rai Bindeshwari Prasad. The application for registration of name was accordingly withdrawn. The father of the defendant No. 4 sold his interest to the plaintiff on the 15th of October 1908, and the plaintiff as the owner of the entire four annas share purchased at the auction sale on the 19th of September 1907 brought the present suit for declaration of his title and for recovery of possession.

The suit was contested by the defendant No. 1 and the defendant No. 2. The original defendant No. 2 Rai Bendeswari Prasad died after filing a written statement and his widow Mt. Ramdulari Kuer was substituted in his place and is now the defendant No. 2. The defendant No. 1 is a purchaser from the defendant No. 2 under a deed of sale dated the 20th Baisakh 1323 (May 1916). Their defence was that the property originally belonged to one Jaikaran Lal who was the maternal grandfather of Rai Bindeswari Prasad. Jaikaran Lal died leaving a widow, Jasoda Kuer, and on her death the property passed to her daughter, Mt. Lochan Kuer, who was the mother of Rai Bindeswari Prasad. Mt. Loachan Kuer sold the property to one Mt. Peyari and she in her turn sold it to the defendant No. 3.

The case of the defendants Nos. 1 and 2 was that the sale by Mt. Lochan Kuer was without any legal necessity and all that passed by the conveyance executed by Mt. Lochan Kuer was only her life-interest. Mt. Lochan Kuer died on the 5th of May 1906 and, on the 5th of May 1907, Rai Bindeswari Prasad instituted a suit (No. 69 of 1907) against the defendant No. 3 for possession of the property on the allegation that the sale by Lochan Kuer was inoperative after her death. This suit was compromised and a compromise decree was passed in favour of Rai Bindeswari Prasad on the 13th of December 1907. It is contended on behalf of the contesting defendants that the purchase of the plaintiff in execution sale on the 19th September 1907 was during the active prosecution of the suit brought by Rai Bindeswari Prasad which was a contentious suit and that the doctrine of *Lis Pendens* applied to the plaintiff's purchase. It was further contended that the sale by Mt. Lochan Kuer was without any legal necessity and was not binding on the reversioner Rai Bindeswari Prasad after the death of Lochan Kuer. It was further alleged that the deed of sale dated the 16th of November 1907 mentioned by the plaintiff in his plaint as having been executed by the defendant No. 3 in favour of Rai Bindeswari was not executed with the knowledge or permission of Rai Bindewari and, that he did not acquire the property under that deed of sale but under the compromise decree passed on the 13th December 1907.

Both the Courts below have held that the suit No. 69 of 1907 instituted by Rai Bindeswari was a collusive suit and the compromise decree was also a collusive decree and, that, therefore, the doctrine of *Lis Pendens* did not apply to the plaintiff's purchase. They further held that the deed of sale of the 16th of November 1907 was executed with the knowledge and consent of Rai Bindeswari Prasad and that having regard to the fact that the interest of defendant No. 3 had already been sold in the execution of the plaintiff's decree on the 19th September 1907 no interest passed to the defendant No. 2 under that deed of sale.

The important question for decision in the present appeals is as to whether the purchase of the plaintiff at the auction sale held on 19th September 1907 is affected by the doctrine of *Lis Pendens*. This would depend on a finding as to whether the suit No. 69 of 1907 brought by Rai Bindeswari Prasad against the defendant No. 3 was a *bona fide* and contentious suit or whether it was a collusive suit. The learned District Judge as well as the learned Subordinate Judge have held that this suit was a collusive suit. This finding is based on mere suspicion. The dates of the various transactions are set out in the judgment of the learned District Judge and, from the fact that the suit of Rai Bindeswari was brought in May 1907, within a month of the date on which the plaintiff had filed his application for execution namely the 11th of April 1907, and that Rai Bindeswari entered into an agreement of sale with defendant No. 3 while his suit was still pending and after attachment of the property in the execution of the plaintiff's decree and, in fact after the auction sale thereof, and that on the 16th

of November 1907 Rai Bindeswari took a *kobala* of the same property from the defendant No. 3 while the suit was still pending, and that in December 1907 after the sale in execution in favour of the plaintiff had been confirmed there were consultations between Rai Bindeswari and his pleaders with reference to his suit and that on 12th December 1907 a petition was filed in Bindeswari's suit that the parties were compromising and on the next day, that is on 13th December 1907 a petition of compromise was filed in the suit wherein the defendant No. 3 stated that Bindeswari's claim was correct and that he was not in a position to refute it by evidence, the learned Judge came to the conclusion that Rai Bindeswari's suit was not *bona fide* and contentious suit, but was fraudulent and collusive suit in order to defeat the plaintiff. I am, however, not prepared to agree with the conclusion of the learned Judge. It is not safe to come to a finding of collusion and fraud on mere suspicion. The suit brought by Rai Bindeswari on the face of it appears to be a *bona fide* suit. It appears that the suit was instituted on the 5th of May 1907; written statement was filed on 24th of June 1907; issues were settled on the 2nd July 1907; documents were filed by the defendant on 11th July 1907: time was taken by the plaintiff to produce evidence and on the 25th of July 1907 a list of witnesses was filed by the plaintiff and Rai Bindeswari. All these took place before the auction sale in favour of the present plaintiff and there is no reason to assume that the proceedings taken in Rai Bindeswari's suit were not *bona fide* proceedings in active prosecution of a contentious suit. I agree with the learned Judge that the *kobala* of the 16th November 1907 must be taken to have been executed with the knowledge and consent of Rai Bindeswari and the defence of the defendants Nos. 1 and 2 in the present case that the said *kabala* was executed at the instance of a servant of Rai Bindeswari without his knowledge and consent cannot be true. But it is quite evident that *kobala* was really in settlement of the dispute between Rai Bindeswari and defendant No. 3. No doubt a sum of money was paid by Rai Bindeswari to the defendant No. 3 as a consideration for the *kobala* but that would not in any way affect the result of the case. When however Rai Bindeswari discovered that before the execution of his *kobala* on the 16th November 1907 the property had already been sold in execution of a decree in favour of the plaintiff there was a consultation between him and his lawyers and as his suit had not been finally disposed of Rai Bindeswari was advised by his lawyers to file a petition of compromise in the suit and to obtain a compromise decree. To my mind the fact that Rai Bindeswari had taken a *kobala* before the compromise petition was filed will not affect the rights of the parties and it must be held that the purchase of the plaintiff was during the active prosecution of a contentious suit. That the doctrine of *Lis Pendens* will apply to a purchase during the pendency of a suit which terminates in a consent decree is settled by authorities. I may only refer to the case of *Tinoodhan Chattarji* v. *Trailokhya Charan Sanyal* (1). This case is also an authority for the proposition that the doctrine applies to a purchase at an execution sale. The fact that payment was made by Rai Bindeswari to the defendant No. 3 in order to obtain the consent decree will not affect the doctrine of *Lis pendens*. This view is supported by the case of *Tangor Manjhi* v. *Jaldhar Diari* (2) where in spite of the fact that a sum of Rs. 2,000/-was paid by the plaintiff in order to induce the defendant to agree to a compromise decree it was held not to affect the *Lis Pendens*.

The learned District Judge has observed that the plaintiff in the present suit had established his title as against the defendant No. 3 before any proceedings were instituted by the defendant No. 2. It is difficult to understand what the learned Judge means by this observation. The mere fact of the plaintiff having applied for execution and asked for attachment of the property at the time when the suit of Rai Bindeswari was brought did not establish the title of the plaintiff as against the defendant No. 3. I have already observed that the sequence of dates as set out in the judgment of the District Judge does not lead to the irresistible conclusion that Rai Bindeswari's suit was not a contentious suit. I am, therefore, of opinion that the purchase of the plaintiff is affected by the doctrine of *Lis Pendens*,

(1) [1913] 17 C. W. N. 413—18 I. C. 177.
(2) [1910] 14 C. W. N. 322—5 I. C. 691.

and under S. 52 of the Transfer of Property Act, his purchase must be subject to the rights of Rai Bindeswari under the compromise decree passed in suit No. 69 of 1907.

It has been contended on behalf of the plaintiff that the *kobala* of the 16th of November amounts to an admission on the part of Rai Bindeswari that the sale by Lochan Kuer was a valid sale and binding upon the reversioner and, in this view of the case, it must be held that the defendant No. 3 had a valid title which passed to the plaintiff under the auction sale. The question as to whether the sale by Lochan Kuer was a sale binding upon the reversioner need not be gone into in the present case. The learned district Judge has refused to consider this question on grounds which do not appear to be sound. The question was distinctly raised in the written statement and in the issues framed in the trial Court and evidence was adduced on the point. Had it been necessary to consider this question it would have been necessary to make a remand; but in view of the fact that the plaintiff's purchase is affected by the doctrine of *Lis Pendens* it is not necessary to decide this question.

In the circumstances the plaintiff is not entitled to the declaration asked for by him and his suit must be dismissed. The decision of the learned District Judge must be set aside and the suit dismissed with costs throughout, and the appeals allowed. There will be only one hearing fee in both the appeals.

Mullick, J.—I agree. In my opinion there was no legal evidence to support the finding that the suit brought by Rai Bindeswari Prasad on the 5th May 1907 was fraudulent and collusive. I agree that the plaintiff's purchase was subject to the rule of *Lis Pendens* and he acquired no title as against Rai Bindeswari Prasad.

The appeals must therefore be decreed.

Appeals allowed.

1925 PATNA 465.

FOSTER, J.

Adbul Halim— Petitioner,

v.

Ismail Momin—Opposite Party.

Civil Rev. No. 460 of 1923, Decided on the 10th April 1924, from a decision of the Munsiff, Madhubani, D/- 13th September 1923.

✱(a) *Civil P. C., 2nd Schedule—Para 15 (a)—Consulting strangers on law point, style etc., is not misconduct—Consulting on facts, is misconduct.*

In the award the arbitrator who had been made sole arbitrator stated that he began the arbitration, in the presence of four persons whom he named and whom, he said he associated with himself in one assembly for the purpose of strengthening his own opinion. He did not get any information from those persons or made use of it in arriving at the findings of fact.

Held: that if he asked them questions of law, or if he consulted them as to the style, syntax or grammer of his award, he was quite within his rights as an arbitrator, but if he arrived at any findings of fact by consulting the people and if he allowed the persons sitting with him to affect his decision as assessors then it must be held that there had been misconduct.[P. 466, C.1]

✱ (b) *Civil P. C. 2nd Schedule Para 15 (a)—Confidential enquiry is misconduct.*

No arbitrator performing his functions, which are in a sense the functions of a Judge, can listen to confidential information adverse to the one or the other party without committing grave misconduct. The words of the petition of the parties allowing the arbitrator full latitude in his method of coming to a decision cannot be interpreted as including unfair conduct. 13 C. L. J. 399 at p. 402 and 14 Bom. L. R. 1007 Foll. [P. 466 C 2.]

(c) *Arbitration—Adjective law does not apply—Principles of justice apply.*

An arbitrator is ordinarily free from the fetters of adjective law, but that does not make him free from the fundamental principles of justice. [P.467. C.1.]

Ram Prasad—for Petitioner.

Mohammad Hasan Jan—for Opposite Party.

Judgment.—This was a title suit pending in the Court of the Munsiff of Madhubani the subject matter being a small parcel of land the site of a house. On the 20th June 1923 the parties put in a petition to the Court to the effect that they had agreed to refer the matter to arbitration, that they had agreed that the arbitrator should be one Azizul Hassan and that the arbitrator was empowered by them to decide the case either with evidence or without evidence or by any other method as he should think fit. A few days later the Court drew up an order of reference in the form prescribed in the Second Schedule of the Civil Procedure Code attaching to that order a copy of the plaint and of the written statement and the petition for reference to an arbitration. The arbitration award was filed in Court in due course signed by Azizul Hassan alone. This award was subjected to an objection filed by the plaintiff. The objection was disallowed by the learned Munsiff and the suit was dismissed in

terms of the award. The plaintiff now moves this Court for revision of this order and urges two grounds each of which has reference to some passage in the arbitrators's award. In the second paragraph of that award he stated that he began the arbitration, on the 12th July 1923 in the presence of four persons whom he names and who, he says, were men of good birth and trustworthy. He says that he associated them with him in one assembly for the purpose of strengthening his own opinion, (*waste musthakam karni rai apne*). Now, the objection is that this was misconduct inasmuch as the arbitrator was shirking his responsibility and was going beyond the order of reference under which he was acting. The cases *Jamuna Kunwar* v. *Nasib Ali* (1) and *Pheran* v. *Bahoran* (2) are invoked as authorities for holding that the arbitration was void. But in those cases the arbitrator undoubtedly failed to take the whole responsibility for the award. In the present case, the arbitrator Azizul Hassan may have had those persons present as he said in Court in order that they might help him to put his award in a presentable form, and possibly that may be the meaning of the words *waste mustakam karne rai apne*; or he may have meant merely to make it clear that he was not acting in a manner that was in any way surreptitous; whatever may have been his motive in getting those people to sit with him, I can find nothing to indicate misconduct on his part. He does not appear to have got any information from those persons or to have made use of it in arriving at the findings of fact. If he asked them questions of law, or if he consulted them as to the style, syntax or grammer of his award, he was, I think, quite within his rights as an arbitrator; but if he arrived at any findings of fact by consulting the people and if he allowed the persons sitting with him to affect his decision as assessors then I should have been inclined to hold that there had been misconduct.

A more serious objection is the second point urged by the petitioner, towards the end of his award where he states "from the evidence of the parties and their witnesses and also from my confidential enquiry from other persons it appears that all the actions of the plaintiff are illegal"; now, here plaintiff has obviously a genuine grievance. The learned Munsiff in considering this matter disallowed the objection of the plaintiff firstly on the ground that there was nothing to show that the arbitrator had made use of anything learnt confidentially; and secondly on the ground that the terms of the reference of arbitration admitted of confidential enquiry by the arbitrator. As to the first ground taken by the learned Munsiff I am prepared to agree that on looking at the award itself there is nothing that I can put my finger on and say that it is the result of the confidential enquiry except the general statement which I have quoted, namely "from confidential enquiry it appears that all the actions of the plaintiff are illegal." As to the second ground I find myself absolutely unable to agree with the learned Munsiff. No arbitrator performing his functions, which are in a sense the functions of a Judge can listen to confidential information adverse to one or other party without committing grave misconduct. The words of the petition of the parties allowing the arbitrator full latitude in his method of coming to a decision cannot possibly be interpreted as including unfair conduct. The parties must be presumed to have signed that petition with an eye each to his own interest and no man with an eye to his own interest would refer a case to an arbitrator to deal with it behind his back. On the contrary it may be assumed that each party acted with the intention of taking the decision of an honest man who would arrive at his decision in accordance with the methods dictated by equity and good conscience. The holding of confidential enquiries behind the back of either party has been consistently condemned as misconduct in the legal sense. The authorities are reviewed in the judgment of Mukharji, J. in the case of *Ganesh Narain Singh* v. *Malida Kuer*, (3) and there is a decision of the Bombay High Court to the same effect in *Haji Ahmad Rai Hasan* v. *Essaji Tajbhoy* (4).

In addition to the ground which the learned Munsiff has adopted in disallowing the plaintiff's objection the learned Vakil on behalf of the opposite party in this Court has urged that substantial justice has been done in this case and that this case concerns a small piece of land about which it is unnecessary to prolong the

(1) [1902] 24 All. 312=(1902) A. W. N. 72.
(2) 7 N. W. P. 367.
(3) [1911] 13 C. L. J. 399=10 I. C. 450.
(4) [1912] 14 Bom. L. R. 1007=17 I.C. 696.

litigation. On both these points, I am without information. He next urges that the arbitrator was justified in adopting any method he liked inasmuch he is not bound by the rules of evidence. No doubt an arbitrator is ordinarily free from the fetters of the adjective law but that does not make him free from the fundamental principles of justice. I have no alternative but to set aside the award and supersede the arbitration and direct that the Court will proceed with the suit unless the parties agree again to refer the matter to arbitration in which case the process will commence from the point indicated in Paragraph I of Schedule II of the Civil Procedure Code. I do not feel prepared to make this revision a matter for costs inasmuch as whatever has come between the parties has come from the acts not of the parties themselves but of the Court and the arbitrator. I therefore award no costs.

Award set aside.

1925 PATNA 467

DAWSON MILLER, C. J., AND JWALA PRASAD, J.

Rambujhawan Singh and another—Defendants—Appellants.

v.

Suraj Prasad and another—Plaintiffs—Respondents.

First Appeal No. 10 of 1922, Decided on 6th April, 1925, against a decision of the Sub. J., Chapra, D/- 29th March, 1921.

✱ *Hindu Law—Reversioner—Reversioner signing on behalf of widow, mortgage executed by latter—Reversioner's consent cannot be presumed.*

Where a mortgage deed executed by a Hindu widow who was illiterate was signed by the next reversioner (who was her daughter's son) on her behalf,

Held: that on this ground alone the consent of the daughter's son should not be considered as proved. [P. 469, C. 1.]

H. Imam and *L. N. Singh*—for Appellants.

B. N. Mitter and *H. P. Sinha*—for Respondents.

Dawson-Miller, C. J.—The dispute in this appeal concerns the right to certain lands in mauza Jhitkahi which at one time formed part of the estate of Udit Narain Singh who died many years ago about the year 1860 leaving a widow Mt. Jasoda Kuer and a daughter Mt. Barat Kuer but no male issue. The daughter Barat Kuer married one Bihari Singh and by him had a son Suraj Singh who predeceased his mother leaving a widow Mukha Kuer who is the first Defendant in this suit. Upon Udit Narain's death his property was inherited by his widow Jasoda and on her death sometime later Barat Kuer succeeded to the property and died in the year 1918. Upon her death without leaving issue, her son Suraj Singh having predeceased her, the succession re-opened. The Plaintiff Suraj Prasad Singh a distant collateral relation of Udit Narain Singh, claims to be entitled to be land in dispute as the next reversionary heir of Udit Narain on the death of Mt. Barat Kuer. The Appellants Rambujhawan Singh and Manoge Rai, who are the Defendants Nos. 9 and 10 in the suit, claim the property under two sale deeds dated the 18th May 1909 executed in their favour by the defendants Nos. 7 and 8, Mr. Herbert Edward Cox and Miss. H. H. Cox, in turn had purchased from Barat Kuer under a registered conveyance executed by her in January 1908. There were a number of other Defendants in the suit who either by relationship to the last male holder or by the title derived from the Appellants (Defendants Nos. 9 and 10) claimed to have some interest in mauza Jhitkahi or the other properties which form the subject of the present suit. In the present appeal, however, we are concerned only with the interest in mauza Jhitkahi and the rival claims thereto of the Plaintiff Suraj Prasad Singh and the Appellants - Defendants, Rambujhawan Singh and Manoge Rai.

Numerous pleas were raised in defence by the Appellants. It was contended that the property was not part of the estate of Udit Narain Singh but the *stridhan* of his widow Mt. Jasoda Kuer and that it was inherited from her by her daughter Barat Kuer as her absolute property over which she had complete power of disposal. The Plaintiff's right as next reversionary heir of Udit Narain Singh was also denied. It was further contended that in any event the sale by Mt. Barat Kuer to the Coxs (Defendants Nos. 7 and 8) from whom the Appellants derived their title was justified by legal necessity. It also appeared that the conveyance executed by Barat Kuer in 1908 was made in order to raise money to pay off certain debts, one of which was a *zarpeshgi* mortgage debt of Rs. 1,100 under an instrument executed by Jasoda Kuer in 1902, the document

having been signed on her behalf, she being illiterate, by her grandson Suraj Singh who was then alive and who was at that time the next reversioner. It was contended before the trial Court that this transaction in which the then reversioner signed on behalf of his grandmother was evidence of his consent and should be taken as proof of justifying necessity for that transaction. On appeal in argument before us although the point had not been raised in the pleadings or issues it was urged that the fact that Suraj Singh signed the *zarpeshgi* of 1902 on his grandmother's behalf, he being the sole reversionary heir at that time, constituted the transaction valid and binding apart from any question of legal necessity.

The learned Subordinate Judge found that the Plaintiff Suraj Prasad Singh was the next reversionary heir of Udit Narain after the death of Mt. Barat Kuer, a finding which is no longer disputed. He further found that mauza Jhitkahi formed part of the estate of Udit Narain Singh and was not the *stridhan* property of his wife and daughter. Although this finding was questioned in argument before us the point was subsequently abandoned on its being pointed out that Udit Narain Singh during his life-time had purported to deal with this property as his own. The learned Judge also found that out of the sum of Rs. 5,000, the purchase price paid to Mt. Barat Kuer under the conveyance of 1908 a sum of Rs. 1,300 only was justified by legal necessity and ordered the sale to be declared void and possession to be given to the Plaintiff Suraj Prasad Singh on payment of that sum to the Appellants who had purchased as already stated from Barat Kuer's transferees. He was also of opinion that there was no proof of legal necessity by the fact that Suraj Singh (Barat Kuer's son) had signed the mortgage of 1902 on his grandmother's behalf.

The Appellants contended before us, although somewhat half-heartedly, that the whole of the purchase price paid to Barat Kuer was justified by legal necessity and, secondly, that the mortgage debt of 1902 for Rs 1,100 to discharge which was one of the objects of the sale was binding on the reversioners and that that sum should in any event be added to the amount repayable to the Appellants out of the purchase price.

The sale deed of 1908 in favour of the Coxs recites that the vendor Mt. Barat Kuer is pressed for money and that suits are threatened against her and that it is necessary to sell the property in order to raise money. The purchase price of Rs. 5,000 was said to be required for the following purposes :—

(1) To discharge a debt of Rs, 2,000 due to Mr. William Herbert Cox under a *zarpeshgi* bond, dated the 2nd August 1897, executed by Mt. Jasoda Kuer.

(2) To discharge a *zarpeshgi* bond of Rs. 1,100 executed by Jasoda Kuer on the 30th November 1902 in favour of Barhamdeo Singh.

(3) To discharge a mortgage debt of Rs. 424 executed by Jasoda Kuer in favour of Bhikan Sheikh on the 26th September 1898.

(4) The balance of Rs. 1,476 was required to pay other petty debts and Government revenue and for necessary expenses, the amounts and details of which are not specified.

The sum of Rs. 1,300 allowed by the Subordinate Judge as justified by legal necessity formed part of the first of the above items for Rs. 2,000. This sum was said to have been borrowed by Jasoda Kuer to pay off a previous *zarpeshgi* of Rs. 1,200 executed by Udit Narain in 1860 in favour of Mr. Henry Hill, proprietor of the Bara factory, the balance of Rs. 800 being required to pay a debt of Rs. 700 due to Ganesh Das Marwari, the remaining Rs. 100 being for household expenses and maintenance during a time of scarcity. The learned Judge considered that the *zarpeshgi* executed by Udit Narain was a debt due from his estate and therefore justly payable out of the same. There was no satisfactory evidence of necessity for the loan due to Ganesh Das Marwari and the learned Judge disallowed it. He thought, however, that the circumstances showed that Rs. 100 might well be required for the necessary personal expenses of Jasoda Kuer as 1897 was a famine year. He accordingly allowed Rs. 1,300 in all out of the purchase price. The Appellants have not seriously contended that any further portion of this item can be justified on the ground of legal necessity and I see no reason to differ from the conclusions of the trial Court.

The second item of Rs. 1,100 and the third item of Rs. 424 were both loans contracted by Jasoda Kuer to pay off

debts due to the Bara factory owned by Mr. Hill but the Judge found that there was no evidence of any justifying necessity for contracting these debts and it has not been seriously urged before us that there is any evidence to support them on that ground. It was argued, however, that the mortgage bond for Rs. 1,100 which was signed in Jasoda's name by her daughter's son, then the next reversioner, must be taken as having been consented to by him. It was argued that a transfer effected by a limited owner such as a Hindu widow with the consent of the next reversioner was a valid and binding transaction. Accepting this proposition as a correct exposition of the law there is nothing, apart from the fact that the reversioner signed on behalf of his grandmother, to prove his consent to the transaction. It has frequently been held that the signature of a party as a witness to a deed or as the scribe who wrote it is not in itself evidence of his consent to the transaction and I can see no reason why a different principle should be applied to a person who simply signs the name of another at that other's request. It may or may not be that he was fully aware of the contents of the document and it may or may not be that he approved of it, but the fact that he merely acted as the amanuensis of another affords in itself no evidence of his own knowledge of the contents of the document. Still less can it be said to express his concurrence in the matters expressed therein. His part is merely mechanical and expresses no separate intention of his own but merely the intention of the party on whose behalf he acts. To hold otherwise would, in my opinion, in many cases work injustice and be fraught with much danger.

The fourth item of Rs. 1,476 paid in cash to Barat Kuer was according to the sale deed required by the vendor to pay debts due to *mahajans* for sums borrowed during time of famine, for maintenance and for payment of Government revenue and other necessary expenses. There was no evidence to support these recitals in the sale deed but some evidence was given to the effect that money was required for the *sradh* of Jasoda Kuer and the *gaona* of Barat Kuer's son Suraj Singh who was then alive, but this was not alleged in the sale deed and the learned Subordinate Judge rejected the evidence as untrustworthy. The learned Counsel for the Appellants has not referred us to any evidence which could be said to show that there was any legal necessity for this sum. The verbal evidence in fact was not even referred to in argument but having looked at it I consider that there is no reason to differ from the learned Judge's findings. As the onus lies on the purchaser to prove the necessity for the sale this appeal fails and is dismissed with costs.

Jwala Prasad, J.—I agree.

Appeal dismissed.

1925 PATNA 469

ROSS, J.

Harihar Singh — Defendant — Appellant.

v.

Dasrath Ahir and others — Plaintiffs—Respondents.

Appeal No. 1516 of 1921, Decided on 18th July 1924, from Appellate Decree, from a decision of the Sub. J., Saran, D/- 17th August 1921.

Malicious—Prosecution—Plaintiff must establish his innocence.

The first thing that the plaintiff in a suit for damages for malicious prosecution has to prove is his innocence. Where the information to the Magistrate which led to proceedings under S. 107, Criminal P. C. being taken against the plaintiffs included more than one specific accusation.

Held: that the fact that one of these accusations had not been supported by evidence was no ground for giving the plaintiffs a decree for damages for malicious prosecution, when the case as a whole had not been found to have been laid without reasonable and probable cause.

[P. 470, C. 1, 2.]

Baikuntha Nath Mitter — for Appellant.

Ram Prasad and *B. K. Sinha* — for Respondents.

Judgment.—This is an appeal by defendant No. 2 against a decree of the Subordinate Judge of Saran in a suit for damages for malicious prosecution. The plaintiffs' case was that the defendant No. 1 who was the *peshkar* of the Deputy Commissioner of Darjeeling had made an application to the Magistrate of Saran on the 3rd December 1918, which resulted in proceedings being taken against the plaintiffs under S 107, Cr. P. C., which ended in their favour. Defendant No. 2 is the son of defendant No. 1. The principal allegations in the application to the Magistrate were that the defendant No. 1 had been assaulted by the plaintiffs on his way home from Ekma Railway Station, and further that they had carried away the

crops of his paddy field of 1¼ *bighas*. This second allegation was based on a telegram sent by defendant No. 2 to defendant No. 1.

The finding of the learned Munsif was that the criminal case under S. 107 of the Cr. P. C. was wholly a concocted story and without any reasonable or probable cause," and he dismissed the suit. The finding of the learned Subordinate Judge was that he was not prepared to believe that the assault was a total myth, and that he had no doubt that defendant No. 1 believed the assault to have been committed at the instance of the plaintiffs. With regard to the telegram about the cutting of the paddy of 1¼ *bighas* sent by defendant No. 2 to defendant No. 1 he held that there was no justification for defendant No. 2 sending the telegram, and that the case was started without reasonable and probable cause by defendant No. 2, but the application by defendant No. 1 so far as he was concerned was not without reasonable and probable cause and was started as an ordinary prudent man would have done under the circumstances. While dismissing the appeal so far as defendant No. 1 was concerned the learned Subordinate Judge gave the plaintiffs a decree for Rs. 147-8-0 against the defendant No. 2. It was held in *Sheikh Muchi Osta* v. *Horsmul Marwari* (1) that the first thing that the plaintiff in a suit for damages for malicious prosecution has to prove is his innocence. Now on the findings of neither Court below can it be said that the plaintiffs have proved their innocence. In the opinion of both Courts there was reasonable and probable cause for the information to the Magistrate which led to the proceedings under S. 107, Cr. P. C. That information included more than one specific accusation and the fact, that one of these accusations has not been supported by evidence is in my opinion, no ground for giving the plaintiffs a decree for damages for malicious prosecution, when the case as a whole has not been found to have been laid without reasonable and probable cause. No authority was cited to support such a contention and in view of the findings as to the nature of the proceedings under S. 107, Cr. P. C., as a whole, it seems to me impossible to give the plaintiffs a decree for damages.

I, therefore, allow this appeal with costs, set aside the decree of the learned Subordinate Judge and restore the decree of the Munsif and dismiss the suit with costs throughout.

Appeal allowed.

(1) [1913] 17 C.W.N. 434=19 I.C. 24.

1925 PATNA 470

DAS AND ADAMI. JJ.

Ladu Narain Singh—Defendant — Appellant.

v.

Goberdhan Das and others—Defendants & Plaintiff—Respondents.

Appeal No. 21 of 1923, Decided on 22nd January, 1925, from Original Decree, against the decision of the Addl. Sub. J., Hazaribagh, D/- 10th November, 1922.

(a) *T. P. Act, S. 43—Transferor's representation believed and acted upon by transferee is essential.*

To apply the principle of S. 43 it must be established that there was a representation made by the transferor which was believed by the transferee and that the transferee relying on the truth of that representation changed his position to his detriment. [P. 471, C. 2]

(b) *Hindu Law—Debts by grandfather for legal necessity—Debts bind family property,*

A man must satisfy out of the family properties in his hands, the debts contracted for legal necessity by his paternal grandfather. [P 472 C 1]

★★ (c) *Hindu Law of Debts—Grandfather—Interest is payable by grandson.*

The text of Vishnu and Yajnavalkya do not place any limit on the extent of a grandson's liability for the debts of the grandfather but treat the liability of the son and grandson to discharge the debt of their ancestor as co-extensive. The text of Brihaspati which states that interest need not be paid on debts of the grandfather has not been adopted in the decisions of the Courts and interest must be held to be payable on the debts of the grandfather. [P. 472, C. 1]

(d) *Chota Nagpur Encumbered Estates Act. (6 of 1876) S. 12 A—Sub. cl. (1) (b) and Sub-S (3)—Property released on 2/10/1915—Mortgage on 10/10/1915 was held void.*

The estate was attached under the provisions of the encumbered Estates Act: but it was released on the 2nd October, 1915. On 10th October, 1915 a mortgage of the property was executed,

Held: that the mortgage was void under the provision of Sub-S. (1) cl. (b) read with sub-S. 3 of S. 12A of the Encumbered Estates Act. [P. 471, C. 1]

S. M. Mullick and *N. N. Sen* — for Appellant.

N. Chandra Sinha and *Nitai Chandra Ghose*—for Respondents.

Das, J.—This was a suit to enforce a mortgage executed by Sukhnath Singh and his father Tikait Tulsi Narayan Singh against the Defendant who is the grandson of Sukhnath. Tikait Tulsi Narayan Singh was the holder of an impartible estate known as Gadi Chakmanju. The

estate was attached under the provision of the Encumbered Estates Act: but it was released on the 2nd October 1915. On the 10th October 1915 the bond, which is sought to be enforced in this suit, was executed in favour of the Plaintiff. The learned Subordinate Judge has come to the conclusion that the mortgage is void under the provision of Sub-S. (1), cl. (*b*) read with sub-s. 3 of S. 12A of the Encumbered Estates Act. This view is obviously right and no attempt has been made before us to combat this

The learned Subordinate Judge however found that the mortgage bond was executed for consideration and that there was valid legal necessity to support the transaction. It was contended before him that there was nothing to prevent Sukhnath from executing the mortgage and that the Plaintiff was entitled to a mortgage decree by virtue of S. 43 of the Transfer of Property Act. This view did not find favour with the learned Subordinate Judge who however gave the Plaintiff a money decree for the amount claimed as against the Defendant. The Defendants appeals to this Court and he contends firstly, that the learned Subordinate Judge should not have passed any decree as against him; and, secondly, that the decree should have been for the principal sum claimed and not for interest. The plaintiff has presented a cross-appeal and he contends that he was entitled to a mortgage decree as against the Defendants.

It will be convenient to dispose of the cross-objection. Mr. Naresh Chandra Sinha relies upon S. 43 of the Transfer of Property Act which is as follows:—

"Where a person erroneously represents that he is authorised to transfer certain immovable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option"

Now the rule of law which underlies S. 43 of the Transfer of Property Act is that, as between the transferor and the transferee, the transferor cannot plead subsequent title to the land transferred if he had induced the transferee to pay money for the transfer. As has been pointed out the principle is an extension of the well-known rule of estoppel. Now Mr. Naresh Chandra Sinha concedes that at the date of the transfer Sukhnath had no title to the properties mortgaged; but he contends that inasmuch as he did acquire a title to it subsequently, it was obligatory on him to make good the representation made by him to the mortgagee. But if the principle underlying S. 43 of the Transfer of Property Act be an extension of the well-known rule of estoppel it must be established that there was a representation made by Sukhnath which was believed by the Plaintiff and that the Plaintiff relying on the truth of that representation changed his position to his detriment. But in this case the Plaintiff has given his evidence and he admits that he asked Sukhnath to join in the mortgage as Tulsi was an old man and his son Sukhnath would become the *malik* after his death. The evidence of the Plaintiff shows that there was no representation made by Sukhnath and that in any event the Plaintiff could not have been mislead by any representation that might have been made by Sukhnath. In my opinion the learned Subordinate Judge was right in holding that S. 43 of the Transfer of Property Act has no application to the facts of this case. I must accordingly dismiss the cross-objection.

Coming now to the appeal, the first contention raised by Mr. Susil Madhab Mullick is to the effect that the defendant took the property by survivorship and that the properties which are now in his hands cannot be regarded as assets of his grand-father Sukhnath. He accordingly invites us to hold that the learned Subordinate Judge should not have passed a decree against him. The question whether the property which once belonged to Sukhnath and which is now in the possession of his grandson can be regarded as assets of Sukhnath in the hands of the Defendant is a difficult one and I do not propose to express any opinion on it, for I am satisfied that the Plaintiff is entitled to a decree as against the Defendant. The debt was undoubtedly contracted by Sukhnath. It is found by the learned Subordinate Judge and not disputed before us that the debt was contracted for a legal necessity. The defendant is accordingly bound to discharge that debt. There is no doubt that the Defendant is in possession of the

family property which was once in the possession of Sukhnath. That being so, he must satisfy the debt of Sukhnath out of the family property in his hands.

It was then contended that he is not liable for interest; and reliance is placed on the text of Brihaspati which is to the following effect:—

"The father's debt must be first paid, and next a debt contracted by the man himself: but the debt of the paternal grand-father must even be paid before either of these. The sons must pay the debt of their father, when proved, as if it were their own or with interest; the son's son must pay the debt of his grand-father, but without interest; and his son shall not be compelled to discharge it."

It was contended before us that as the Hindu law which imposes on the grandson the obligation to pay the debts of his grand-father limits that obligation to the principal amount of the debt only the Courts in enforcing the obligation should not give the creditor a decree for interest. It is conceded by Mr. Mullick that there is no case to support his view; but he contends that we are bound by the text of Brihaspati and that he is clearly entitled to succeed on this point. But as has been pointed out by Banerji, J., in *Lachman Das* v. *Khunnu Lal* (1) the texts of Vishnu and Yajnavalkya do not place any such limit on the extent of a grandson's liability, but treat the liability of the son and the grandson to discharge the debt of their ancestor as co-extensive. In my opinion whatever the text of Brihaspati may mean that text has not been adopted in the decisions of our Courts and I am not prepared to accept it for the decision of this case This is the conclusion at which Banerji, J., arrived in the case to which I have referred and with which I agree. The result is that this appeal is dismissed with costs.

Adami, J.—I agree.

(1) [1895] 19 All. 25=(1896) A.W.N. 183 (F.B.)

1925 PATNA 472

MULLICK AND BUCKNILL, JJ.

Sheobhanjan Singh & others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Rev. No. 113 of 1924, Decided on 22nd January 1925, from S. J., Patna D/- 4—12—1924.

Criminal P. Code, S. 407—Part of case tried as second class Magistrate and part as first class—Appeal lies to Sessions Judge.

It is not the conviction by a second class Magistrate but the holding of a trial by such Magistrate that determines the forum of the appeal.

Where the Magistrate was vested with first class powers so netime before the hearing of the argu nents in the case, *i.e.*, part of the trial was held by him as a second class Magistrate and part as a first class Magistrate,

Held: that the proper tribunal for hearing the appeal was the Sessions Judge and not the District Magistrate. 8 *Cr. L. J.* 48 Ref. [P 472 C 2]

Ahmad Raza—for Accused.

Mullick, J.—It appears that in this case the trial was commenced by Babu Paresh Nath Mazumdar while he was a Deputy Magistrate of the second class. On the 20th September 1924 this Magistrate was vested with first class powers. On the 24th September the trial was continued and some prosecution witnesses were cross-examined and discharged. The case continued until the 28th September when arguments were heard and on the 29th September judgment was delivered and the accused were convicted.

The question now is whether the appeal lies to the District Magistrate or to the Sessions Judge. The Sessions Judge has referred the matter to us and is of opinion that the appeal should be heard by the District Magistrate. He states that the trial was completed by the Magistrate in this case while he was a second class Magistrate and that he was vested with first class powers after the hearing was closed and before the delivery of the judgment. The learned Judge relies on *Emperor* v. *Nga Paw* (1). It may be admitted that the wording of S. 407 Cr.P.C. admits of the view that it is not the conviction by a second class Magistrate but the holding of a trial by such Magistrate that determines the forum of the appeal. In this case, however, that question does not arise because the Behar and Orissa Gazette of the 24th September 1924 shows that Babu Paresh Nath Mazumdar was vested with first class powers sometime before the hearing of the arguments in the case. Therefore part of the trial was held by him as a second class Magistrate and part as a first class Magistrate, and I think in the circumstances the proper tribunal for hearing the appeal is the Sessions Judge and not the District Magistrate.

Bucknill, J.—I agree.

(1) [1908] 8 Cr. L. J. 48.

1925 PATNA 473 (1)

DAS AND ROSS, JJ.

Maharajah Bahadur Singh Kesheo Prasad Singh—Plaintiff—Appellant.

v.

Ramdeal Kuer and others—Defendants—Respondents.

Second Appeal Nos. 212, 213, 216, 241 to 242 and 244 of 1922, Decided on 2nd July 1924 from Sub. J., Shahabad, D/- 25th November 1921.

(a) *Bengal Tenancy Act., S.* 60 — *Suit for apportionment of rent by registered proprietor—Plea of tenants that they paid rent for over* 12 *years to proprietor of adjoining estate is not tenable.*

Under S. 60 a tenant cannot plead that the registered proprietor should not get the rent apportioned on the ground that the proprietor of adjoining mahal had realized rent for over 12 years in open assertion that the lands belonged to his mahal. Nor is such a proprieter a necessary party to the suit. [P. 473, C. 2]

(b) *Bengal Cess Act., S* 41 — *Raiyat must pay cess to landlord.*

Under the provision of S. 41 of the Cess Act every cultivating raiyat is to pay to the person, to whom his rent is payable one half of the road cess. [P. 473, C. 2]

L. N. Singh and *N. N. Singh*—for Appellant.

S. S. Lal, S. C. Mitter and *N. N. Sen*—for Respondents.

Ross, J.—These appeals are directed against a decree of the Subordinate Judge of Shahabad dismissing the plaintiff's claim for apportionment of rents with respect to certain holdings which are partly in his *Mahal* Naubarer and partly in the adjoining *Mahal* Gang Barar. The ground upon which the learned Subordinate Judge dismissed the claim was that it was proved that the plaintiff had never realized rents from the tenants defendants for these holdings, and that for more than twelve years the proprietors of Gang Barar, who were made parties to the suit, had realised rents in open assertion that the lands appertained to Gang Barar, it was therefore too late for the proprietors of Naubarar to claim the rents as against the proprietors of Gang Barar. The fallacy in this reasoning is that plaintiff has not claimed rent as against the proprietors of Gang Barar but has claimed rent from the tenants defendants. It was unnecessary to implead the landlords of Gang Barar and they must he dismissed from these actions with costs throughout. But as regards the right of the plaintiff to recover rents from the tenants for the lands in Naubarar, S. 60 of the B. T. Act concludes the matter. It is admitted that the plaintiff is the recorded proprietor of Naubarar and that the Commissioner appointed for this purpose has ascertained the extent of the lands of these holdings which lie within Naubarar. Consequently by the provisions of S. 60 of the Bengal Tenancy Act, the plaintiff is the only person to whom the tenants are entitled to pay rent for these lands lying within Naubarar and they cannot be permitted to set up the title of the proprietors of Gang Barar.

The only other question in the appeal is whether the plaintiff is entitled to recover cess from the tenants. Under the provision of S. 41 of the Cess Act every cultivating raiyat is to pay to the person, to whom his rent is payable one half of the road cess. It was suggested that the Cess Act does not prevail in the U. P., but this estate is now borne on the Register of the Collector of Shahabad and the Act is in force over this estate.

The result is that the appeals must be decreed with cost with the exception of S. A. No. 213 of 1922 and the cases must be remanded to the Court below in order to assess the proper rent payable by the tenants for the lands found by the Commissioner to be included in Naubarar. At the same time the defendants second party, proprietors of Gang Barar, will be dismissed from these actions with cost in all the Courts. As the Commissioner has not found that in suit No. 264 any lands are within Naubarar, S. A. No. 213 of 1922 arising out of this suit must be dismissed with cost.

Das, J.—I agree.

Cases remanded.

★ 1925 PATNA 473 (2)

DAS AND ADAMI, JJ.

Sheikh Imdad Ali—Appellant.

v.

Munshi Nandkumar Lal and others—Plaintiffs—Respondents.

Appeal No. 68 of 1923, Decided on 16th February 1925, from Appellate Decree, against a decision of Jud. Commr. of Chota Nagpur, D/- 24th June 1921.

★ *Lim. Act., S.* 19—*Admission as to factum of purchase does not amount to admission as to its validity.*

An admission that a certain party has purchased the property is not an admission that that party has acquired a good title in the pro-

perty, for it is quite consistent with an assertion that the purchase was bad in law and did not operate to confer any title on the alleged purchasers. [P 947 C 2]

N. C. Sinha and *N. C. Ghosh*—for Appellant.

N. V. Sen—for Respondents

Das, J.—The only question in this appeal is whether there is a sufficient acknowledgment within the meaning of S. 19 of the Limitation Act to take the case out of the statute of limitation. In 1902 the plaintiff along with certain other persons purchased an 8 annas share of a *jagir* in Mouzah Jaipur which belonged to Defendant No. 1. It is admitted that the plaintiff did not recover actual possession of the land although there was a delivery of possession through the Court on the 10th of August 1902. The record-of-rights recorded Defendant No. 1 as in possession of the disputed land. The present suit was instituted on the 30th January 1920 and is *prima facie* barred by limitation. But the plaintiff relies upon a certain acknowledgment made by Defendant No. 1 sometime in June 1913 in a suit which was instituted by Bishun Lochan against him. The acknowledgment is contained in the 12th paragraph of his written statement and is as follows:—"That 8 annas of village Jaipur, out of 16 annas, that is to say, four annas *mokurari* share of Jamadar Jageswar Dayal Singh and 4 annas share of the Defendant, total 8 annas, together with the disputed property, was sold in execution of a certificate for arrears of road cess and was purchased by Dinesh Prasad, Gorakhnath, Nandkumar and Tilakdhari Lal, who obtained a certificate. That in spite of the fact that a *tenaza* was filed in the Settlement Department they did not get possession but were ordered to sue for possession before Civil Court. So long as all these persons are not made parties to the suit, the plaintiff's suit cannot proceed. It is admitted that the property to which reference is made in the 12th paragraph of the written statement is the same as that which is the subject-matter of the present litigation. The learned Judicial Commissioner has come to the conclusion that there is an acknowledgment of the title of Dinesh Prasad, Gorakhnath, Nandkumar and Tilakdhari Lal in this written statement which was filed by Defendant No. 1 in June 1913 sufficient in law to take the case out of the statute of limitation. I am unable to agree with this view. It is undoubtedly admitted that the property was sold in execution of a certificate for arrears of road-cess and was purchased by Dinesh Prasad, Gorakhnath, Nandkumar and Tilakdhari Lal; but an admission that a certain party has purchased the property is not an admission that that party has acquired a good title in the property, for it is quite consistent with an assertion that the purchase was bad in law and did not operate to confer any title on the alleged purchasers. A case is cited in Halsbury's Laws of England, 19th Vol. at p. 132, para, 253, where it was held that an admission that a person has recovered judgment in an action of ejectment is not an admission of title, for it is quite consistent with an assertion that the judgment in ejectment was wrong and that the person had no title at all. In my opinion the principle is equally applicable to a case like this. The admission that the property was purchased amongst others by Nandkumar Lal was coupled with an assertion that the purchasers did not get possession of the land and I am unable to read the statement in para. 12 of the written statement as an acknowledgment of the title of the purchaser. In my opinion the decision of the learned Judical Commissioner should be reversed and the decision of the Court of first instance should be restored.

I would accordingly allow the appeal, set aside the decision of the learned Judge in the Court below and restore the decision of the Court of first instance. The result is that the suit is dismissed with costs in all the Courts.

Adami, J.—I agree.

Appeal allowed.

★★ 1925 PATNA 474
Full Bench

DAWSON-MILLER, C. J., JWALA PRASAD AND DAS, JJ.

Adaya Prasad Singh—Judgment-debtor—Appellant.

v.

Ram Narayan Das and others—Decree-holders—Respondents.

Appeal No. 139 of 1924, Decided on 23rd March, 1925, from Appellate Decree, on reference by Ross and Kulwant Sahay, JJ.

★★ *Civil P. C., O. 21, R. 22 — Rule applies to subsequent execution petitions and is not confined to first petition.*

The rule applies to every application for execution and not merely the first application, and

therefore in every case where the application is made more than a year after the decree and more than a year after the last order was made against the judgment-debtor in any previous execution, a fresh notice must be served. 1925 *Patna* 111 *dissented from.* [P. 476, C. 1, 2]

Siv Narayan Bose—for Appellant.

Satyendra Nath Banerjee—for Respondents.

Dawson-Miller, C. J.—This case has been referred to the Full Bench because the learned Judges before whom it came took a different view from that expressed in the earlier case of *Mahadeo Singh* v. *Dhobi Singh* (1)

The question for determination is whether a petition for execution filed on the 11th April 1923 is time-barred or not. The facts which it is necessary to refer to in order to appreciate the question in dispute are shortly as follows.

The decree which is the subject of the present application for execution was passed in favour of the Respondents in the year 1913. After five applications for execution which left the decree unsatisfied, a sixth execution petition was filed on the 1st December 1919. An order for attachment of some of the judgment-debtor's property was made in those proceedings on the 26th February 1920 and in April the property was sold. The sale, however, was set aside on the 28th August following, and that execution case then came to an end. It should be noted that the last order passed against the judgment-debtor in that execution case was the order for attachment of the 26th February 1920. That is the only date which is of any importance in that execution case in considering the present question. A seventh application for execution was filed on the 13th May 1922 and in that case a notice was issued under O. 21, r. 22 on the 9th November 1922. That notice appears to have been served on or before the 29th November of the same year. An objection was afterwards taken in that execution case by the judgment-debtor to the effect that the petition for execution was not in accordance with law. The objection was sustained and the case was dismissed on the 10th February 1923. The present execution case, which is the eighth, was filed on the 11th April 1923. That application was made within three years of the previous one but more than three years from the date of applying to take any step in aid of execution in the sixth execution case.

The learned Munsif decided that as the seventh application for execution was not according to law, it did not create a fresh starting point for limitation. He accordingly dismissed the present application.

The learned Subordinate Judge on appeal came to the conclusion that although the application itself in the seventh case may not have been according to law still an order had been passed in those proceedings on the 9th November 1922 as required by O. 21, r. 22,, and therefore under cl. (6) of Art. 182 of the Limitation Act a fresh period of limitation of three years began to run from that date. From that decision there was an appeal to this Court. The appeal was heard by a bench of two Judges who came to the conclusion that the order of the 9th November 1922 passed in the seventh application for execution was an order required by the Code of Civil Procedure within the meaning of Art. 182 of the Limitation Act, and therefore the present application which was within three years, in fact within one year of that order, was in time. As, however, there was a previous decision of this Court, to which I have referred, which took a different view, the case was referred to this Bench.

The only question for determination in this appeal is whether in the circumstances which I have stated the order passed on the 9th November 1922 ordering notice to issue under O. 21, r. 22, was a notice required by the Code within the meaning of the 6th clause of Art. 182. I perhaps ought to mention that it is no longer contended that the notice if required by the Code is bad merely on the ground that the seventh execution petition filed on the 13th May 1922 was not in accordance with law.

O. 21, r. 22 provides as follows :— "Where an application for execution is made—(*a*) more than one year from the date of the decree, or (*b*) against the legal representative of a party to the decree the, Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. There is a proviso to that rule which makes it unnecessary that a notice should be issued in certain cases, but before dealing with that it is necessary to

(1) 1924 Patna 111=2 Pat. 916=4 P.L.T. 721 =(1923) P. H. C. C. 283

see what is included under the rule itself apart from the proviso.

The argument of the learned Vakil who appears on behalf the Appellant is that under the rule which I have just quoted it is necessary to issue notice in execution proceedings once, and once only, and when that has been done no further notice is required to be issued even if the subsequent execution proceedings should have been more than a year or even up to three years from the date when any order was passed against the judgment-debtor in any previous execution and the issue of such a notice therefore did not come within cl. (6) of Art. 182 so as to save limitation. Now, so to interpret the rule would be, in my opinion, to introduce words into it which do not exist. The rule applies to an application for execution and that, to my mind, must include, unless the contrary should appear, every application for execution and not merely the first application. It follows therefore, in my opinion, that wherever an application for execution, whether it be the first or any subsequent application, is made more than one year after the date of the decree, the Court is bound to issue the notice referred to, to the person against whom execution is applied for, unless the proviso makes it unnecessary. The present case, therefore, appears to come directly within the wording of the rule. It is not contended in this case that there is anything in the proviso which would make it unnecessary for the Court to issue the notice, but we are asked to say that the intention of the legislature must have been to require only one notice to be issued and no more. If that was in fact the intention of the legislature, and I can see no reason why it should be so, they have expressed that intention in very unhappy language, for there is nothing in the language of the rule to limit its operation to the first or any other application. But a reference to the proviso seems to me to make it clear that a fresh notice was contemplated as necessary even in subsequent applications except in so far as the proviso renders that course unnecessary. The proviso to the rule reads thus:—

"Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him." But for that proviso it would be necessary to issue the notice in every case whether it be the first, second or third or later application where it is made more than a year after the decree. The legislature has considered, however, that if the party has had notice by some order being made against him in some previous execution case, then within a year of that order no further notice should be required. That seems to me to be the intention and object of the rule as a whole. Again with regard to the legal representative, it is provided in his case that notice to him need not be given solely because he is the legal representative, if upon a previous application for execution against him the Court has ordered execution to issue. But even although he is a legal representative he may still come under cl. (*a*) of the rule subject to the proviso relating to that part of the rule.

The learned Judges in the previous case [*Mahadeo Singh* v. *Dhobi Singh* (1)] appears to me, with great respect, to have taken somewhat too narrow a view of the meaning of O 21, r. 22. They stated: "The object of the rule is merely to protect the judgment-debtor or his legal representative from being lulled into a sense of security by the decree holder's delay in executing his decree; but once the original decree has been put into execution and a notice has been served under r. 22 indicating his intention to proceed to execution, it does not seem to me that it is contemplated by r. 22 that a fresh notice must be served for every execution application made more than one year after the last order against the judgment-debtor." With great respect to the learned Judges who decided that case I find myself unable to agree and I think that the proper interpretation of O. 21. r. 22 is that which I have already indicated, namely, that in every case where the application is made more than a year after the decree and more than a year after the last order made against the judgment-debtor in any previous execution, then a fresh notice must be served.

In my opinion this appeal should be dismissed with costs to the Respondent to be paid by the Appellant.

Jwala Prasad, J.—I agree.

Das, J.—I also agree.

Appeal dismissed.

1925 PATNA 477

MULLICK AND KULWANT SAHAY, JJ.

Mt. Abbasi Begum—Appellant.

v.

Mt. Yaquti Begum—Respondent.

Appeal No. 6 of 1924, Decided on 2nd December, 1924, from Original Order of the Dt. J., Muzaffarpur, D/-22nd December, 1923.

Guardians and Wards Act., (1890) *S. 45—Court refusing to allow guardian to show by evidence that sum ordered to be paid was not really due—Fine cannot be imposed.*

In order to enable the Court to impose the fine it must be shown that the sum for the non-payment of which the fine has been imposed was actually due from the guardian, and if the guardian represents that the sum is not due, no fine can be imposed unless it is ascertained as to whether the sum which he has been ordered to pay is really due from him.

[P 477, C 2]

On a previous occasion accounts were examined and a certain amount was stated in the Dt. Judge's order to be due from the guardian, to the minor. The guardian continued as such for some time after. Then she was succeeded by another who in turn was succeeded by a third. To the intermediate guardian, the original guardian had paid a portion of the amount stated to be due from her. When the guardian for the time being applied to realise the balance, the original guardian wanted to examine witnesses to show that the amount stated to be due from her included certain items which were actually realised not by her but by her successor in the office of guardianship. Her objection was overruled and eventually on her non-payment, she was fined.

Held: that the order, being one without any enquiry as regards the amount actually payable by the guardian, was improper. [P 478, C 2]

Khurshaid Hasnain and *Syed Ali Khan*—for Appellant.

W. H. Akbari and *Bhagwan Prasad*—for Respondent.

Facts.—By his order dated 2nd September 1921, the Dt. Judge found *inter alia* that Rs. 2,475 and odd was due by Mt. Abbasi Begum in her capacity as guardian of Yaquti Begum, minor. Mt. Abbasi Begum continued as guardian for some time after. Then she was succeeded by S. Ahmed Nawab in the guardianship. Mt. Abbasi Begum paid Rs. 1,000 to Sd. Ahmed Nawab. The guardianship then shifted to Sd. Azizuddin Hussein who applied to realise the balance due from the ex-guardian, Mt. Abbasi Begum. Mt. Abbasi Begum objected that the Rs. 2,475 included certain rents due from the tenants which she had failed to realise in respect of the share of the minor, that Sd. Ahmed Nawab had made realisations for the periods for which she had been made liable and that such realisations would appear from the accounts filed by Sd. Ahmed Nawab. The Dt. Judge on 4th October 1923 held that there was no necessity for examining witnesses as proposed by Mt. Abbasi Begum and rejected her objection. Eventually, Mt. Abbasi Begum having failed to make the payment, the Dt. Judge imposed a fine of Rs. 50 upon her. The present appeal was filed against this order.

[**Kulwant Sahay, J.**—His Lordship stated the facts of the case and remarked that the Dist. Judge ought to have gone into the question as to the amount actually due from the appellant, and proceeded as follows :—]

The order of the 2nd of September, 1921, was apparently passed under S. 34 of the Guardians and Wards Act at a time when Mt. Abbasi Begum was still the guardian of the minor Yaquti Begum. It is contended by the learned counsel for the respondent that the order of the 4th of October, 1923, was passed under sub-S. (3) of S. 41 of Guardians and Wards Act and that no appeal lies against such an order. S. 45 of the Act, however, provides that the guardian shall be liable by order of the Court to a fine not exceeding Rs. 100 in case he fails to pay into Court the balance due from him in compliance with a requisition under clause (*d*) of S. 34, or if the guardian, after he has ceased to be such, fails to deliver any property in compliance with a requisition under sub S. (3) of S. 41 of the Act. Therefore, in order to enable the Court to impose the fine it must be shown that the sum for the non-payment of which the fine has been imposed was actually due from the guardian, and if the guardian represents that the sum is not due, no fine can be imposed unless it is ascertained as to whether the sum which he has been ordered to pay is really due from

him. In *Jagannath* v. *Mahesh Chandra Pal* (1) it was held that if the requisition under S. 34 (*c*) be not in conformity with S. 34 (*d*) no fine can validly be imposed on the guardian for failure to comply therewith. The same principle will apply in case of the failure of the guardian to pay a sum which he may be called upon to pay under sub S. (3) of S. 41 of the Act. I am, therefore, of opinion that the order being one without any enquiry as regards the amount actually payable by the appellant was improper. The learned District Judge seems to be of opinion that it was immaterial as to who had realized the unrealized rents for which the appellant was made liable. In my opinion it will be inequitable to make the guardian pay any sum for which she was made liable on account of non-realization from tenants and which realizations were subsequently made by the new guardian. I would, therefore, set aside the order of the District Judge, dated the 22nd December, 1923 imposing the fine upon the appellant and direct that her objection dated the 4th October, 1923, be considered. In her petition of objection of that date she stated that the fact of the realization of the unrealized rents would appear from the account papers of Mr. Saiyid Ahmed Nawab. The enquiry will therefore be limited to the papers of Mr. Saiyid Ahmed Nawab. If the village papers kept by the village *amlas* during the period of the guardianship of Mr. Ahmed Nawab or the accounts produced by him in Court show any realization from tenants or *thikadars* for the period for which Abbasi Begum was made liable, such, realizations must be credited in favour of Abbasi Begum and she must be called upon to pay only the balance left after giving credit for such realizations.

The result is that the appeal is allowed and the order of the District Judge is set aside with costs.

Mullick, J.—I agree. If Mr. Ahmed Nawab has by arrangement realized part of the balance of Rs. 1,475 due from the appellant it cannot be said that there has been failure on her part to pay the sum of Rs. 1,475. Therefore a a fresh notice must issue for the sum really due.

Appeal allowed.

(1) [1916] 25 C. L. J. 149 = 36 I. C. 286 = 21 C. W. N. 688.

✱ 1925 PATNA 478

MULLICK AND ROSS, JJ.

Askaran Baid—Decree-holder—Appellant.

v.

Raghunath Prasad and others—Judgment-debor—Respondents.

Mis. Appeal No. 141 of 1924, Decided on 8th April 1925, against an order of the Sub. J., Gaya, D/- 30th April 1924.

✱ *Civil P. C., S. 47 and O. 21, R. 98—Decree-holder being auction purchaser—Order under O. 21, R. 98 is appealable.*

When the decree-holder is the auction purchaser and is resisted by the judgment-debtor an order made under rule 98 is appealable as a decree. [P 479 C 2]

Khurshaid Husnain, Kailaspathi and *Sarjoo Prasad*—for Appellant.

Murari Prasad and *Brij Kishore Prasad*—for Respondents.

Mullick, J.—This appeal arises out of an application made under Order 21, rule 97, of the Civil Procedure Code against a judgment-debtor in a mortgage-decree who is alleged to have resisted the delivery of possession to the decree-holder. The decree has not been printed but the Subordinate Judge states that the property is described as.

"One *kita makan* with he land, *haksakunati* and *choukath* and *kenwar* and other *lawazmat* appertaining to the house."

He also states that the house is described as.

"Within the Gaya Municipality bearing No. 49 in Ward No. 10.,'

He further states that the decree gives no boundaries nor any area. In the execution petition which was filed on the 20th February 1923 the area is given as 2 kathas and the description is as above. In the first sale proclamation, which was published shortly afterwards, the description is substantially the same ; but the area is given as 2 kathas 2 dhurs. In the second sale proclamation the area is further altered to 2 kathas 7 dhurs and sale certificate which has been printed shows that what was sold was "one two-storeyed pucca house together with the land and the residential right as also the door frames and door leaves and other materials of the house, holding No. 49 Ward No. 10 paying the annual holding and latrine tax of Rs. 22-8 0."

The sale certificate states the approximate area as 2 kathas 7 dhurs.

When the Civil Court peon went to give delivery of possession of this property on the 1st March 1924, he was resisted by the judgment-debtor Raghunath Prasad and others.

It is now found that at the time of mortgage there was a piece of waste land near the house and that another house has been built upon it since then and that the area of the sites upon which the two houses stand are respectively 2 kathas 7 dhurs and 2 kathas. In the summary inquiry, which he has held under Order 21 rule 97 C. P. C., the Subordinate Judge finds that what was mortgaged and sold was the house standing on the 2 kathas 7 dhurs inclusive of the land and that it was never intended to mortgage or to sell the other plot of 2 kathas.

The decree-holder, however, claims this plot as a part of the property covered by the mortgage and also the house standing on it as an increment thereto.

Having regard to the descriptions given (1) in the execution petition, (2) in the two sale proclamations, and (3) in the sale certificate, it is difficult to see how the decree-holder can be entitled to delivery of possession of the plot of 2 kathas and the house standing thereon. He contends that the ruling description of the property is the holding number and that the area is only a false demonstration. I agree with the Subordinate Judge that this cannot be so. The decree-holder deliberately chose to sell one house standing on a site of 2 kathas or 2 kathas 7 dhurs. At the time of the mortgage suit the second house had already been built, but he took no trouble to mention that fact in his plaint and he was careful not to give either the area or the boundaries of the mortgaged land. He gave instead the Municipal number which is not a permanent description and may change at any moment. Having regard to the facts of this case, I do not think it can be accepted as the description which identifies the property. In my opinion what was mortgaged was only the house which existed at the time of the mortgage and the site upon which it stood. On the merits, therefore, the learned Subordinate Judge was right.

It is also contended by the repondent that no appeal lies.

It is urged that an order delivering or refusing to deliver possession to a decree-holder is not an order relating to the execution, satisfaction or discharge of the decree and, therefore, is not appealable as an order made under S. 47 of the Civil Procedure Code.

Now in one sense it is true that a decree for the enforcement of a mortgage by the sale of the mortgaged property is satisfied as soon as the sale takes place and the decretal amount is deposited to the credit of the decree-holder. But at the same time the legislature has thought fit to make rules for regulating the procedure for annulling or giving effect to the sale. These rules are included in Order 21, which deals exclusively with execution and I do not think it will be a straining of language to hold that proceedings connected with the delivery of possession referred to in rule 94 and the subsequent rules are proceedings relating to the execution of the decree. From this point of view an order under rule 98 would, in my opinion, be one relating to execution. Whether an order relating to resistance against delivery of possession is appealable will depend on whether Ss. 2 and 47 apply to it, and I have no doubt that when the decree-holder is the auction-purchaser and is resisted by the judgment-debtor an order made under rule 98 is appealable as a decree.

Indeed in a mortgage suit it is difficult to conceive any thing more vital to the satisfaction of the decree than the delivery of possession to the decree-holder of the property which he has purchased at the auction sale in part or full payment of his decree. The machinery of the Court sale merely substitutes a contract by the Court for one by the parties themselves. If the contract had been made by the parties, the delivery of possession would have been the most important ingredient of the contract for setting off the purchase money against the decretal sum and I see no reason why it should be otherwise at a Court sale.

I agree, therefore, with the dissenting judgment of Stanley, C. J. in *Bhagwati* v. *Banwari Lal* (1) and with the judgment of the Calcutta High Court in *Hari Charan Dutta* v. *Manmohan Naudi* (2). There are observations in *Sasibhushan Mukherji* v. *Radhanath Bose* (3) to the effect that the decree-holder purchaser has no higher

(1) [1908] 31 All. 82=5 A.L.J. 71=1 I.C. 416=5 M. L. T. 185 (F. B.)
(2) [1913] 18 C. W. N. 27=20 I. C. 874.
(3) [1914] 19 C. W. N. 835=25 I. C. 267=20 C. L. J. 433.

rights than any other auction-purchaser ; but the decision of that case did not turn upon those observations. It is difficult to see why the generality of the term "parties to the suit" in S. 47 should be limited and apply only to questions arising before the auction-purchase and why a decree-holder should cease to be a party merely because the Court makes the contract of sale for him.

A reference to rule 102 would to some extent seem to support this view. Under this rule the decree-holder has, but the judgment-debtor has not, the right to challenge a decision under rule 98, by suit and if S. 47 does not apply, then the decree-holder has an unfair advantage. If however, S. 47 is held to be applicable, this inequality is removed and rule 103 is left to operate between the decree-holder purchaser on the one hand and a third party acting under the instigation of the judgment-debtor on the other. It has to be admitted, however, that the rule still leaves an inequality in so far as it penalises a judgment-debtor who may have made an arrangement with a third party auction-purchaser that he will not take immediate possession [such as was disclosed in *Hari Charan Dutt's* case (2)] but with such a case we are not at present concerned.

But in the majority of cases the judgment-debtor resists on the ground that the property of which delivery of possession is sought was not in fact sold or that if sold, the sale was illegal or contrary to the terms of the decree. In such an objection the auction-purchaser, whether he be the decree-holder or a third party, would be a necessary party and the order of the Court disposing of the objection would certainly be a decree under S 47 ; but the objection must be made before delivery of possession. In *Durga Charan Mandal* v. *Kali Prasana Sarkar* (4) an objection was taken after the confirmation of the sale but before delivery of possession that the holding was not saleable and it was held that the execution Court was competent to investigate it under S. 47 provided the judgment-debtor could show that he was ignorant of the processes that led to the sale.

In the present case the objection of the judgment-debtor was that the house on the smaller plot had not been sold and that it was not competent for the Court to sell it. In my opinion the objection was one under S. 47 C. P. C. and the order of the Court in favour of the decree-holder was, in my judgment, appealable.

The appeal therefore lies, but as it fails on the merits it is dismissed with costs.

Ross, J.—I agree that the appeal should be dismissed.

Appeal dismissed

(4) [1899] 26 Cal. 727=3 C. W. N. 586.

1925 PATNA 480

JWALA PRASAD, AG. C. J. AND MACPHERSON, J.

Rai Kashinath Singh Bahadur—Plaintiff—Appellant.

v.

Kailas Singh and another—Defendants—Respondents.

Appeal No. 50 of 1924, Decided on 7th July 1924, from Appellate Order of the Addl. Sub. J., Gaya, D/- 19th June 1923.

Civil P. C., O. 22, R. 4—Suit does not abate on death of one of the defendants, where liability is joint and several—Claim for rent creates such liability.

The test is whether the liability of the defendants or the judgment-debtors is joint and several in order to determine whether the death of one of the defendants or judgment-debtors renders the entire decree null and void. [P 481 C 2]

A claim for rent is joint and several one as against the tenants. [P 482 C 1]

J. P. Sinha—for Appellant.

Rsspondents not represented.

Jwala Prasad, Ag. C. J.—This is an appeal against an order passed by the Subordinate Judge of Gaya dated the 18th December 1923 setting aside an order of the Munsif of Gaya dated the 19th June 1923.

The order in question relates to the execution of a decree obtained by the appellant against a number of persons as defendants. The decree is dated the 17th February 1922 and is said to be a rent decree. An objection was raised by some of the judgment-debtors to the execution of the decree upon the ground that three of the judgment-debtors were dead at the time when the decree was passed and consequently the decree was a nullity and incapable of execution. This objection was overruled by the Munsif who held that there was no good evidence to show that three of the judgment-debtors were dead before the decree was passed.

On appeal the Subordinate Judge held that there was good evidence as to one of the judgment-debtors Chhedi having died before the decree was passed.

This is a finding of fact and is not capable of challenge in second appeal. The learned Subordinate Judge, however, holds that as one of the judgment-debtors, Chhedi, had died before the decree was passed the entire decree is a nullity and incapable of execution. Upon this view he allowed the appeal and dismissed the execution case.

As a point of law the learned Subordinate Judge is not correct in stating that the death of one of the defendants necessarily makes the entire decree null and void. The suit apparently was instituted against a number of defendants with respect to arrears of rent due from them. The decree or a copy thereof is not on the record but the description thereof in the application for execution shows that it was a rent decree and the Munsif also incidentally refers to it as a rent decree. If it was a rent decree the liability of the defendants was joint and several and the plaintiff was entitled to enforce his claim for rent against the defendants jointly and severally. Therefore upon the death of one of the defendants he was entitled to continue his suit against the remaining defendants and the effect of the omission to bring the legal representatives of the deceased defendant upon the record would only be the abatement of the suit against that defendant and not necessarily the abatement of it against all the defendants. Such is the law as laid down in rule 4 of Order 22 of the Code of Civil Procedure which runs thus :—

" 4. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit ".

Clause (3) of that rule says :—

" Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant ".

Therefore if the right to sue against the remaining defendants survives the death of one of the defendants will not cause the abatement of the entire suit but only as against the deceased defendant. The present Code of 1908 has set at rest the doubt that possibly arose under the old law. As a matter of fact under the old law although the wording was not clear the interpretation given to it by the several High Courts shows that the suit would not necessarily abate on account of the death of one of several defendants if the right to sue survives against the remaining defendants. The authorities have been referred to in Mulla's Code of Civil Procedure under Order 22 rule 4 and I need only refer to two cases. *Abdul Aziz* v. *Basdeo Singh* (1) and *Joy Gobind Laha* v. *Monmotha Nath Banerji* (2) I quote these authorities not only for the purpose of showing that the suit will not abate by reason of the death of one of the defendants provided the right to sue survives against the remaining defendants but also for the proposition that a claim for rent is joint and several as against the tenants. The placitum in the Allahabad case which agrees with the body of the ruling runs as follows :—

" Held that the liability of joint holders of a fixed rate tenancy to payment of rent is joint and several and not joint only. The failure, therefore of the plaintiff in a suit for rent against several fixed rate tenants jointly to bring upon the record the representative of a deceased defendant is no bar to the continuance of the suit against the remaining defendants." The learned Judges observe that the case seems to be covered by the decision of the Calcutta High Court in *Joy Gobind Laha* v. *Monmotha Nath Banerji* (2). That was a suit against several persons for the recovery of the rent of a holding. Their Lordships also observed that they found no reason for distinguishing between the liability of several holders of a fixed-rate tenancy and the liability of several tenants of any other holding. Therefore if the decree was with respect to rent the liability of the " Judgment-debtor's was joint irrespective of the nature of the holding. Consequently the death of " Judgment-debtor, Chhedi, does not at all affect the liability of the other defendants and the suit did not abate against those defendants and the decree against those defendants remains valid. As observed above

(1) [1912] 34 All. 604=17 I. C. 89=10 A. L. J. 183.
(2) [1906] 33 Cal. 580.

I have referred to the authorities of the Calcutta and Allahabad High Courts because they related to claims for rent but the cases referred to by Mr. Mulla which I have carefully gone through show that the principle applies to all kinds of claims where the claim can be enforced jointly and severally against the defendants. The test therefore is whether the liability of the defendants or the judgment-debtors is joint and several in order to determine whether the death of one of the defendants or judgment-debtors renders the entire decree null and void. It would have been well if we had a copy of the decree upon the record but in the absence of the decree I rely on the description thereof given in the execution petition and the judgment of the Munsif. I therefore set aside the order of the Subordinate Judge and restore that of the Munsif and direct the execution to proceed except as against the deceased judgment-debtor Chhedi Singh and his legal representatives. The decree so far as Chhedi and his legal representatives are concerned is null and void. The appeal is decreed with costs. There is no appearance on behalf of the opposite party.

Macpherson, J.—I agree.

1925 PATNA 482

MULLICK AND ROSS, JJ.

Shaikh Kaloo—Judgment-debtor — Appellant.

v.

Bholanath and others — Decree-holders—Respondents.

M. No. 216 and C. R. No. 322 of 1924, Decided on 13th March 1925, from an order of the Dt., Gaya, D/-8th June, 1924.

Civil P. C., S. 47—Objection to attachment by a party against whom suit was dismissed—Objection is one under S. 47 and not under O. 21, R. 58.

Under S. 47 parties to the suit include the parties against whom the suit has been dismissed and therefore an objection by such a party that the property attached in execution is not liable to attachment is one under S. 47 and not under O. 21, R. 58 and the decision thereon is a decree. [P 483 C 1]

N. K. Prasad No. II—for Appellant.

Kailash Pati—for Respondents.

Mullick, J.—This appeal arises out of an order made by the District Judge of Gaya on the 8th of July 1924 allowing an appeal from the decision of the Munsif of Gaya dated the 12th of May 1924. It appears that Bholanath and another got a decree for money against Musammat Wasihan and Toolia and in execution attached two houses in the town of Gaya alleging that they were the properties of the above judgment-debtors. An objection was then preferred purporting to be made under S. 47 of the Civil Procedure Code by the appellant Kaloo who alleged that the houses were his properties and did not belong to Wasihan and Toolia.

The Munsif allowed the application and withdrew the attachment whereupon the decree-holder appealed to the District Judge who set aside the Munsif's order and found that the properties belonged to the judgment-debtors and that they were liable to be sold.

The present second appeal is preferred by the defendant Kaloo who urges that no appeal lay to the District Judge as the decision of the Munsif was one under Order 21 Rule 58 of the Civil Procedure Code and that the only remedy open to the decree-holder was to institute a regular suit. The appellant has also, by way of precaution, filed a petition in revision which has been marked as Civil Revision Case No. 322 of 1924.

The sole question argued before us is whether the appellant was entitled to come in under S. 47 of the Civil Procedure Code. The learned Vakil for the appellant urges that though the appellant was impleaded as a defendant in the original suit in which the money decree was made, eventually the suit was dismissed against him; and that although his name appears among both the parties to the suit in the decree, he was in fact not affected by the decree and was not party within the meaning of S. 47. On this point, there was some conflict of opinion in the various Courts before the present Civil Procedure Code was enacted. It was held, for instance, in *Sheo Pargash Singh* v. *Nawab Singh* (1) that S. 244 of the Code of Civil Procedure of 1882 does not apply to a dispute between the decree-holder and a person against whom though a party to the suit, no decree has been passed. The general principle upon which this decision and others of a similar kind were based was that it was not fair that a person against whom no decree had been made and who was really in the position of a stranger, should be compelled to have

(1) [1910] 32 All. 321=5 I.C. 495=7 A.L.J. 264.

resort to the summary procedure of the Execution Court in order to establish his title. That principle, however, has not been accepted in S. 47 of the present Code of Civil Procedure of 1908, which has expressly enacted that the parties to the suit include the parties against whom the suit has been dismissed. Therefore, upon the plain wording of the statute there can be no room for argument as to whether the appellant was entitled under S. 47 of the Code, to apply to the execution Court for the determination of his claim ; and as the decision of Execution Court was a final decision on a question of right, it was a decree and an appeal lay against it to the District Judge. Therefore the objection that the District Judge had no jurisdiction to entertain the appeal against the Munsif's order fails. The Munsif also does not appear to have treated the application of Kaloo as one under Order 21 Rule 58 C. P. C., and, even if he had done so the objection that an appeal did not lie would not have been entertainable if in fact that application was one entertainable under S. 47 of the Code.

A second appeal therefore would have lain to this Court against the order of the District Judge, if the matter had not been concluded by a finding of fact. The District Judge finds that the attached property was the property of the judgment debtors and that finding is final in second appeal. The second appeal therefore fails and it is dismissed with costs.

Civil Revision No. 322 of 1924 is not pressed and the application is dismissed. There will be no separate costs in the Revision.

Das, J.—I agree.

Application dismissed.

1925 PATNA 483

BUCKNILL AND ROSS, JJ.

Shaikh Muhammad Yassin—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 207 of 1924, Decided on the 19th December 1924, from a decision of Assistant Sessions Judge, Muzaffarpur, D/- 27th September, 1924.

(*a*) *Criminal P. C., S. 195—Penal Code S. 211—False information to police followed by complaint to Court—Sanction to prosecute is necessary.*

Where an information to the police is followed by a complaint to the Court based on the same allegations and the same charge, the sanction of complaint of the Court itself under S. 195 (1) (b) of the Code is necessary before the Court could take cognizance of an offence punishable under S. 211 of the Indian Penal Code, in respect of the false charge made to the police, on the ground that it was an offence committed in relation to a proceeding in Court. The fact that the complaint was not investigated by the Court, does not make any difference. 43 *Cal.*, 1152 and 44 *Cal.*, 650 *followed*. [P. 484, C. 1,2]

(*b*) *Criminal P. C., Ss. 195, 476 and 4 (1) (h)—Order passed by Court on complaint made by Police is not complaint by Court.*

Where a prosecution was initiated by the Police who made the complaint and on that complaint the Magistrate passed an order to summon the accused.

Held; that the order could not be construed as a "complaint" within the meaning of the Code. [P. 484, C. 2]

Khurshaid Husnain and *Ahmad Raza*—for Appellant.

Assistant Government Advocate — for Opposite Party.

Ross, J.—This is an appeal against a conviction by the learned Assistant Sessions Judge of Muzaffarpur. The appellant Muhammad Yassin was charged with having on the 25th of October 1923 instituted criminal proceedings charging certain persons with the offences of rioting and murder, knowing that there was no just or lawful ground for such proceedings. The case was instituted by way of information to the police. The police enquired into the case and reported that it was false, and the Sub-Inspector complained against the informant whereupon the Magistrate ordered that he should be summoned under S. 211 of the Indian Penal Code. The appellant was committed for the trial and has been sentenced to five years' rigorous imprisonment.

It appears upon the record that on the 5th of November 1923, before the police had submitted the final report, Muhammad Yassin filed a petition before the Magistrate complaining of the police investigation and praying that the case should be enquired into and the persons whom he accused summoned. Subsequently, when he was called upon by Magistrate to show cause why he should not be prosecuted for instituting a false case, he again asserted that the case was true. These complaints were never investigated and he was not even examined on oath.

The contention of the learned Vakil who appears for the appellant is that inasmuch as the petition of the 5th

November filed before the Magistrate was a complaint within the definition in the Criminal Procedure Code the offence, if any, became an offence which was committed in or in relation to a proceeding in Court, and, consequently, a complaint in writing by the Court or by some other Court to which it was subordinate was a condition precedent to cognizance being taken of this offence under S. 211. Two authorities have been cited in support of this proposition. The first is the decision in *Tayebulla* v. *Emperor* (1) where Mr. Justice Mukherji and Mr. Justice Sheepshanks distinguished the cases where there is an information to the police only from those where there is also a complaint in Court. Their Lordships pointed out that "A sanction is requisite in respect of an offence under S. 211 of the Indian Penal Code only when such offence has been committed in or in relation to any proceeding in any Court; no sanction is necessary when a false charge has been made to the Police and has not been followed by a judicial investigation thereof by a Court. The position is different where upon the police report as to the falsity of the complaint, the complainant insists upon a judicial investigation; if he does so he is deemed to have preferred a complaint to the Magistrate. If the Magistrate finds his case to be false, a sanction would be requisite under S. 195 (1) (b) as the offence may be said to have been committed in proceeding in a Court". The same view was taken in *Brown* v. *Ananda Lal Mullick* (2) where it was laid down that where an information to the police is followed by a complaint to the Court, based on the same allegations and the same charge, and such complaint has been investigated by the Court, the sanction of complaint of the Court itself under S. 195 (1) (b) of the Code is necessary before the Court could take cognizance of an offence punishable under S. 211 of the Indian Penal Code, in respect of the false charge made to the police, on the ground that it was an offence committed in relation to a proceeding in Court. The decision in that case was arrived at independently of the decision in *Tayebulla's* (1) case to which, at the end of the judgment, reference is also made.

(1) [1916] 43 Cal. 1152=24 C.L.J. 134=20 C.W.N. 165=36 I. C. 845=18 Cr. L. J. 33.
(2) [1917] 44 Cal. 650=20 C.W.N. 1347=18 Cr L. J. 25=36 I. C. 857=25 C.L.J. 59.

The learned Assistant Government Advocate seeks to distinguish these on the ground that the complaint in the present instance was not investigated by the Court. To my mind that cannot make any difference in favour of the prosecution. The complainant was entitled to have his complaint enquired into and the fact that no enquiry was made cannot be made a merit in the prosecution. The absence of an investigation cannot be made a ground of distinction. The point is that by making his complaint to the Court the informant has withdrawn the information from the category of mere police proceedings and has raised it to the category of a proceeding in Court. This necessitates a complaint by the Court if the informant is to be proceeded against. The matter is no longer in the hands of the police but is within the cognizance of the Court itself. A further answer was suggested to this effect that the order of the Magistrate summoning the appellant was itself a complaint either within S. 195 (1) (b) or within S. 476 of the Code. In my opinion this is not a tenable argument. A reference to the definition of "Complaint" in the Code is a sufficient answer. And these proceedings were initiated by the Sub-Inspector of Police who made the complaint and on that complaint the Magistrate passed an order to summon the appellant. It is, in my opionion, impossible to consture that order passed on a complaint as being itself a complaint within the meaning of the Code. It follows therefore on the decisions above referred to that the proceedings in which the appellant has been convicted were wholly without jurisdiction because the bar imposed by S. 195 has never been removed.

The conviction therefore cannot stand and must be set aside.

Bucknill, J.—I agree.

Conviction set aside.

★ 1925 PATNA 484

MULLICK AND ROSS, JJ.

Khirodhar Singh and others—Decree-holders—Petitioners.

v.

Gajadhar Lal Mahto and others—Opposite Party.

Civil Rev. No. 390 of 1924, Decided on 6th April, 1925, against an order of the Sub. J., Patna, D/-19th June, 1924.

(a) *Civil P. C., S. 47—Mortgage decree—Order that properties should be sold in certain order—Order is appealable.*

Where a mortgage decree was passed against certain properties and the Court ordered that at first all except a certain item should be put up for sale and if such sale failed to fetch a sufficient sum, then the other item should be sold.

Held: that the order was a final order between the parties in a matter relating to the execution, satisfaction and discharge of the decree and was appealable. [P. 485, C. 2.]

★ (b) *Mortgage—Subsequent purchaser of one of the items—Purchase subject to mortgage—Mortgage decree—Execution Court cannot order properties to be sold in particular order.*

The execution Court ought not ordinarily to fetter the discretion of the decree-holder to put to sale whatever property he wished first to sell. [P. 485, C. 2.]

Where subsequent to the execution of a mortgage, a certain portion of the property was purchased by another and where there was a suit on the mortgage and the suit was decreed and in the executing court the subsequent purchaser applied that the items purchased by him should be sold only if the other items were insufficient.

Held: that the question turned on the form of the contract between the vendor and the purchaser, namely whether the property was sold subject to the encumbrance or not and as in the present case, it appeared that the sale was subject to the mortgage, there was no ground for interfering with the rights of the mortgagee to sell the property in any order he pleased. (*Case law discussed*) [P. 487, C. 1.]

B. C. Sinha for *Reysat Hussain*—for Petitioners.

P. C. Rai for *Raghu Nandan Prasad*—for Opposite Party.

Ross, J.—This is an application in revision by the decree holder against an order passed by the Subordinate Judge of Patna in execution proceedings.

The Petitioner held a mortgage over two properties, a *gola* and some *kasht* land. The Opposite Party is a subsequent purchaser of the *gola*. A decree was passed on the mortgage and the decree-holder applied for sale of both properties. The Opposite Party claimed that the *gola* should be sold only if the other property did not fetch a sum sufficient for the satisfaction of the decree. The learned Subordinate Judge was of opinion that such an order could be passed and he therefore ordered that all the mortgaged properties should be advertised for sale and that at first all except the *gola* should be put up for sale and, if such sale failed to fetch a sufficient sum, then the *gola* should also be sold.

The decree-holder contends that this order is without jurisdiction and that he is entitled to sell the mortgaged properties in any order he chooses. As it is doubtful whether any question of jurisdiction arises, this application will be treated as an appeal inasmuch as it is a final order between the parties in a matter relating to the execution, satisfaction and discharge of the decree.

The learned Vakil for the Opposite Party relies on Ss. 56 and 81 of the Transfer of Property Act and O. 34, R. 4 of the Civil Procedure Code and upon the decisions in *Rajkeshwar Prasad Narain Singh* v. *Mohammad Khalilul Rahman* (1), *Kommineni Appaya* v. *Mangala Rangayya* (2) and *Bhagwan Chandra Das* v. *Rai Saheb Dharam Narain Das* (3) and contends that the Court is entitled to say in what order the mortgaged properties should be sold having regard to the equities of the case.

It is not easy to reconcile all the decisions on the right of the subsequent purchaser to claim marshalling. See on the one hand *Rodhmul* v. *Ramharakh* (4), *Chuni Lal* v. *Full Chand* (5) and *Magni lala Ram* v. *Mehdi Hossein Khan* (6) and on the other hand *Bhikhari* v. *Dalip* (7) and *Dilawar* v. *Bolaki Ram* (8).

The subject has been discussed in *Jatadhari Singh* v. *Baldeo Lal* (9) where in the leading judgment the cases are referred to and it is shown that the authorities in the Calcutta High Court are all unanimous in holding that the executing Court ought not ordinarily to fetter the discretion of the decree-holder to put to sale whatever property he wishes first to sell. O. 34, R. 4 of the Civil Procedure Code is referred to and it is pointed out that, while the Court making the decree has no doubt a right to declare what portion of the mortgaged property should be sold first, that discretion is not to be arbitrarily exercised and is subject to the general principle that the Court cannot prejudice the rights of the mortgagee if he has not himself done any act which prejudices the rights of those having equities against the mortgagor. It is further ob-

(1) 1924 Pat. 459=3 Pat. 522=5 P. L. T. 223.
(2) [1908] 31 Mad. 419=3 M. L. T. 287=18 M. L. J. 229 (F. B.)
(3) 1924 Pat. 802=3 Pat. 962=2 Pat. L. R. 242=1925 P. H. C. C. 62.
(4) [1885] 7 All. 711=(1885) A. W. N. 198.
(5) [1894] 18 Bom. 160.
(6) [1903] 31 Cal. 95=8 C. W. N. 30.
(7) [1895] 17 All. 434=(1895) A. W. N. 83.
(8) [1885] 11 Cal. 258.
(9) [1919] 4 Pat. L. J. 207=51 I. C. 444

served that in the absence of a direction in the decree to the contrary it would seem that this discretion vests in the execution Court also. *Rajkesawar Prasad Narain Singh* v. *Mohammad Khalilul Rahman* (1) was a case between a prior and a puisne mortgagee and it was held that the puisne mortgagee was entitled to the benefit of S. 81 although he had purchased the property in execution of his mortgage decree. But the learned Vakil relied on a passage in the judgment at P. 533 where it is said that apart from the question of marshalling it appears that the Court has undoubtedly the right to direct under O. 34, R. 4, that the properties mortgaged should be sold in a particular order. The judgment goes on to say that ordinarily the right of selling the property in a particular order rests with the decree-holder; and, in the absence of any contract between the parties, the decree-holder may proceed to sell the properties in whatever order he thinks best so as to facilitate the realization of his mortgage debt. "But the Court can in the circumstances of a case and in view of the equities arising in favour of the various parties, direct the order in which the properties should be sold;" and, in fact in that case the Court did direct that the properties of the puisne mortgagee should be sold last. In *Kommineni Appayya* v. *Mangala Rangayya* (2) there were two properties, parcel No. 1 and parcel No 2, that were mortgaged to the Plaintiff, and the third Defendant subsequently purchased parcel No. 1. It was held in that case that although the third Defendant was not entitled to have the property marshalled and to insist that parcel No. 2 should be first sold before recourse was had to parcel No. 1, yet under S. 88 of the Transfer of Property Act (O. 34, R. 4, C. P. C.) the Court might order that a portion sufficient to discharge the Plaintiff's debt be sold; and, if parcel No. 2 was sufficient and the Plaintiff could not possibly be prejudiced by such sale, it might be open to the Court to direct in the decree itself its sale before the other oroperty.

In *Bhagwan Chandra Das* v. *Rai Saheb Dharam Narain Das* (3) the question was whether the decree holders were entitled to have all the properties which were mortgaged to themselves sold in execution of their decree. In that case the Subordinate Judge had excluded from the sale properties which had been purchased subsequently to the mortgage. The Court in allowing the appeal decided that all the property must be advertised for sale and when they were actually brought into execution and became subject to sale it would then be for the Court to decide on just and equitable principles which property ought to be sold first.

The rule and its limitations are stated in *Averall* v. *Wade* (10) where Lord St. Leonards while stating that where one creditor has a demand against two estates and another against one only, the latter is entitled to throw the former on the fund that is not common to both, added: "This is a narrow doctrine and cannot generally be enforced against an encumbrancer who is a mortgagee. Whatever may be the equity of the creditor with only one security, the mortgagee of both estates has a right to compel the debtor to redeem or he may foreclose." It is further, however, pointed out that whereas in a suit for foreclosure the first mortgagee has a right to foreclose and all that the second mortgagee can do is to redeem him, in the case where the mortgagee is not entitled to anything more than his money, that is, where the decree is for sale, the equity of the creditor with only one security may be easily worked out.

S 55 (1) (*g*) of the Transfer of Property Act provides that the seller is bound, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing: and, following this principle, S. 56 enacts that "where two properties are subject to any charge, and one of the properties is sold the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property so far as such property will extend." The matter is put thus by Sir Rashbehary Ghose in his Law of Mortgage, Fifth Ed., at p. 388: "The question, therefore, is not whether the purchaser takes subject to the mortgage as between himself and the mortgagee, but whether he is bound to discharge the mortgage debt as between himself and the mortgagor. If he is not, he may undoubtedly insist upon marshalling. On the other hand if the purchaser cannot claim exoneration, the whole burden of the mortgage debt should not, as between

(10) [1835] 1 L. L. and G. T. Sug. 262.

him and the mortgagor, be thrown on the latter."

The question therefore turns on the form of the contract between the vendor and the purchaser, namely, whether the property was sold subject to the encumbrance or not It is stated in the Petitioners' affidavit that in their written statement the Opposite Party prayed that their purchased property should be ordered to be sold after the other properties, but the learned Subordinate Judge who decreed the suit ordered that no facility should be allowed to the Opposite Party; and the decree is silent on the subject. The presumption therefore is that what the Opposite Party paid for was the equity of redemption only and there is no equity in his favour. There is therefore no ground for interfering with the rights of the mortgagee to sell the property in any order he pleases. I would allow this appeal with costs and set aside the order of the learned Subordinate Judge and disallow the objection of the judgment-debtor.

Mullick, J.—I agree.

Appeal allowed.

1925 PATNA 487

Ross, J.

The Bengal North Western Ry. Co.—Petitioner.

v

Sukhdeo Prasad—Opposite Party.

Civil Rev. No 489 of 1924, Decided on 30th January, 1925, from a decision of the Sub. J., Motihari, D/- 14th August, 1924.

✱ *Master and Servant—Agreement between parties that master may impose fine—Fine imposed—Suit claiming refund of fine is not barred—Contract Act, S. 23.*

Where the plaintiff, a railway servant had been dismissed and fined a sum of money and he came into Court and claimed that he was wrongly dismissed and that the fine should not have been imposed,

Held; the agreement between the plaintiff and defendant company could not take away the plaintiff's right of action in a claim of this sort. [P 488 C 1]

S. M. Bose—for Petitioner.

Janak Kishore—for Opposite Party.

Judgment.—The petitioner is the Bengal and North Western Railway. The opposite party was the Assistant Station Master of Tarsarai. As the result of certain departmental enquiries into the disappearance of a consignment of paddy the opposite party was dismissed from the service of the Company and was fined Rs. 150 which was ordered to be realized from his Provident Fund. The opposite party then brought an action for recovery of this sum. He failed in the Munsif's Court both on the merits and on the ground that under the rules of the Provident Fund in case of dismissal the Agent may cause to be withheld all or any part of the bonus provisionally allotted to the servant.

The Provident Fund consists of two parts, the sum contributed by the Railway servant and the bonus and interest contributed by the Company. A note on the form of the statement of the depositor's account shows that the bonus although shown in the account cannot be claimed as a right by the depositor, but is under rules 14 (2) and (4) wholly at the disposal of the Company which reserves full power over it. The relevant rule 14 (4) has been referred to above. The learned Munsif referred to these rules and then went on to say that the plaintiff was under liability to the Company for payment of Rs. 150 as fine as the Company was entitled to deduct that amount from his account. It is evident therefore that the learned Munsiff did not absolve the Company of the responsibility for this sum merely on the strength of these rules, but on the substantial ground that the opposite party was liable to pay fine of Rs. 150. The learned Subordinate Judge held on the merits of the case that there was no proof of any misconduct or negligence on the part of the opposite party and he therefore gave the opposite party a decree.

The contention on behalf of the petitioner Company is that the learned Subordinate Judge has not dealt with the question discussed in the latter part of the Munsif's judgment, namely, over that part of the Provident Fund which concerns the bonus and interest is subject to their control. Now the finding of the learned Subordinate Judge is that although the Company has under the terms of the agreement power to impose a fine on the railway servant for breach of any rule or discipline, the railway servant in this case has not been proved to have broken any rule and the fine was therefore illegal-

ly imposed and its deduction from the Provident Fund was not justified.

He therefore ordered a refund.

Now it seems to me that the railway Company in deducting this sum from the Provident Fund of the plaintiff was not acting in arbitrary exercise of any power reserved to it under their Provident Fund Rules. It is not even specifically stated that the amount was realized from the bonus and not from the plaintiff's own contribution and it cannot be assumed that that was so. As soon as it is held that the fine was wrongly imposed it seems to me to follow as a necessary consequence that the plaintiff is entitled to a decree for a refund of the amount. The Company were purporting to exercise their legal powers to fine their servants under the terms of the agreement between them and their servants. They were not purporting to exercise any arbitrary powers over the bonus portion of the servant's Provident Fund. Consequently as the Court has found that the fine was wrongly imposed, the plaintiff must get the money back. It was objected on behalf of the petitioner Company that by submitting to an agreement which empowers the Company to impose a fine the plaintiff had chosen his forum and the jurisdiction of the Civil Court was ousted. In my opinion this argument is without foundation.

The plaintiff has been dismissed and has been fined a sum of money and he comes to Court and claims that he was wrongly dismissed and that the fine should not have been imposed. This is a matter of a civil nature and nothing in the terms of the agreement can take away the plaintiff's right of action in a claim of this sort.

I would therefore dismiss the application with costs.

Hearing fee one gold mohur.

Application dismissed.

1925 PATNA 488

MULLICK AND ROSS JJ.

Mt. Ladli Begum—Plaintiff—Petitioner.

v.

Ram Das and others—Defendants—Opposite Party.

Civil Rev. No. 515 and 516 of 1924, Decided on 6th April, 1925, against an order of the Dt J., Muzaffarpur, D/-27th August, 1924.

Court Fees Act. S. 12—Civil P. C., S. 115—Appellate Court dissenting from Trial Court's valuation and returning appeal to be presented to proper court, acts with jurisdiction.

Where a suit was dismissed by a Subordinate Judge and on appeal to the Dt. Judge he differed from the Sub-Judge as to the value of the properties and returned the appeal to be presented to the proper Court.

Held: that the Dt. J., had jurisdiction to pass the order that he passed and that no revision lay.

[P. 489, C. 2.]

Mahomed Hasan Jan—for Petitioner.

Shiveshwar Dayal, Syed Noorul Hasan and *A.H. Fakhruddin*—for Opposite Party.

Mullick, J.—These two applications in revision arise out of suit Nos. 20 and 21 of 1922 before the Subordinate Judge of Muzafferpur. The Plaintiff, a *mutwalli* asks for a declaration that the properties in suit are increments to a wakf created by Mt. Nurjahan Begum and for recovery of possession from the Defendants who in one case claim title under a Court sale of the 16th February 1914 and in the other under a *kobala* executed by Mt. Nurjahan on the 9th August 1914. One of the issues raised at the trial was whether the Court-fee paid was sufficient. The issue was decided in favour of the Plaintiff, but the suits were dismissed on the merits. An appeal was taken by the Plaintiffs to the District Judge who found that the value of the properties was not Rs. 2,100 as held by the trial Court but not less than Rs. 15,000 or 20,000 and he accordingly returned the memoranda of appeal to be presented to the proper Court.

Against this order an appeal was preferred to this Court under Or. 43, r. 1 (*a*) of Civil Procedure Code; but we held following *Raghunath Charan Singh* v. *Shamo Koeri* (1) that no appeal lay and we directed the applications to be registered as revision cases.

It is now urged before us by the learned Vakil for the Plaintiff that the learned Judge's order returning the memoranda of appeal was without jurisdiction. I think this contention must fail. Clearly S. 11 of the Suits Valuation Act of 1887 does not apply. The Subordinate Judge had unlimited pecuniary jurisdiction and no objection was or could have been taken before him on the ground of his jurisdiction to try the suit. If the suit had been tried by a Munsif it may be that an objection as to valuation for the purpose of determining the court-fee might, in certain circumstances, have also been re-

(1) [1903] 31 Cal. 344.

garded as an objection as to jurisdiction ; and in that case the appeal Court, if satisfied, that, inspite of the under-valuation, the disposal of the Suit on the merits had not been prejudiced, would have been entitled to hear the appeal as if there has been no defect of jurisdiction.

But here the question is not whether the Subordinate Judge had jurisdiction to try the suit but whether the appeal Court had jurisdiction to hear the appeal. Ordinarily the appeal Court does not interfere with a valuation made by a trial Court for the purpose of determining jurisdiction, but it is always open to a party to take this as a ground of appeal. The Court may also investigate the matter in exercise of its inherent powers Part I of the Suits Valuation Act empowers the Local Government to make rules for determining the value of land for purposes of jurisdiction in certain classes of suits, and Part II declares that in suits not coming within paras. V, VI and IX and para. X, cl. (*d*) of S. 7 of the Court Fees Act, the value as determinable for the computation of court-fees and the value for the purposes of jurisdiction shall be the same. Under the first part of S. 12 of the Court Fees Act the valuation made by the trial Court for the purpose of computing the court-fee is final as between the parties, but the finality so conferred is confined within very narrow limits and it is even open to a party to appeal on a question of category, that is to say, the class within which the suit falls. On a question of valuation pure and simple, a party cannot appeal, but the Court may set under the 2nd part of S. 12 of the Court Fees Act for the purpose of protecting the revenue.

Here the suits before us fall within the S. 7 para 4 (*c*) of the Court Fees Act and the valuation for the purpose of computing the court-fee must determine the jurisdiction. But there was nothing to prevent the defendants from objecting before the District Judge that he had no jurisdiction to hear the appeal. The District Judge had jurisdiction, and indeed it was his duty, to determine the point, and as there was material before him for coming to the finding that the value of the subject-matter was at least Rs. 15,000 and that therefore he was not competent to hear the appeal, no revision lies against his order.

It follows from this view that an appeal on the ground of defect of jurisdiction may, if successful, disturb the finality of the valuation for the purpose of computation of court-fees in suits coming under S. 8 of the Suits Valuation Act. but there can be no doubt that the first clause of S. 12 of the Court Fees Act is subject to the provisions of the Suits Valuation Act ; and so it has been held in *Peary Shah* v. *Surajmal Marwari* (2). In the present case the Court vested with jurisdiction to hear the appeals will, in deciding the question of jurisdiction, be competent to levy deficit court-fee on the plaint if satisfied that the District Judge's valuation was correct.

The immediate question however before us is whether the District Judge acted without jurisdiction in returning the memoranda of appeal. The answer is in the negative and these applications in revision are dismissed with costs : hearing fee two gold mohurs in each case.

Ross, J.—I agree.

Applications dismissed.

(2) [1912] 16 C.L.J. 371=16 I.C. 575=17 C.W. N. 503.

1925 PATNA 489

MULLICK AND KULWANT SAHAY, JJ.

(*The Hon'ble Maharaja Bahadur*) *Kesheo Prasad Singh*—Plaintiff—Appellant.

v.

Triloke Nath Tewari—Defendant—Respondent.

Appeals Nos. 325 and 326 of 1922, Decided on 18th December, 1924 from a decision of the Dist. J., Arrah, D/- 25th January, 1922.

B. T. Act, S. 150—*Tenant pleading that he has cultivated lesser area than that for which rent is claimed—S.* 150 *applies.*

Irrespective of the question as to whether the burden of proof lies on the plaintiff or not, in cases where the defendant admits that money is due from him to the plaintiff on account of rent, his plea that the amount claimed is in excess of the amount due cannot be taken cognizance of by the Court unless the defendant pays into Court the amount so admitted to be due. (30 Cal. 945 Diss, Hence where the tenant pleads that he has cultivated a lesser area than that in respect of which rent is claimed, S. 150 would apply.

[P. 491 C 2, P. 492 C 1.]

L. N. Sinha and *N. N. Sinha*—for Appellant.

Sambhu Saran—for Respondent.

Kulwant Sahay, J.—These are two appeals by the plaintiff against the decision of the District Judge of Shahabad,

confirming the decision of the Subordinate Judge. The suits were for arrears of rent for the years 1324 to 1327 Fasli in respect of two holdings in diara land. The rents were claimed on the basis of two pattas. It appears from the plaint that the two pattas which were dated the 27th Baiaskh 1308 related to two areas of 149 bighas 18 kathas 8 dhurs and 72 bighas 8 kathas 15 dhurs respectively. In the first patta relating to the 149 bighas odd there were two rates of rent, one at Rs. 5-3-6 per bigha and the other at Rs. 2 per bigha, making a total of Rs. 525-2-6 for the entire area of 149 bighas odd. In the second patta which related to the 72 bighas and odd there was only one rate of Rs. 7-2-0 per bigha, making a total of Rs. 516-2-0 for the entire area. The claim was for the total amounts shown in the two pattas as the rent of the entire holdings. The defendants in their written statement pleaded that the plaintiff was entitled to realise rent only for the areas actually cultivated in the years in suit and not for the entire area mentioned in the pattas. They further stated that they had tendered rent every year to the amla of the plaintiff for the areas actually cultivated by them, but that the amounts were not received, and, therefore, payments were not made. The learned Subordinate Judge held that the plaintiff was entitled to rent only for the areas actually cultivated in the years in suit. He further held that the plaintiff had failed to prove that any area in excess of that admitted by the defendants was actually cultivated in the years in suit and he accordingly made a decree at the rates given in the pattas for the areas admitted by the defendants to have been cultivated by them. Against the decree of the Subordinate Judge the plaintiff went in appeal before the District Judge. The learned District Judge agreed with the Subordinate Judge on both the points and dismissed the appeal. A new point was taken in appeal before the District Judge which was not taken before the Subordinate Judge, namely that under S. 150 of the Bengal Tenancy Act the Subordinate Judge had no power to entertain the defendant's plea that a less amount was due than was claimed by the plaintiff until the amount admitted to be due was paid into Court. The learned District Judge has overruled this objection on the authority of the decision of Division Bench of the Calcutta High Court in the case of *Banarsi Prasad* v. *Makhan Rai* (1).

Against the decrees of the District Judge the plaintiff has preferred the present second appeals, and the points taken by the learned Vakil for the appellant are: first, that the learned District Judge was wrong in proceeding upon the admission of the defendant as regards the area actually under cultivation in the years in suit: and secondly, that having regard to the provisions of S. 150 of the Bengal Tenancy Act the Court below ought to have refused to take cognizance of the plea set up by the defendants.

As regards the first point, I am of opinion that the learned District Judge was right in holding that the plaintiff had failed to prove that the defendants had actually cultivated land in excess of the areas admitted by them. That the defendants were liable to pay rent on the areas actually under cultivation and not the total amount stated in the pattas was not in dispute, as, in fact, it could not be disputed having regard to the decision in the previous rent suits between the parties. As regards the areas actually cultivated, the learned District Judge has considered the evidence adduced by the plaintiff, and has held that the measurement papers produced by him cannot be relied upon inasmuch as the plaintiff's own papers indicate that the measurements were not correct. Under the circumstances the only course open was to accept the areas admitted by the defendants.

As regards the second point, the learned District Judge has held that the plea raised by the defendant was not a simple plea of exemption from liability to pay rent by reason of diluvion so that in the absence of evidence on the defendant's side the plaintiff would have been at once entitled to a decree for the full amount which he claimed. He proceeds to observe that in the peculiar circumstances under which rent has been found to be payable for these holdings, the burden of proof originally lay upon the plaintiff to show that the area, claimed by him to have been cultivated actually had been cultivated in the years in suit. He relied on the decision of the Calcutta High Court in the case of *Banarsi Prasad* v. *Makhan Rai* (1). That decision no doubt supports the view taken by the learned

(1) [1903] 30 Cal. 947=7 C. W. N. 514.

Judge. It has been held in that case that S.150 of the Bengal Tenancy Act is limited in its operation to those cases in which the plea of the tenant is one in respect of which the burden of proof lies upon him, in other words where it is a plea of confession and avoidance, and that the Section does not apply to a case where the rate of rent is in dispute. Bannerji, J. in dealing with this point observed as follows :—

"In my opinion S. 150 of the Bengal Tenancy Act is limited in its operation to those cases where the plea of the tenant is of a nature such that the burden of proving it rests upon the tenants, and in the absence of evidence on his side, the plaintiff would be entitled to a decree for the full amount, as for instance where the plea is in the nature of a plea of payment or a plea of exemption from liability to pay rent by reason of diluvion or by reason of partial eviction or for any other similar reason. Where, however, the plea is of a nature such that the real question involved in it must remain to be determined by the Court notwithstanding that the defendant's plea is disregarded I am of opinion that the section was not intended to apply to such a case." The learned Judge felt it difficult upon the plain wording of the Section to put the interpretation which he wanted to put upon them, but he was of opinion that the interpretation put by him was the only reasonable view of the meaning of the language of the section and the intention of the legislature, and that that was the only view upon which the provisions contained in the Section could work without leading to any anomaly. Pargiter, J. agreed with Bannerji, J. and he was also of opinion that the construction placed upon the Section by Bannerji, J. was the true construction. With very great respect to the learned Judges, I am unable, upon a plain reading of the language of the Section, to place that interpretation upon it. In order to place that interpretation it would be necessary to read into the Section words which do not occur there It would be necessary to read into the Section words to the effect that the Court shall refuse to take cognizance of the plea only in cases where the burden of proof lies on the defendant, where as the Section is couched in general language and prohibits the Court from taking cognizance of the plea that the amount claimed is in excess of the amount due unless the defendant pays into the Court the amount which he admits to be due. No doubt the Section is not happily worded and it may lead to an anomaly, but we are concerned here with the plain language of the Section, and I find no ambiguity in the words used and I am of opinion that irrespective of the question as to whether the burden of proof lies on the plaintiff or not, in cases where the defendant admits that money is due from him to the plaintiff on account of rent, his plea that the amount claimed is in excess of the amount due cannot be taken cognizance of by the Court unless the defendant pays into Court the amount so admitted to be due. If it is open to us to speculate as to the intention of the Legislature, it might as well be said that the intention was to enable landlords to realize the amount admittedly due without any further trouble. The landlords have to pay the Government revenue and other demands whether they realize their rents from the tenants or not and the intention of the Legislature might have been to see that no harrassment was caused to them and the Courts should compell the defaulting tenants to pay the admittedly unpaid rents without delay. It can hardly be said that the Legislature presumed that a tenant would raise a plea of payment dishonestly, the presumption on the other hand would be that honest pleas would be taken. I am therefore unable to agree with the learned Judge in the view he has taken of S. 150 of the Bengal Tenancy Act in the present case.

The question, however, remains as to whether the decree of the District Judge should be set aside on the ground that the plea of the defendant ought not to have been taken cognizance of. Now it appears that evidence has been gone into and upon the evidence it has been found as a fact by both the Courts below that the defendant is not liable to pay rent for the entire area covered by the two pattas. Under the circumstances it would be manifestly unjust to make a decree in favour of the plaintiff for the entire amount claimed by him. At the most, the plaintiff can only insist on a remand so that the Court may ask the defendant to pay the amount admittedly due before taking cognizance of his plea. It was the duty of the Court to refuse to take cognizance of the plea when it found that the

defendant had admitted that money was due, and if it had done so, it is fair to presume that the defendant would have paid in the admitted amount. We are informed by the learned Vakil for the defendant-respondent that after the decree of the lower appellate Court, they deposited in Court the entire amount decreed and he has produced the chalans of such deposit. Under the circumstances I am of opinion that no useful purpose will be served by making a remand with a direction to give the defendants an opportunity to make the deposits and then to try the case over again in the event of such deposit being made. The dafect in the procedure adopted in the trial of the suits by reason of overlooking the provisions of S. 150 of the Bengal Tenancy Act has not to my mind affected the decision of the case on the merits or the jurisdiction of the Court, and under S. 99 of the Code of Civil Procedure such defect does not make it compulsory for us to reverse the decision of the Courts below. I would therefore dismiss both the appeals, but having regard to the circumstances of the case I would make no order as to costs in these appeals.

Mullick, J.—I agree. The point decided in *Banarsi Prasad's* case namely whether a plea that the rate of rent claimed was in excess of that payable attracts the application of S. 150 Bengal Tenancy Act does not arise here. On the contrary there are observations in that case which assist the appellant here and which in my opinion favour the view that S. 150 applies where the tenant pleads that he has cultivated a lesser area than that in respect of which rent is claimed. In every such case whether the tenant appears or not the onus of proving the claim is on the landlord. S. 150 is designed not to relieve him of that burden but to give both parties a chance of avoiding further litigation. In many cases a landlord will give up a substantial part of his claim if the tenant makes a fair offer accompanied with cost. The Section is really not penal for the dishonest tenant may always evade it by pleading an absurdly low amount; it is intended to benefit the honest tenant and the honest landlord.

★ 1925 PATNA 492

ROSS AND KULWANT SAHAY, JJ.

Kameshwar Narain Singh—Plaintiff—Appellant.

v.

Janardhan Prasad Narain Singh and others—Defendants—Respondents.

Case No. 452 and 456 of 1922, Decided on 22nd January 1925, from a decision of the Dt. J., Darbhanga, D/- 31st January 1922.

★ *Co-sharer--Easement—Two plots held exclusively by two co-sharers severally — Holder of one plot cannot claim easement over the other plot.*

Although exclusive possession by co-sharers of portions of undivided estates is a common thing, such exclusive possession does not amount to an ouster of the other co-sharers. Every joint owner has a right to use any portion of the joint lands so long as he does not exclude the other co-sharers from it. Therefore one co-sharer in exclusive possession of a plot cannot acquire a right of easement over another plot held exclusively by another co-sharer. [P. 493, C. 2]

S. M. Mullick and *S. N. Rai*—for Appellant.

K. P. Jayaswal, *S. K. Mitter* and *Janak Kishore*—for Respondents.

Kulwant Sahay, J.—These two appeals arise out of a decree passed by the District Judge of Darbhanga whereby he modified a decree of the Additional Subordinate Judge. Appeal No. 452 is by one of the defendants 1st party and appeal No. 456 is by the plaintiff. The case made by the plaintiff in the plaint was that he and the defendants 1st and second parties were the 16as. proprietors of Mouza Bishunpur Narhan and Patti Nizamat bearing Touzi No. 3942, that the said Mouza was under Collectorate partition which had not been finished at the time the suit was brought and that before the said Collectorate partition the said mouza was never divided by the proprietors amongst themselves. But for the sake of facility in enjoyment and use of the joint property the names of different proprietors were entered against some of the plots in the Khatian. The plaintiff stated that his *zenana* house was situated on plots Nos. 2983, 2984 and 2985 and that his male quarters were situated on plots Nos. 2964 and 2965. The dispute was as regards plot No. 2966. The plaintiff claimed that this plot 2966 which was an open *parti* land in front of his male quarters was used by him under right of easement for

holding parties, *panchayat* and celebrating marriage festivals etc. He also claimed a right of easement to pass from his male quarters to his female quarters across a foot-path in plot No. 2966. He further claimed that plot 2966 belonged to him in proprietary interest. The reliefs asked in the plaint were :—

(1) It may be held by the Court that in the land bearing No. 2966, the plaintiff has acquired the right to use the land at the time of marriage, dance parties, *sradhs*, *bhoj and panchayats* etc., and that the way which is marked as (K), (Kh) and (Ga) in the map attached to the plaint, has been in use without resistence for more than 60 years and that the said right of easement is necessary.

(2) It may be held by the Court that defendants 1st party have no right to erect the house on the said land and that if a house is erected on the aforesaid land the plaintiff will be put to serious loss and the way leading to the male quarters from the female quarters will be closed.

(3) That on adjudication of relief clauses (1) and (2) defendants 1st party may be forbidden by a perpetual injunction from erecting any house and the house which has already been built may be demolished and the aforesaid land be cleared.

The defence of the defendants was that Plot 2966 belonged to defendant No. 1 exclusively, that the plaintiff had acquired no right of easement over the said plot and that the suit was barred by *res judicata*. The first Court held that the plaintiff had failed to prove any right of easement over plot 2966. He further found that the plaintiff had failed to prove that plot 2966 belonged to him exclusively. The learned Subordinate Judge therefore dismissed the suit. On appeal by the plaintiff to the District Judge the finding of the Subordinate Judge has been upheld, as regards the question of the plaintiff's title to plot No. 2966 and also the easement claimed by the plaintiff as regards his right to hold parties over 2966 but as regards the right of way, the learned District Judge has come to a finding that the plaintiff has succeeded in establishing a right of way from his Baithak to his Zenana house along the foot-path which extended over O to G in the map filed with the plaint in a straight line. The learned Judge also found that the defendants had completed the house on plot 2966 before any notice was given to them to show cause why injunction should not be issued. In the circumstances he thought that it was not a fit case of mandatory injunction. He held that the plaintiff had no doubt a right of way over the disputed land in a straight line from O to G in the Commissioner's map, but in view of the circumstances appearing in the evidence he was of opinion that this right has now to be exercised by the plaintiff along the line marked O. N. B, F and G in the Commissioner's map and that the plaintiff would not be entitled to use the foot-path claimed although it was found that he had acquired a right by prescription.

Now having regard to the case made by the plaintiff I fail to see how the plaintiff can claim the right of easement over plot 2966. His own case is that the whole village is jointly held by him and defendants 1st and 2nd parties and that there is a partition proceeding going on in the Collectorate for a partition of the village among the proprietors. Now if he is the owner of the village he can obviously have no right of easement against himself. The learned Vakil for the plaintiff appellant relies upon the finding of the District Judge that the plaintiff has failed to prove that plot 2966 belonged exclusively to him. What the finding means is that although there has been no actual partition of the village amongst the co-sharers, yet each co-sharer is in exclusive possession of certain plots. Now exclusive possession by co-sharers of portions of undivided estates is a common thing. Such exclusive posession does not amount to an ouster of the other co-sharers. Every joint owner has a right to use any portion of the joint lands so long as he does not exclude the other co-sharers from it. In the present case the use by the defendants of plot 2966 exclusively is not an ouster of the plaintiff and if the plaintiff is dissatisfied with the defendants' using plot 2966 exclusively, his only remedy is by way of partition. Upon the case made by the plaintiff, I fail to see how he can claim any right of easement over any portion of the village of which he is a co-owner. I therefore fail to see how the learned District Judge could come to a finding that the plaintiff had acquired a right of easement by prescription over plot 2966. In the circumstances, I think that the decree

made by the Subordinate Judge was correct and the suit of the plaintiff must be dismissed with costs throughout. Appeal No. 452 of the defendant is decreed and No. 456 of the plaintiff is dismissed, one set of hearing fee being allowed in both the appeals.

I may add that upon the case made by the plaintiff it is not necessary to decide whether plot 2966 is the exclusive property of the defendants or whether the plaintiff has also got a title to this plot jointly with the defendants. That question must be left open in the present suit.

Ross, J.—I agree.

Appeal allowed.

1925 PATNA 494

DAWSON MILLER, C. J. AND FOSTER, J.

Jogindra Narayan Chaudhuri—Plaintiff—Appellant.

v.

Chinai Muhammad Sircar — Defendant—Respondent.

First Appeal No. 240 of 1921, Decided on 10th December, 1924, from a decision of the Sub. J., Purnea, D/- 27th April, 1921.

Limitation Act, Arts. 89 and 115—Written agreement between agent and principal—Principal's suit for accounts—Art. 89 applies—Lim. Act. Art. 115.

The plaintiff engaged the defendant as his agent to look after certain villages and collect the rents, rendering an account to the plaintiff between the parties. There were written agreements between the parties. After some years, the defendant was dismissed.

Held; a suit by the plaintiff for accounts was governed by Art. 89 and not Art. 115 of the Lim. Act. [P 495, C 2]

Lal Mohan Ganguly—for Appellant.

Dawson Miller, C. J.—This is appeal on behalf of the plaintiff from a decision of the Subordinate Judge of Purnea dated the 27th April 1921 dismissing the plaintiff's claim on the ground that it was time barred under Art. 115 of the Limitation Act. The plaintiff has appealed and contends that the case is governed not by Art. 115 but by Arts. 88 and 89 of the Limitation Act.

The facts shortly stated are that the plaintiff engaged the defendant as his agent to look after two villages and collect the rents rendering an account to the plaintiff. There were two written agreements in the case one relating to each of the mauzas. The first was executed in the year 1905 and the other one in the following year. The claim is for an account of the collections made between the years 1312 and 1313 B. S. respectively for the two villages and the year 1323 B.S. which later year would cover the period between the middle of April 1916 and the middle of April 1917. The defendant was dismissed sometime in about Assin 1324 that is, in September or October 1917. He has rendered no accounts and the present suit was instituted on the 26th May 1920.

The learned Subordinate Judge before whom the case came for trial took the view that as the relations between the plaintiff and the defendant depended on a contract the case was governed by Art. 115. That article provides for compensation for the breach of any contract express or implied not in writing registered, and not herein specifically provided for. The period of limitation is three years and the time from which the period begins to run is the date when the contract is broken or where there are successive breaches when the breach in respect of which the suit is instituted occurs or when the breach is continuing when it ceases. The learned Judge in arriving at the conclusion that Art. 115 applied rather than the earlier Article relied upon the cases of *Jogesh Chandra* v. *Binode Lal Roy* (1) and *Easin Sarkar* v. *Barada Kishore Acharya Chowdhry* (2). With regard to the former case a registered contract was relied upon as bringing the case not within Art. 115 of the Limitation Act but within Art. 116. Now Art. 116 is not an Article which like the one immediately preceding applies only to cases not specially provided for in other parts of the schedule. It applies to compensation for the breach of a contract in writing registered and it may well be that in a case of a registered contract that Article which gives 6 years as the period of limitation is to be preferred to Art. 89 which limits the period to 3 years only. Whether that interpretation of the Act is right or wrong we are not concerned with it in the present appeal. The question for determination here is whether Art. 115 which relates to a contract not in writing registered, not specially pro-

(1) [1910] 14 C. W. N. 122=5 I. C, 59.
(2) [1910] 11 C. L. J. 43=5 I. C. 186.

vided for in other parts of the schedule is to be given preference to Art. 88 and Art 89 where the suit clearly falls within those Articles. The first of the cases therefore relied upon by the learned Subordinate Judge does not appear to me to be any authority for the view which he appears to have taken in this case. It is true that in that case there is a dictum to the effect that where there is a definite contract to account at the end of the year the proper Article would be Art 115 as the contract would be broken by the failure of the agent to account at the end of each year but it must be noted that in that case the contract was in writing and registered, and the Article which was applied was Art. 116. The dictum to which I have referred was based apparently upon the case of *Mati Lal Bose* v. *Amin Chand Chattopadhaya* (3) a case in which again there was a dictum to the effect that Art. 115 would override the provisions of Art. 89 where both were applicable. This however was merely a dictum because the question in dispute in that case related to the effect of Art. 116 upon the earlier Article, namely Art. 89 and it was not necessary for the Court in that case to consider what the effect would be in a case coming under the Article.

In the other case relied upon by the learned Judge namely, *Easin Sarkar* v. *Barada Kishore Acharyya Chowdhry* (2) again it was proved that there had been a demand and a refusal to render an account more than three years before the suit was brought and therefore it was of no moment whether Art. 89 or Art. 115 was applied. It was not necessary therefore in that case to consider the question under which of these Articles the suit came. The matter, however, has been considered by other decisions in the Calcutta High Court and I need only refer to that of *Shib Chandra Roy* v. *Chandra Narain Mukherjee* (4). That was a suit by a principal against his agent for an account and for recovery of money from him that might be found due. It was held there that it was a suit for movable property received by the agent on behalf of the principal and not accounted for and was governed by Art. 89 of the schedule to the Limitation Act. The learned Judges there pointed out that the cases to which I have already referred dealt merely with Art. 116 and were no authority for the proposition that Art. 115 would override Art. 89 and in the result they found that Art. 89 was the proper Article to apply in such cases. If that is the proper article to apply in the present case and, in my opinion, it undoubtedly is, then it would appear that the present suit is not barred by limitation. The learned Judge seemed to think that it was barred upon the allegations in the plaint and without taking any evidence he decided the suit against the plaintiff. He seems to have relied upon certain allegations in paragraph 4 of the plaint which states that "Notwithstanding the fact that he was repeatedly asked to submit collection and nikas (adjustment) papers he did not do so nor is he inclined to submit them. Therefore in Asin 1324 of the Bangla year, the plaintiff dispensed with his service in connection with the collection and realisation of the said mauzas." The learned Judge seems to have assumed that these repeated applications were applications made at the end of each financial year or that they were at all events at some period anterior to the time when the last collections were made and certainly anterior to 3 years from the time when the plaintiff brought his suit. There is nothing however in the plaint to indicate that any demand was made more than three years before the beginning of this suit. The suit was brought within three years from the date when the defendant's services terminated. Therefore the suit is *Prima facie* in time unless it can be shown that some demand was made before that date with regard to all or some of the sums due for the years in question and that that demand was refused. That is a question of fact which will have to be gone into at the trial and in my opinion there is nothing in the plaint from which any such inference can be drawn. The appeal is allowed, the decision of the preliminary point arrived at by the trial Court is set aside and the case is remanded under Order 41 rule 23 of the Civil Procedure Code to the trial Court for decision of the other issues in the case.

Foster J.—I agree.

Case remanded.

(3) [1905] 1 C. L. J. 211.
(4) [1905] 32 Cal. 719=1 C. L. J. 232.

1925 PATNA 496

MULLICK AND ROSS, JJ.

Mahanth Ram Charan Das—Defendant—Appellant.

v.

Gossain Ramlakhan Das — Plaintiff — Respondent.

Appeal No. 619 of 1922, Decided on 28th April, 1925, from Appellate Decree against a decision of the Sub. J., Chapra, D/- 1st May, 1922.

Contract Act, S. 54 — Agreement between two chelas of a deceased mohunth of muth — One to be mohunt and other adhikari — Latter entitled to maintenance in event of difference — Latter suing for mohunthship—Suit failing—Maintenance cannot be claimed.

The appellant and respondent were both chelas of the late mohunt of a muth. According to custom and practice of the muth there was one mohunt only and two chelas cannot become mohunts at the same time. After the death of the late mohunt, both the chelas had become mohunts with the result that dispute had arisen between them. They therefore executed an ekrarnama. They agreed that the appellant should be declared to be the mohunt and the respondent adhikari of the said muth; and they declared that they should, to the end of their lives, be bound to act according to the terms set forth in the ekrarnama. The material terms set forth in the ekrarnama. were that the appellant should remain mohunt and malik of all the properties of the muth during his life-time; and the respondent adhikari during his life-time; and that in the event of difference between the parties the appellant would give to the Respondent Rs. 40 a year for maintenance out of the income of the properties of the muth and this should remain a charge on the muth properties. Notwithstanding the terms of this agreement the respondent brought a suit against the appellant in the Court of the District Judge claiming the mohuntship. That suit was dismissed.

Held, that the respondent by his action in bringing a suit for mohuntship broke his promise and defeated the whole intention of the agreement; and that he could no longer hold the appellant to his part of the contract, and that he could not therefore maintain a suit for maintenance as vouch safed by the ekrarnama.

[P. 497, C. 2]

C. C. Das and *Hasan Jan* — for Appellant.

P. Dayal and *Harishwar Prasad* — for Respondent.

Ross, J.—The question in this appeal is whether in the circumstances of the case the learned Subordinate Judge was wrong in reversing the decision of the Munsif and in giving the Plaintiff-Respondent a decree for maintenance at the rate of Rs. 40 a year and charging the same upon the properties of a certain *muth*, on the basis of an *ekrarnama* executed on the 23rd of April 1905.

The Appellant and the Respondent were both *chelas* of the late *mohunt* of the *muth*. The *ekrarnama* recites that according to the custom and practice of the *muth* there is one *mohunt* only and two *chelas* cannot become *mohunts* at the same time. After the death of the late *mohunt*, both the *chelas* had become *mohunts* with the result that disputes had arisen between them. They therefore agreed that the Appellant should be declared to be the *mohunt* and the Respondent *adhikari* of the said *muth*; and they declared that they should, to the end of their lives, be bound to act according to the terms set forth in the *ekrarnama*. The material terms were set forth in the *ekrarnama*. The material terms were that the Appellant should remain *mohunt* and *malik* of all the properties of the *muth* during his life-time; and the Respondent *adhikari* during his life-time; and that in the event of difference between the parties the Appellant would give to the Respondent Rs. 40 a year for maintenance out of the income of the properties of the *muth* and this should remain a charge on the *muth* properties. Notwithstanding the terms of this agreement the Respondent, on the 27th of April 1909, brought a suit against the Appellant in the Court of the District Judge claiming the *mohuntship*. That suit was dismissed both by the trial Court and on appeal by the High Court.

On these facts the learned Counsel for the Appellant contends that the Respondent has been guilty of acts tending to the subversion of the relationship created by the *ekrarnama*, and consequently cannot claim any relief under it; and that the consideration for the *ekrarnama* has failed by reason of the conduct of the Respondent. In support of his argument he referred to the judgment of Lord Cranworth in *Blackett* v. *Bates* (1) and to the decision of the Privy Council in *Srish Chandra Roy* v. *Banamali Roy* (2). The learned Vakil for the Respondent contended that these decisions have no application to the present case, because they were decisions in suits for specific performance, whereas

(1) [1865] 1 Ch. App. 117=35 L. J. Ch. 324=12 Jur. (N. S.) 151=13 L.T. 656=14 W. R. 319.

(2) [1904] 31 Cal. 584=31 I.A. 107=8 C.W.N. 594=6 Bom. L. R. 501=14 M. L. J. 185=2 A.L.J. 31=8 Sar. 677 (P. C.)

the present is a case of an executed agreement. It is true that in considering the present claim, which is a claim for money, the Court will not be influenced by the equitable considerations which arise in a suit for specific performance ; but the decision of the Judicial Committee is not without effect in the present case. That was a suit for specific performance of an agreement for a lease which was part of a general agreement entered into by the predecessors of the parties to the suit in settlement of a suit then pending between them. One of the documents constituting the settlement was an *ekrar* by which the Defendant in that suit agreed to acknowledge the validity of the adoption of the then Plaintiff. Notwithstanding that *ekrar* he subsequently contested the adoption in various litigations. The decision proceeded on the grounds that there had been a failure of consideration for the agreement and also that the conduct of the Plaintiff's predecessor was at variance with and amounted to a subversion of the relation intended to be established by the compromise. Specific performance of the agreement was therefore refused. The observations of their Lordships on the nature of the compromise are relevant to the present question. In the course of his judgment Lord Davey said : "The second and principal point of the Appellants was characterized by more boldness than plausibility. It was that Banwari Lal (that is, the original Plaintiff) had received the full benefit of the compromise by being armed with the *ekrar* as a shield against the attacks of Krishna (that is, the original Defendant) and therefore the agreement in suit was for an executed consideration.....The security of his title to the zemindari was of immeasurably greater importance to Banwari Lal than the mere question of the *patni*. And their Lordships have already expressed their opinion that the principal consideration to Banwari Lal for the agreement was to obtain such security and immunity from future attacks. In short they do not give the *ekrar* the restricted effect suggested by the learned Counsel, but they think that its language necessarily imports an agreement by Krishna to abstain from questioning the validity of the adoption for the future. Their Lordships are of opinion that there has been a failure of the consideration for the agreement in suit." Now this language applies with even greater force to the present *ekrarnama*, because there is an express stipulation that the Appellant should remain *mohunt* during his life-time and that the parties to the end of their lives would be bound to act according to the terms of the *ekrarnama*. The *ekrarnama* consists of mutual promises each of which is the consideration for the other. The Respondent promised to recognize the Appellant as *mohunt* throughout their lives and the Appellant promised to recognize the Respondent as *adhikari* throughout their lives. The object of the *ekrarnama* was expressed to save the property of the *muth* from the ruin and loss likely to arise from the dispute between the two parties who had both been installed as *mohunts*. By his action in bringing a suit for the *mohuntship* the Respondent broke his promise and defeated the whole intention of the agreement ; and he can therefore no longer hold the Appellant to his part of the contract.

The learned Vakil for the Respondent contended that the clause about maintenance was an isolated agreement for compensation to the Respondent in the event of his losing the post of *adhikari*. In my opinion, it is impossible to construe the document in this way. The recognition of the Respondent as *adhikari* was subject to this that in the event of differences arising between the parties which should involve his ceasing to be *adhikari*, he would be entitled to maintenance. This is not an independent agreement, but an integral part of the whole agreement ; and the terms of the agreement as a whole having been broken by the Respondent he is not entitled to any benefit under this subsidiary clause.

I therefore hold that the Respondent is not entitled to the benefit of this agreement and that this claim for maintenance must fail. The result is that the appeal is decreed with costs and the suit is dismissed with costs throughout.

Mullick, J.—I agree. I only wish to add that the Defendant is not estopped from denying that the *ekrarnama* is enforceable against him. It is true that in the former suit he raised an issue as to the validity and genuineness of the *ekrarnama*. The Plaintiff denied execution, but the Court found that he had executed the document and that he had therein admitted the title of the Defendant. Whether the document was enforceable

against the Defendant was neither litigated nor decided and therefore no question of *res judicata* or estoppel against the Defendant arises.

Appeal allowed.

1925 PATNA 498

DAS, J.

Sheo Pershad and others—Appellants.

v.

Jhaman Singh and others — Respondents.

Appeal No. 806 of 1922, Decided on 15th December, 1924, from appellate Decree. from a decision of the Sub. J., Gaya, D/-11th July, 1922.

Record-of-Rights—Entry based on special oath—Opposite not authorised to be bound by the oath—Entry is wrong.

Where there was an entry in the Record-of-Rights that the defendant (tenant) owned certain trees jointly with plaintiff (landlord) but it was found that at the preparation of the Record-of-Rights the gomastha of the plaintiffs said that if the defendants took special oath and said that they had any interest in the trees, he would give up his position that the plaintiffs were entitled to the trees to the exclusion of the defendants and that the defendants had no hesitation in taking this special oath upon which the survey authorities recorded these trees in the name of the plaintiffs and defendants jointly..

Held: there were sufficient materials before the Court in support of plaintiff's case that there was no foundation at all for the entry in the Record-of-Rights especially when the gomastha had no authority from his master to consent to his master's title being bartered away in this manner. [P 498, C 2 ; P 499, C 1]

Janak Kishore—for Appellants.

Siveshwar Dayal—for Respondents.

Judgment.—Plot 469 has been Recorded in the Record-of-Rights as *Ghairmazrua bandh* ; and certain trees standing on plot 469 have been recorded as belonging to the plaintiffs and the defendants. The plaintiffs are the admitted landlords ; the defendants are the tenants in respect of the adjoining land in the *putti* not of the plaintiffs but of other persons. The plaintiffs embarrassed by the entry in the Record-of-Rights giving half the interest in the trees in the plot 469 to the defendants, sued for declaration that those trees belong to them and that the entry in the Record-of-Rights is wrong.

The Court of first instance decreed the plaintiff's suit. The Lower Appellate Court differed from the Court of first instance and has dismissed the plaintiff's suit.

The first question argued before me turns on the question of onus as to which the Courts below have differed. The Court of first instance thought that the onus was on the defendants to establish that they had any title to these trees. The Lower Appellate Court thought that the onus was on the plaintiffs to establish that the entry in the Record-of-Right giving half the interest in the trees to the defendants is erroneous. It is true to say that the initial onus is on the party who attacks an entry in the Record-of-Rights. It was undoubtedly for the plaintiffs to establish that they were entitled to the trees to the exclusion of the defendants. But the plaintiffs showed that the land itself was recorded as *ghairmazrua bandh*. In other words the land upon which the trees are planted is the property of the plaintiffs in which the defendants have no interest whatever. This consideration had great weight with the Court of first instance.

This is not all. The learned Judge in the Court below apparently conceded that it was open to the plaintiffs to show that there were no materials upon which the survey authorities could have decided that the defendants were entitled to half the interest in the trees ; but he thought that the plaintiffs placed no materials before the Court. Now this is not correct. The judgment of the learned Munsif shows that the survey authorities proceeded upon the evidence of one of the defendants to whom special oath was administered at the instance of Gaya Prasad, the *gomastha* of the plaintiffs. What happened was this. Gaya Prasad apparently said that if the defendants took special oath and said that they had any interest in the trees he would give up his position that the plaintiffs were entitled to the trees to the exclusion of the defendants. The defendants had no hesitation in taking this special oath and this is how the survey authorities came to record these trees in the name of the plaintiffs and defendants jointly. If the Court of first instance is right in saying that the survey authorities proceeded solely on what was stated by the defendants on special oath, then clearly there is

no foundation whatever for the entry in the Record-of-Rights. Gaya Prasad had no authority from his master to consent to his master's title being bartered away in this manner ; and the survey authorities apparently did not examine the materials with a view to see whether the defendants had any interest in these trees.

Now the learned Subordinate Judge in the Court below does not deal with this matter at all. But there is a sweeping assertion that it was for the plaintiffs to show that there was no basis for the entry in the Record-of-Rights. In my opinion the way in which the learned Subordinate Judge has dealt with this matter is somewhat unsatisfactory, and the question should be re-investigated by him.

Mr. Siveswar Dayal draws my attention to that portion of the judgment where the learned Subordinate Judge says that he is satisfied on evidence that the defendants were all along in possession of the said trees and further that the plaintiffs and defendants were entitled to the trees jointly in equal shares. I recognise that this finding looks very much like a finding of fact, but the way in which the learned Subordinate Judge has dealt with whole case has satisfied me that he ought to rehear the matter. The learned Judge attached too great a weight to the entry in the Record-of-Rights and overlooked the fact first that the land upon which the trees stood was *Ghair-mazrua bandh* and that therefore the trees presumably belonged to the plaintiffs, and secondly that the plaintiffs placed materials before the Court in support of their case that there was no foundation at all for the entry in the Record-of-Rights. I do not know what the decision of the learned Subordinate Judge would have been had he considered the matter from this point of view.

I would accordingly allow the appeal, set aside the judgment and decree passed by the Court below and remand the case to that Court for a decision according to law,

Costs will abide the result and will follow the decision in the Court below.

Case remanded.

1925 PATNA 499

DAS AND ADAMI, JJ.

Kumar Kamekhya Narain Singh — Plaintiff—Appellant.

v.

Bechu Singh—Defendant—Respondent.

First Appeal No. 104 of 1921, Decided on 2nd January 1925, from a decision of the Add. Sub. J., Hazaribagh, D/- 31st January 1921.

Landlord and Tenant — Marfatdari receipts granted--Question whether tenancy is created in favour of grantee is one of fact.

The question, whether the grant of marfatdari receipts operates as a recognition of the grantee as a tenant from year to year, is essentially one of fact. [P 500 C 1]

Where for a number of years such receipts are granted without any protest by anybody the inference may be raised that there was a creation of a tenancy. [P 500 C 1]

But where there was no intention on the part of the landlord to treat the grantee of the receiptas a tenant and where there was no intention on the part of the grantee to pay rent to the landlord except on receipt made out in his name,

Held ; that there was no creation of a tenancy in favour of the grantee of the marfatdari receipts. [P 500 C 2]

Sultan Ahmed and *S. M. Mullick* — for Appellant.

K. B. Dutt and *Bankim Chandra Dey*— for Respondent.

Das, J.—The predecessor-in title of the plaintiff granted a mokarrari istemrari lease in favour of Dipnath Singh and Mitarjit Singh. It is conceded that the lease was not a hereditary lease but that it was operative for the life-time of the grantees. Mitarjit Singh who survived Dipnath Singh died sometime in 1902. The suit out of which this appeal arises was instituted on the 1st of April 1920, for the ejectment of the defendants. The suit has been dismissed as against defendants 8 to 11 on the ground that they have acquired a title by adverse possession.

It is contended that on the admission made by defendant No. 8 there was no question of adverse possession to be tried. Defendant No. 8 said in examination-in-chief that he never paid rent for the mouzah to the Ramgarh Raj. In cross-examination he said as follows :—

"I paid rent for the mouzah in suit for 2 or 3 years after Mitterjit's death to Narsingh Dayal the *zarbharnadhar* of the mouza under Raja, and I used to get receipts from him. I paid rent to him for 9 or 10 years in all. The receipts which I got

from the *zarbharnadhar* are at home They were marfatdari receipts."

It is contended that there is a direct admission by defendant No. 8 that there was payment of rent by him to the Raj and that the payment of such rent by defendant No. 8 and the acceptance thereof by the plaintiff operated as a recognition of defendant No. 8 as a tenant rom year to year, and that, that being so, the defendants could not put forward a title by adverse possession as against the plaintiff. If this argument is to succeed at all it could not affect defendants other than defendant No- 8 ; but in my opinion, the argument ought not to succeed at all. It will be noticed that the Court below has proceeded on the hypothesis that rent was never paid by these defendants and it appears that the argument was not put in this form in the Court below. But what is the admission made by defendant No. 8 in this case ? His admission is that the *zarbharnadhar* of the Raj accepted rent from him and granted him marfatdari receipts Now marfatdari receipts are receipts made out in the name of the original tenant although they show that the rent has been actually paid by a third person. The question is whether the grant of marfatdari receipts operated as a recognition of defendant No. 8 as a tenant from year to year.

In my opinion the question is essentially one of fact. I can quite understand the position where for a number of years such receipts are granted without any protest by anybody and the inference may be raised that there was a creation of a tenancy. But in this case defendant No. 8 says that in 1904 or 1905 he went to the Raja and demanded receipt in his own name. The Raja was willing to grant marfatdari receipts but was not willing to give him receipts in his own name. He declined to take marfatdari receipts and the Raja threatened to sue him in ejectment. It is conceded that since that interview no rent has ever been paid by defendant No. 8 or by any of the defendants. Mitarjit Singh as I have said before, died in 1902.

Now the story told by defendant No. 8 has been accepted by the learned Judge in the Court below and we have not been invited in this Court to dissent from the view expressed by the learned Judge on this point.

Now the question is, was a tenancy in favour of defendant No. 8 created by acceptance of rent from him. It seems to me that the facts clearly establish that there was no intention on the part of the plaintiff to treat defendant No. 8 as a tenant and that there was no intention on the part of defendant No. 8 to pay rent to the Raj except on receipts made out in his name. That being so. there was no creation of a fresh tenancy in favour of any of the defendants and the plaintiff's suit is clearly barred by the provision of Article 139 of the Limitation Act.

It was then contended that the learned Judge erred in dismissing the plaintiff's suit in respect of the 15 annas 9 pies interest claimed by defendants 8 to 11. It appears that defendant No. 8 holds as mortgagee to the extent of 1 anna 6 pies and that defendants 9 to 11 hold as mortgagees to the extent of 2 annas, and the contention is that so far as these interests are concerned, the plaintiff should have succeeded. The point was not argued in Court below ; nor has it been taken in the grounds of appeal in this Court. But in any case I do not understand how the point can be raised. The defendants were actually in possession of this land. It was necessary for the plaintiff to sue for recovery of possession of this land within 12 years from the death of Mitarjit Singh. The suit not having been brought within 12 years from the death of Mitarjit Singh the whole suit must be dismissed as barred by limitation.

In my opinion the decision of the learned Subordinate Judge is right and it ought to be affirmed.

I would dismiss this appeal with costs.

Adami, J.—I agree.

Appeal dismissed.

★ 1925 PATNA 500

MULLICK, ROSS AND KULWANT SAHAY JJ.

Mohit Narain Jha—Judgment-debtor—Appellant.

v.

Thakan Jha and others—Respondents.

Appeal No. 82 of 1924, Decided on 16th April, 1925, from Original Order of the Sub. J., Darbhanga, D/- 5th April. 1924

★ (a) *Civil P. C.*, 21, *R.* 66—*Order under, is not final and cannot be* res judicata—*Civil P.C., S.* 11.

Order of the Court determining any of the particulars to be stated in the sale proclamation under O. 21, R. 66 is not a final order and the parties are at liberty to re-open the same question in a subsequent execution proceeding.

[P 502, C 2]

★ (b) *Civil P. C., O.* 21, 66—*Order refusing to notify incumbrance—Order is one under R.* 66

Order of an executing Court refusing to notify an encumbrance in the sale proclamation, is really an order under O. 21, rule 66 and is therefore not appealable. [P 503, C 1]

K. P. Jayaswal and *L. K. Jha*—for Appellant.

Murari Prasad and *Anirudhji Barman*—for Respondents.

Kulwant Sahay, J.—This is an appeal by one of the judgment debtors, Mohitnarain Jha, against an order of the Subordinate Judge of Darbhanga, dated the 5th of April 1924, rejecting his application of objection to the execution proceeding. The decree under execution was passed on the basis of a mortgage bond executed by one Shibnath Jha on the 27th of September 1916 in favour of Mt. Debidhira Dai mortgaging certain properties. Three of those properties were held in lease by the present appellant under a *thica patta* dated the 7th January 1915 executed by Shibnath Jah for a term of seven years from 1322 to 1328 Fs. The *patta* provided that, after the expiry of the lease in 1328, the lessee was to continue in possession for another term of seven years from 1329 to 1335 on the same *jama* and conditions as the original lease; and that the lessor was to execute a fresh *patta* for the subsequent period. It appears that the mortgagee Debidhira Dai objected to advance the loan and to take the mortgage unless the lessee agreed to give up possession of the leasehold properties after 1328, in case she had to purchase any of those properties either by a private conveyance or in execution of a mortgage decree for the satisfaction of the mortgage debt. The lessor induced the lessee to agree to this term and accordingly on the same day on which the mortgage was executed namely, the 27th September 1916, the lessee executed an *ekrarnama* in favour of the mortgagee Mt. Debidhira Dai by which he agreed to waive his thica right and to relinquish possession of the property which the mortgagee might purchase either by private sale or at a sale in execution for payment of the mortgage debt. The mortgagee instituted a suit to enforce the mortgage and, in this suit, the lessee, who is the present appellant, was made a party and was the defendant No. 8.

One of the issues raised in mortgage suit was issue No. 2 which ran thus; "Is the *ekrarnama* dated the 27th of September 1916 binding on defendant No. 8 and has plaintiff any cause of action against him?". The learned Subordinate Judge held that according to the terms of the *ekrarnama* of 1916, the defendant No. 8's lease would be subject to the plaintiff's mortgage if the dues of the plaintiff be not paid by the executant till 1328. He further held that the defendant was bound to give up possession of the property if the plaintiff purchased any of the mortgaged properties, and the usual mortgage decree was made in which it was directed that the defendant No. 8 would be bound to give up possession after 1328 if the plaintiff herself purchased any of the properties. Debidhira Dai executed this decree in Execution case No. 166 of 1922. An application was filed by present appellant praying that a note be made in the sale proclamation that the mortgaged property shall be sold subject to his lease, and after the decree holder purchased the properties, the applicant shall give up possession thereof after 1328.

The learned Subordinate Judge refused this application by his order dated the 26th of August 1922. The reason given for refusing this application was that the lease had expired in 1328, and that therefore the lessee had no right to continue in possession, the application for making the note in the sale proclamation having been filed in the year 1329, that is after the expiry of the lease. This execution case was, however, ultimately dismissed.

The original decree holder thereafter assigned her decree to the present respondent, Thaken Jha. The present execution, which is execution case No. 283 of 1923, has been taken out by the assignee and the appellant filed an objection to the execution in which he objected to competence of the assignee to take out execution on the ground that he was merely a *farzidar* for Kamalnath Jha, judgment debtor. He also prayed that, in case the assignee was held entitled to proceed with the execution, a note might be made in the sale proclamation that the properties advertised for sale shall be sold subject to

his prior lease which extends up to 1335. The learned Subordinate Judge has rejected the objection of the appellant on finding that the assignee was not the *farzidar* for Kamalnath Jha and that the application for making a note in the sale proclamation was barred by *res judicata* on account of the previous order of the Subordinate Judge in the execution case of Debidhira Dai, dated the 26th of August 1922 mentioned above. He has further held that on a true interpretation of the *ekrarnama* in favour of the original decree-holder the assignee was entitled to take the benefit thereof, and that the agreement contained in the *ekrarnama* was not a personal agreement with Debidhira Dai as was contended by appellant. Against this order the appellant has come up on appeal to this Court.

The first point taken by the learned Counsel for the appellant is that the assignee was a *farzidar* for Kamalnath Jha, one of the judgment-debtors, and, therefore, he was not entitled to execute the decree The learned Subordinate Judge has discussed the evidence and has come to the conclusion that it has not been satisfactorily established that the assignee was *farzidar* for Kamalnath Jha. On a consideration of the evidence which has been placed before us I am of opinion that the learned Subordinate Judge was right in his conclusion on this point.

The learned Counsel has referred to the evidence on behalf of the assignee and argued that this evidence is not sufficient to show that he was a real purchaser, but it was for the appellant to prove conclusively that the assignee was a *farzidar* for the judgment-debtor. The evidence on his behalf is not at all satisfactory to prove the *farzi* character of the assignment and this ground of the appeal must fail.

The second ground taken by the learned Counsel for the appellant is that the Subordinate Judge was wrong in holding that the present application, in so far as it asked a note to be made in the sale proclamation about the properties being subject to the appellant's lease, was barred by *res judicata*. The contention appears to be sound. The application made by the present appellant in the previous execution case was that his lease might be notified in the sale proclamation. Now this was an application in connection with the drawing up of the sale proclamation as provided by Order 21, rule 66 of the Civil Procedure Code. The Court executing the decree is required to state certain particulars in the sale proclamation and in order to state those particulars it is sometimes necessary that the Court should hold a summary enquiry. The sale proclamation has to be drawn up under Order 21, rule 66 of the Code after notice to the decree-holder and the judgment-debtor and both parties are entitled to apply to the Court asking it to state such particulars in the sale proclamation as they think proper. When there is a difference between the decree-holder and the judgment-debtor as regards any of the particulars to be stated in the sale proclamation, the Court has to make a summary enquiry and pass orders after such enquiry. One of the particulars to be stated in the sale proclamation is as regards the encumbrance to which the property sought to be sold is liable. Another particular to be stated therein, as provided by clause (e) sub-rule (2) rule 66, is everything which the Court considers, material for a purchaser to know in order to judge of the nature and value of the property. Under this head the matter, which is usually enquired into by the Court, is as regards the valuation of the property and evidence is generally given under clause (4) of the rule in order to enable the Court to state those particulars. It has been held that the order of the Court determining any of the particulars to be stated in the sale proclamation under Order 21, rule 66 is not a final order and the parties are at liberty to re-open the same question in a subsequent proceeding such as proceedings relating to setting aside the sale under Order 21, rule 90 of the Code of Civil Procedure. The order of the Court in previous execution case of the original decree holder, dated the 26th of August, 1922, was therefore not a final order but an interlocutory order after a summary enquiry ; and it cannot be held that such an order would operate as *res judicata* in a subsequent proceeding. Moreover the objection taken on the previous occasion was that the lease has expired in 1328 F. and was not subsistent at the time the previous execution was taken out. The objection in the present case is that the present decree-holder, who is the assignee of the decree-holder, is not entitled to the benefit of the *ekrarnama* which was a personal agreement with the

original mortgagee decree-holder. No doubt there was a summary decision in the previous execution case that the lease had expired in 1328, but that was only a reason given for disallowing the prayer of the judg nent debtor to notify the lease in the sale proclamation. It is the final order which operates as a bar in cases where the principle of *res judicata* is applicable. The reasons given for the final order cannot operate as a bar. In a subsequent proceeding between the heirs of the original lessor and the lessee it has been determined by this Court that the lease did not expire in 1328, but would expire in 1335. No doubt the present decree-holder or his predecessor was not a party to the proceeding in which that decision was come to; but I am of opinion that it is still open to the lessee, the present appellant, to raise that question in the presence of the present decree-holder. I am therefore of opinion that the learned Subordinate Judge was wrong in holding that the application of the appellant was barred by *res judicata*.

It has, however, been contended by the learned Vakil for the respondent that if the order in the previous execution case be held merely to be an order under Order 21, rule 66 of the Code and not an order under S. 47, then the present order under appeal, so far as it disallows the appellant's prayer to notify the lease in the sale proclamation, is also an order under Order 21, rule 66 of the Code and is therefore, not appealable. This objection of the respondent appears to be sound. The order of the learned Subordinate Judge, in so far as it refuses to notify the lease in the sale proclamation, is really an order under Order 21, rule 66 and is therefore not appealable, and the present appeal, in so far as this part of the order is concerned, is incompetent.

The question, however, as regards the interpretation of the ekrarnama was raised in the Court below and decided by it, it has also been raised before us and has been fully argued on both sides. I think it therefore desirable to express my opinion as regards the interpretation thereof. It has been contended on behalf of the appellant that the agreement contained in the ekrarnama was an agreement entered into with the mortgagee Musammat Debdhira Dai personally, and her heirs or representatives are not entitled to take the benefit thereof. Reference is made to the terms of the ekrarnama and to the absence of any expression showing that it was the intention of the parties that their heirs or representatives of the original mortgagee could enforce the terms of the ekrarnama. I have read the ekrarnama carefully and I have considered the circumstances under which it was executed; and I am of opinion that the intention of the parties was that not only the mortgagee Musammat Debdhira Dai personally was to take advantage of the terms thereof, but that her heirs and assignees and legal representatives were also entitled to the benefit thereof. It is to be noted that the terms of this ekrarnama were settled before the mortgage was executed although the actual execution of the ekrarnama took place after the execution of the mortgage bond. There is a recital in the ekrarnama that the lessor, Babu Shibnath Jha, was in need of money but the moneylender raised the objection that in the event of non-payment of the debt up till 1328 if she (the Mahajan) be under the necessity of getting a Kobala executed in respect of the mortgaged property or purchasing at an auction sale any of the Mouzas held in lease by the lessee, she would be put to loss if the lessee continued to hold possession after 1328. The ekrarnama was therefore executed at the request of Babu Shibnath Jha for the satisfaction of the Mahajan, the moneylender. It was a part of the terms of the mortgage and to my mind it seems clear that the mortgage was executed with the stipulation that in case the mortgagee purchased the property the lessee would give up possession after 1328. I see no reason to hold that this was a personal agreement to enure for the benefit of Mt. Debdhira Dai personally and not of her heirs and representatives. It had the effect of enlarging the security and must be taken to be for the benefit of the mortgagee and her heirs and representatives.

Stress is laid by the learned Counsel for the appellant on the expression contained in the ekrarnama to the effect that if the said Mahajan herself purchased any of the leasehold properties then the lessee would give up possession after 1328; and it is contended that the expression "herself shows that it was intended that Musammat Debdhira Dai alone could take

advantage of this ekrarnama. In my opinion this contention is not sound. What was intended to be expressed was that if the mortgagee purchased then the lessee would give up possession if ; an out sider or a third person purchased, then the lessee would not give up possession. What was contemplated was the case of the mortgagee becoming the auction purchaser in contradistinction to a third person purchasing the property.

It is next argued that there was no intention that this covenant should run with the land ; and it is pointed out that it was stipulated in the ekrarnama that if the mortgagee purchased one, two or all the three Mouzas and obtained delivery of possession thereof, the condition as regards relinquishment by the lessee shall hold good in respect of the one, two or three Mouzas which the mortgagee might purchase and not of the other Mouza or Mouzas which she might not purchase. I am unable to see any force in this contention. This term in the ekrarnama is in no way in conflict with the previous terms thereof and does not show that the covenant was not to run with the land. It only emphasises the fact that no one except the mortgagee was to get the benefit of the agreement ; and that if the mortgagee purchased only one or two out of the three leasehold properties, then she would be entitled to take possession of only that one or those two properties. Reference has been made by the learned Counsel for the appellant to S. 6 clause (d) of the Transfer of Property Act which provides that an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him ; and it is argued that the assignment, in so far as the terms of the ekrarnama are concerned, is bad in law. This would be so only if it be held that the covenant in the ekrarnama was a personal agreement with Musammat Debdhira Dai. Once it is found that it was not a personal covenant, S. 6 clause (d) of the Transfer of Property Act can have no application to the present case.

I am therefore of opinion that the learned Subordinate Judge was right in holding that the covenant in the ekrarnama was for the benefit of the decree-holder, whoever he might be, at the time of the execution of the decree. I would however, dismiss this appeal, in so far as the question of the farzi character of the assignment is concerned, against the appellant on the merits, and in so far as the appellant's application to notify the lease in the sale proclamation is concerned, on the ground that no appeal lies against this portion of the order. The appellant ought to pay the costs of this appeal.

Mullick, J.—I agree.

Ross, J.—I agree that the appeal so far as it questions the right of the respondent to execute the decree on the ground that he is a farzidar of one of the judgment-debtors should be dismissed ; and I also agree that no appeal lies against the decision of the Subordinate Judge refusing to notify the appellant's lease in the sale proclamation. The appeal should therefore be dismissed with costs.

Appeal dismissed.

★ 1925 PATNA 504

DAS AND FOSTER, J.

Jitan Dusadh and another — Defendants-Appellants.

v.

Jawahir Singh and others—Plaintiffs-Respondents.

S. Appeal No. 1431 of 1921, Decided on 5th August 1924, from a decision of the Sub. J., Gaya. D/- 10th May, 1921.

★ *Civil P. C., O. 41, R. 27—Admitting additional evidence—Question is of discretion.*

Both under the general law and under O. 41, r. 27 the Court may for a substantial cause admit additional evidence in appeal, but the question is one of discretion.

G. N. Mukherjee for B. N. Mitter—for Appellants.

Lachmi Narain Singh—for Respondents.

Das, J.—The only question is whether the learned Judge in the Court below should have considered the village note which was filed by the appellant. Admittedly it was not filed in the Court below and the learned Judge considered the question whether he should admit additional evidence in this case. It may be conceded that both under the general law and under O. 41, r, 27 the Court may for a substantial cause admit additional evidence in appeal, but the question is one of discretion, No sufficient cause was shown by the appellant why additional evidence should be taken in appeal.

In my opinion it is impossible to interfere with the judgment of the Court below and this appeal must be dismissed with costs.

Foster, J.—I agree.

Appeal dismissed.

1925 PATNA 505

JWALA PRASAD AND KULWANT SAHAY, JJ.

(Rani) Bhuneshwari Kuer alias *Bacha Saheba*—Plaintiff—Appellant.

v.

Sukhdeo Singh and others — Defendants—Respondents.

Appeals Nos. 90 and 91 of 1921, 49, 51, 52, 54, 55, 60, 61, 64, 65, 67, to 83, 101 and 117 of 1922, decided on 31st March, 1924, from Original Decrees, from the decision of the Sub. J., Gaya, D/-10 January, 1921.

(a) *B. T. Act*, (1885) *S.* 71 (4)—*Claim for rent based on produce — Tenant preventing landlord from estimating crops—Onus is on tenant to prove actual produce—Evidence Act, S.* 106.

Where rent is claimed on the basis of the produce of the land and where the landlord has opportunity of appraising the crops and falsifies accounts in order to obtain a higher amount of rent, he is not entitled to get any decree except on proof of the produce of the land, and if he fails to prove that, he must be content with the admissions made by the defendants. But where the landlord could not make an estimate of the crops or was prevented from doing so by the tenants, his claim cannot be thrown out simply because he has not been able to prove the actual produce of the lands in the direct possession of the tenants. [P 507, C 1]

(b) *B. T. Act*, (1885) *S.* 70 (5)—*Separate decree apart from order is unnecessary.*

Cl. 5 of S. 70, does not require that a separate decree, apart from the order, should be prepared by the competent Revenue Authority. It simply requires that the order shall be final and shall, on the application by the landlord or the tenants, to the Civil Court, be enforceable as a decree. [P 510, C 2]

In a case of appraisement the Collector does not take possession of the crops nor does he make it over to the landlord. He simply prepares an estimate of the crops under S. 69 and then reduces it into money value and declares how much is due to the landlord and how much to the tenant. In such a case the Collector's order must clearly specify the amount due from one party to the other so that the former may in execution of the order in the Civil Court receive his dues from the latter. Again in a case of division of crops, where the tenant has made himself liable to the landlord by removal of the crop or otherwise such as is provided by S. 71, the Collector's order must clearly state the amount payable to the landlord by tenant, so that the former may receive the same in execution of the order in Civil Court. But where there is a simple division of crops on the spot, each party is entitled to receive from the Collector who takes possession of the crops, his share therein. The party taking his share from the Collector will not be liable to the opposite party and there can be no order to pay anything to the other party. If a party does not choose to take his share, his share will remain in deposit with the Collector. The only order that the Collector can pass is to deposit the share to the credit of that party. The order is capable of execution against the Collector if he does not give to the party his share. The sale proceeds in the Treasury to the credit of the party can be withdrawn any moment he likes. There will not be any necessity of execution. [P 510, C 2; P 511, C 1]

(c) *Decree—No liability fixed upon any party—No decree can be prepared.*

A decree is prepared only when some liability is fixed upon a party; when no liability is fixed no decree can be prepared and in fact in some cases in the Civil Court no decree is prepared. [P 511, C 1]

(d) *B. T. Act*, (1885) *S.* 69—*Both parties admitting that* Bhaoli *rent is payable—Dispute as to system of payment being* batai *or* danabandi *does not exclude Collector's jurisdiction.*

Where it is admitted by both the parties that *bhaoli* rent is payable, the existence of a dispute as to whether the system of payment is *batai* (by division of crops) or *danabandi* (appraisement) does not exclude the Collector's jurisdiction. [P 511, C 2]

Kailaspati, Parmeshwari Dayal and *Nawal Kishore Prasad*—for Appellant.

S. M. Mullick and *S. N. Ray*—for Respondents.

Jwala Prasad, J. — These appeals arise out of suits for recovery of *bhaoli* and *nakdi* rents which were tried together analogously and disposed of by the judgment of the Court below on the 10th January 1921. The landlord is the appellant in some of the cases and tenants in the others. The lands for which rents are claimed are situate in *Mouza* Srewa, Parganah Piara, District Gaya.

As to the *nakdi* rent there is no dispute. The points of difference between the parties have been—

(1) as to the system of paying the *bhaoli* rent; the tenants' case is that the system is *batai* (a division of crop between the landlord and the tenant), whereas the landlord's case is that the system is *danabandi* (appraisement):

(2) as to the proportionate share of the landlord in the produce; the tenants allege that the landlord's share is half, and the landlord, on the other hand, claims that her share is 9/16ths;

(3) as to whether the rent for sugarcane land is *bhaoli* or *nakdi*; the landlord says *bhaoli* and the tenants say *nakdi*; and

(4) as to the quantum of the produce in the years in suit.

The Survey Record-of-Rights, which as finally published on the 23rd November 1916, shows that the system of payment of rent for the *bhaoli* lands is *batai* or division of produce of all kinds including sugar-canes, and the share of the landlord therein is half.

The Court below has upheld the Survey entry as to the rent for the sugar-canes being *bhaoli* and as to the share of the landlord in sugar-canes as well as in other kinds of produce being half. As to the system of payment of the rent, the learned Subordinate Judge has held that it is *danabandi* (*i. e.*, appraisement) as opposed to *batai* (division) entered in the Survey Record-of-Rights. The suit is for the years 1324 to 1326, *i. e.*, for the years just following the final publication of the Survey Record of Rights in 1323 (23rd November 1916) which accentuated the dispute between the landlord and tenants as to the system being *batai* or *danabandi*.

The case of the tenants was that in the year 1324 the paddy crops were amicably divided between the landlord and the tenants, but the landlord refused to give receipt for the rent in kind payable to him. The landlord instituted proceedings before the Collector under S. 69 of the Bengal Tenancy Act for recovering her share in the produce by appraisement of the *rabi* crops for the year 1324. The tenants objected stating that the system was *batai*. On the 11th April the Sub-Divisional Officer considered the objection and held that the custom was of division as decided by the Settlement Authorities. Accordingly he directed an *Amin* to divide the crops. The landlord then did not want to proceed with the case and the *raiyats* were then asked whether they wanted to have the property divided, and, if so, to pay the cost of division. The *raiyats* then deposited the costs and the *khasra* was ultimately filed on the 12th June 1917. Objection to that *khasra* was filed by the landlord on the 26th June 1917. On the 9th July the Sub-Divisional Officer held that "the *khasra* does not show the actual produce of the field owing to the loss done by rains etc. As reported by the *Amin* the *malik* refused to take the *hakimi* share and the *Amin* sold the *hakimi* share according to the *nirkhnama* supplied by the Paraiya Police and deposited the sale-proceeds in the Treasury." This, however, was not a final disposal of the case under Ss. 69 and 70 of the Bengal Tenancy Act. It appeared that the crops of some of these lands were already cut. The tenants stated that it was so because the crops of those lands were divided between the landlord and the tenants. In these circumstances the Sub-Divisional Officer did not consider it desirable to institute proceeding under S. 71 of the Bengal Tenancy Act. Since then for the years 1325 and 1326 for the paddy and *rabi* crops proceedings under Ss. 69 and 70, Bengal Tenancy Act were resorted to. The landlord was not satisfied with the result of those proceedings and she instituted the suits out of which these appeals have arisen.

The only question seriously raised in the appeals is as to the quantum of the produce in the years in suit. There has been no serious dispute and, as a matter of fact, the findings of the Settlement Authorities have been upheld by the Revenue Authorities under Ss. 69 and 70 of the Bengal Tenancy Act as to the sugar-cane being held at *bhaoli* rent and the landlord's share in the produce of all kinds being half. As regards the system of payment of rent, namely, *danabandi* or *batai* the Court below has held that the system was *danabandi* and the landlord's share in the produce is half.

As to the quantum of the produce the Court below has disposed it of in the following words.

"I find that both parties have made incorrect estimates. The plaintiff's men have over-estimated the crops while the tenants have under-estimated them. According to the evidence on plaintiff's side, the average outturn of paddy varies between 15 to 35 maunds per *bigha*, that of *rabi* varies between 6 to 12 maunds a *bigha* and that of *gur* between 25 to 45 maunds per *bigha*. According to the evidence on the defendant's side the average outturn of paddy varies between 6 to 12 maunds that of *rabi* between 15 seers to 2 maunds and that of *gur* between 5 to 11 maunds per *bigha*. Taking the mean of the lowest figures of the *malik* and the highest figures of the tenants I find that the average outturn of paddy is 13½ maunds, that of *rabi* 4 maunds, and that of *gur* 18 maunds per *bigha*. So in the absence of any satisfactory evidence on the point I allow paddy, *rabi* and *gur* at the above rates

for the years in suit. If any of these rates of outturn exceed the rates of outturn given in the plaint, then the plaint rates shall prevail."

Upon the *bhaoli* rent thus ascertained and the undisputed *nakdi* rent the Court below has given cess at annas six per rupee on the yearly *jumma* and damages at 12½ per cent. We have been taken through the evidence of the case relating to the outturn of the crops in the years in suit. The evidence has been very meagre and does not at all seem to be convincing. The feelings between the landlord and the tenants being very much strained owing to the dispute as to the appraisement, it is not possible to believe that there was an estimate or appraisement by the landlord of the crops in the actual charge of the tenants. The Court below was, therefore, perfectly right in not accepting the appraisement papers or the estimates of the crops for the years in suit given on behalf of the landlord. The tenants were the last persons to give a correct idea of the actual produce, and consequently, their evidence also has been rightly rejected by the Court below.

On behalf of the respondents it is contended that the result of the rejection of the evidence both of the landlord and the tenants is that the plaintiff's claim should be decreed upon the admission made by the defendant in the written statement or in their evidence. This argument is based upon the assumption that the onus of proving the claim made in the plaint based on the estimate of the produce was on the landlord, and, if she failed to establish her claim, her suit could only be decreed upon the admissions, if any, made by the tenants. This is true so far as the ordinary principle of onus is concerned. Where the landlord has opportunity of appraising the crops and falsifies accounts in order to obtain a higher amount of rent he is not entitled to get any decree except on proof of the produce of the land, and if he fails to prove that, he must be content with the admissions made by the defendants. But where the landlord as in this case, could not make an estimate of the crops or was prevented from doing so by the tenants, as held by the Court below, it will be hard to throw out her claim, simply because she has not been able to prove the actual produce of the lands in the direct possession of the tenants. In the present case the dispute between the parties arose soon after the Record-of-Rights was prepared and published ; and that dispute was upon the crucial point of the system for the payment of rent, *danabandi* or *batai*. It was not, therefore, possible for the landlord to make a true estimate of the crops in possession of the tenants and in fact she was prevented from doing so by the tenants. In such circumstances the tenants should not be permitted to take advantage of their own wrongful acts and their failure to disclose the true and proper produce of the lands in their actual possession. They had special means of knowledge and the onus of proving what was in their knowledge in such cases must rest upon them. Such has been the view taken by my learned brother in *Rang Lal Singh* v. *Rani Bhuneshwari Kuer* (F. A. No. 141 of 1920) to which I was a party. I adhere to it.

Therefore, in these cases the onus was not upon the landlord, and even if it was, in the circumstances of the case, it shifted upon the tenants to prove actual produce of the land. This principle so far as tenants and landlord are concerned is acknowledged in the statutory provision contained in S. 71 (4) of the Bengal Tenancy Act which runs as follows :

" If the tenant removes any portion of the produce at such a time or in such a manner as to prevent the due appraisement or division thereof at the proper time, the produce shall be deemed to have been as full as the fullest crop of the same description appraised in the neighbourhood on similar land for that harvest."

We have considered the evidence on the record, the village note, crop cutting estimates in the different proceedings, and the reports of the *Amins*, who went to divide the crop, and we are satisfied that the estimate made by the Court below for the years in suit is not challengeable. The recent commutation of rent also points to the same direction. The evidence as to produce being not satisfactory, the rate of rent fixed by commutation would afford a sure guide for estimating the yield of the land in suit. Those proceedings, though not on the record, were mentioned to us by both parties. As a matter of fact, the order in the commutation proceeding was also shown to us.

The next question is as to whether the yield of the lands in suit has been expressed by the Court below in its judg-

ment dated 10th November 1921 in *kachha* or *pucca* weights. The question arose in the Court below at the time of the preparation of the decree and the note appended by that Court in its judgment on the 24th January 1922 shows that the *kachha* weight was meant. Mr. Sushil Madhab Mullick says that it should be *pucca* and not *kachha*. It, however, appears from a reference to the proceedings under Ss. 69 and 70, Bengal Tenancy Act particularly Ex. M-4, that the *kachha* weight was acted upon for the purpose of Ss. 69 and 70 proceedings. The evidence of the plaintiff's witness No. 8, Ajodhya Singh, shows that the *kachha* weight was prevalent in the village during the years in suit. It is admitted that the *kachha* weight was prevalent up to 1324 and that in 1325 *pucca* weight was for the first time introduced. The evidence as to the system of *pucca* weight having been fully brought into force in 1325 is not satisfactory.

I, therefore, agree with the view taken by the Court below expressed in the note to the judgment dated the 10th January 1921 that *kachha* weight was meant to be adopted for determining the quantum of produce of the lands in the years in suit.

Appeals Nos. 73, 79, 80 and 83 are appeals by the landlord alone. There is no counter-appeal by the tenants, nor have the tenants appeared to contest these appeals of the landlord. These appeals are dismissed without costs.

In the remaining cases Mr. Parmeshwar Dayal on behalf of the tenants contends that the present claim of the plaintiff landlord is barred by proceedings under Ss. 69 and 70 of the Bengal Tenancy Act. As to the paddy crop of 1324 he says that there was amicable division thereof between the landlord and the tenants and that the landlord took her share therein, but refused to grant receipt and consequently the suits were brought by the tenants. In view of the dispute between the parties on the crucial points, namely, as to the system of crop appraisement or division, it is not possible to accept the contention of Mr. Parmeshwar Dayal that there was an amicable division of the crops. I, therefore, reject the contention of Mr. Parmeshwar Dayal so far as the payment of the landlord's share of the paddy crops of 1324 is concerned.

As to the *rabi* crop of 1324, it is true the tenants applied for division of the crops under S. 69 of the Bengal Tenancy Act, but it appeared that some of the crops of the land were already cut and removed by the tenants and hence only the remaining crops standing on the lands were divided. The Collector, therefore, did not pass any final order in that case. On the 9th July 1917 when the *Amin's* report was received the Sub-Divisional Officer stated, "It is clear that the *khasra* does not show actual produce of the field owing to the loss done by rains etc. As reported by the *Amin* the *malik* refused to take the *hakimi* share and the *Amin* sold the *hakimi* share according to the *nirkhnama* supplied by the Paraiya Police and deposited the sale proceed in the Treasury *vide chalan* No. 235 dated the 12th June 1917. File." This is the last order in the case (No. 230 of 1916-17), Ex. M. It does not purport to be an order under S. 70 of the Act and in no sense it is a final order under Cl. 5 of the section. Therefore the proceedings adopted by the Collector under Ss. 69 and 70 of the Act as to the *rabi* crop of 1324 cannot operate as a bar to the present claim of the landlord for her share of the produce of the lands in suit.

The contention of Mr. Parmeshwar Dayal, however, stands on a firmer ground so far as the produce of 1325, both paddy and *rabi* and the paddy produce of 1326 are concerned. Now, as to the paddy and the sugar-cane crops of 1325 both parties applied to the Collector under S. 69 of the Bengal Tenancy Act and after the preliminary proceedings the Collector on the 25th March 1918 passed the following order.

"*Khasra* filed. It appears that *raiyats* have taken in the crop their share and so the *malik* also. *Khasra* approved. Case disposed of."

On the next day he passed the following order :

"This day a petition of objection was filed on behalf of Rani Bhuneshwari Kuar. Heard her Pleader. It is rejected for the reasons noted thereon."

The above orders were passed in the proceeding (Ex. M-1) started upon the application of the tenants but by virtue of the order passed in the proceeding (Ex. M-2) started at the instance of the landlord the same order was made applicable in the latter case. Therefore the aforesaid orders governed both the proceedings started at the instance of the landlord and tenant for the paddy and

sugar-cane crops of 1325. This order is impugned by Mr. Sushil Madhab Mullick as being not a final order under Cl. (5) of S. 70 of the Bengal Tenancy Act and, therefore, it cannot operate as a bar to the claim for rent now lodged by the landlord. It is conceded that the objection of Bhuneshwari Kuar landlord was heard and disposed of as is stated in the order of the 26th March 1918 by the Sub-Divisional Officer. But Mr. Mullick says that the Sub-Divisional Officer, has put the cart before the horse inasmuch as he disposed of the case a day prior, *i. e.*, on the 25th March 1918 and the objection was taken up and disposed of on the subsequent day. It is also stated that the order of the 25th March itself is inaccurate inasmuch as it mentions without any reserve that the landlord also took her share of the crops, whereas in the receipt given by the landlord with respect to the crops received on her behalf it was expressly stated that she received the crops under protest. On the 25th March 1918 the Sub-Divisional Officer's attention does not seem to have been drawn to the receipt and he apparently stated that both the *raiyats* and the landlord took their respective share of the crop under a misapprehension, and no doubt it is due to this misapprehension that he approved of the *khasra* on the 25th March 1918. If the matter had rested there we would not have the slightest hesitation in holding that the order of the Sub-Divisional Officer of the 25th March was not a final disposal of the dispute and that it was not an order such as is contemplated by Cl. (5) of S. 70 of the Bengal Tenancy Act. But the objections set forth in the receipt dated the 20th March, dealt with in the order of 25th March were reiterated in a formal objection petition filed on behalf of the landlord and that objection petition was disposed of on the 26th March 1918. Therefore the objections taken in the receipt were also disposed of on the 26th March. The result of the order of the 25th March is that all the objections put forth on behalf of the landlord were disposed of by the Sub-Divisional Officer. The objections were rejected and therefore, the order of the 25th March approving of the *khasra* was allowed to stand. That order is the final order in the case.

Similarly, proceedings (Ex. M-3) under Ss. 69 and 70 of the Bengal Tenancy Act were instituted for the division of *rabi* crop for 1325 and were disposed of and the *khasra* filed by the Commissioner deputed to divide the crop was approved of on the 20th May 1918. It is urged that the *khasra* does not represent the entire crop of the lands in dispute, a portion having been clandestinely removed by the tenants. No doubt, *Amin* Abdul Nayeem, who was first deputed to divide the crops made a report to that effect, and upon the objection of both the parties this *Amin* was re-called and Deo Narayan Lal Mukhtar was deputed to divide the crops with a direction to "take up the work of division at once and note the number of fields from which crop has been removed and appraise the crops of those fields under S. 71, Bengal Tenancy Act" (*vide* : order, dated the 26th March 1918). On the 4th April he was further asked to test the *Amin's* report and to submit a detailed report. He submitted his report on the 10th April stating that there was no removal of any crop but that some crop was damaged by insects and a small portion was stolen by thieves and that the tenants were not at all responsible for this. This report was considered by the Sub-Divisional Officer with the result that the *Amin's* report upon which Mr. Mullick relies was declared to be false and the Mukhtar Commissioner was directed "to divide the standing crop at once" (*vide* : order, dated the 11th April 1918). It is thus patent that there was no removal of any crop by the tenants and the Court accepted the report of the Mukhtar Commissioner and declined to take any action under S. 71 of the Bengal Tenancy Act as was originally contemplated by him when passing the order of the 26th of March 1918. S. 71, cl. (4) says :

"If the tenants remove any portion of the produce at such a time or in such a manner as to prevent the due appraisement or division thereof at the proper time, the produce shall be deemed to have been as full as the fullest crop of the same description appraised in the neighbourhood on similar land for that harvest". The fact that the Collector re-called his previous order under the aforesaid clause shows that he was satisfied that the tenants were not at all responsible for any removal of the crops. Consequently in his final order the Sub-Divisional Officer dealt with

the entire crop of the lands in dispute. That order runs as follows :—

"It appears that the crop of *raiti* share has been made over to tenants and the crop of *hakimi* share sold and sale-proceeds deposited into the Treasury as *malik* refused to take it.

"An objection has been filed on behalf of the defendant *malik*. A Mukhtar Commissioner was deputed at the request of both the parties and Babu Deo Narayan Lal Mukhtar was unanimously selected as the Commissioner by both the parties. I have gone through the report and I do not find that he has submitted it in collusion with the *raiyats*. The defendant *malik* should have objected long ago. Objection disallowed.

"*Khasra* approved. Case disposed of" (*vide* : Ex. M. 3). This order was passed after hearing the parties and disposing of all objections and is the final order in the case. The contention of Mr. Mullick, that the entire plot was not dealt with, is under a misapprehension and is overruled.

Now as to the proceeding for the paddy crop of 1326, this was started at the instance of the tenants and the last order in that case was passed after hearing the parties. By that order of the 24th of March 1919 (Case No. 20 of 1918-19) Ex. M. 4, the *khasra* submitted by the *Amin* was approved. The order is a long one and it seems to have disposed of all the objections that were raised to the proceeding and the *khasra* submitted by the *Amin*. No irregularity has been pointed out in regard to that proceeding. The cases cited by Mr. Sushil Madhab Mullick, namely, *Deo Lal Mahto* v. *Bibi Rakayia* (1) and *Suraj Prosad Mahajan* v. *Karu Singh* (2) do not affect the proceedings and orders made in these cases, inasmuch as orders were passed after considering the objections put forward by the parties and after hearing them in full.

The next objection is as to the form of the orders passed in the aforesaid proceedings. It is said that the order approving the *khasras* filed by the *Amin* or the Commissioner and disposing of the cases are not such as are contemplated by cl. (5) of S. 70 of the Bengal Tenancy Act, under which the order must be in the nature of a decree capable of being executed by a Civil Court. Reliance is placed upon the case of *Kailashpati Narayan Singh* v. *Ganga Singh* (3) and the case of *Suraj Prasad Mahajan* v. *Karu Singh* (2) which is based upon the Calcutta decision. Sir Lawrence Jenkins, C. J., in the former case held that :

"It must be shown that as required by S. 70, sub-S. (5) the Collector passed an order entitled to finality and enforceable as a decree."

The full facts of the case and the exact order passed by the Revenue Authority under Ss. 69 and 70 in that case do not appear and the decision is based upon the following observations by his Lordship the Chief Justice :

"It is conceded before us that there is no order which in the proceedings before the Sub-Divisional Officer can be treated as enforceable as a decree." That decision applies to the facts of the particular case decided and does not apply to the present case. Unlike that case we have the entire proceeding and the final orders passed in these cases and we have to see whether the orders are valid under Cl. (5) of S. 70, Bengal Tenancy Act. The clause, does not require as is contended by Mr. Mullick, that a separate decree, apart from the order, should be prepared by the competent Revenue Authority. It simply requires that the order shall be final and shall, on the application by the landlord or the tenants, to the Civil Court, be enforceable as a decree. The orders in question are undoubtedly final. Now the question is whether the orders in question are enforceable as decrees. In the present case the Collector divided the crops and handed the share of the tenants and upon the refusal by the landlord to take her share in the crops, he (the Collector) directed them to be sold and the sale-proceeds to be deposited to her credit in the Treasury. No doubt in a case of appraisement the Collector does not take possession of the crops nor does he make it over to the landlord. He simply prepares an estimate of the crops under S. 69 and then reduces it into money value and declares how much is due to the landlord and how much to the tenant. In such a case the Collector's order must clearly specify the amount due from one party to the other so that the former may in execution of the order in the Civil Court receive his dues from the latter.

(1) [1920] 57 I. C. 572.
(2) [1919] 4 Pat. L. J. 325=51 I. C. 763=(1919) P. H. C. C. 400.
(3) [1909] 10 C. L. J. 599=4 I. C. 735.

Again in a case of division of crops, where the tenant has made himself liable to the landlord by removal of the crop or otherwise such as is provided in S. 71, the Collector's order must clearly state the amount payable to the landlord by the tenant, so that the former may receive the same in execution of the order in the Civil Court. But where there is a simple division of crops on the spot, each party is entitled to receive from the Collector, who takes possession of the crops, his share therein. The party taking his share from the Collector will not be liable to the opposite party and there can be no order to pay anything to the other party. If a party does not choose to take his share, his share will remain in deposit with the Collector. The only order that the Collector can pass is to deposit the share to the credit of that party. The order is capable of execution against the Collector if he does not give to the party his share. The sale-proceeds in the Treasury to the credit of a party can be withdrawn any moment he likes. There will not be any necessity of execution. A decree is prepared only when some liability is fixed upon a party; when no liability is fixed no decree can be prepared and in fact in some cases in the Civil Court no decree is prepared. The rules of the High Court provide that in suits for money including suits upon mortgage, in suits for specific movables, in suits for accounts, and in suits for arrears of rent no decrees need be drawn up if

(*i*) neither party has to recover anything unless the Judge otherwise directs;

(*ii*) the claim is satisfied after judgment but before the decree is drawn up.

This principle would apply to the case of division of the crops under Ss. 69 and 70 of the Bengal Tenancy Act referred to above. The *Amin's khasra* in the present case shows the produce of the land and the share of landlord and the tenants. The tenants have received their share. The landlord refused to receive her share, and consequently it was sold by the orders of the Collector and the sale-proceeds deposited in the Treasury. It is then contended that the Collector had no power to sell the share of the landlord and in support of this contention Mr. Sushil Madhab Mullick cited the case of *Suroj Prosad Mahajan* v. *Karu Singh* (2). The order by the Revenue Authority objected to has been quoted at page 327 of the judgment. The order does not show that the *khasra* of the *Amin* was accepted and approved, nor does it appear as to whether the *Amin* sold the crops under the orders of the Collector or of his own motion. In the present case the landlord's share of the crop was sold upon her refusal to take it, under the orders of the Collector. The Collector could not keep in his charge indefinitely large quantities of grain and, therefore, the only course left to him was to sell the same and deposit in the Treasury the sale-proceeds thereof. The money deposited in the Treasury on behalf of the landlord represents her share. If the proceeding and the order passed by the Collector under Ss. 69 and 70 are otherwise valid, there is no reason to impeach its validity solely upon the ground that the money was deposited in the Collectorate to the credit of the landlord. The landlord in this case could have no claim against the tenants. No separate decree, therefore, could be prepared nor, as a matter of fact, is any decree prepared in such a case. The orders in question do not contravene the requirements of cl. (5) of S. 70 It is final and is capable of enforcement against the Collector in whose hands the landlord's share is.

The next objection of Mr. Mullick is that the Collector had no jurisdiction to institute a proceeding under S. 70 of the Bengal Tenancy Act, inasmuch as there was a dispute between the parties as to the system of payment of rent, namely, the *batai* or appraisement. In support of this contention he places the case of *Nukheda Singh* v. *Ripu Mardan Singh* (4). In that case the dispute was as to whether the rents were payable under *bhaoli* or *nakdi* system. The Collector's jurisdiction arises only when the rent is payable under the *bhaoli* system; and if this is disputed and a system of cash or *nakdi* rent is set up the Collector apparently will have no jurisdiction under S. 69 and he must leave the question to be determined by a competent Civil Court. In the present case it was admitted by both parties that the produce or *bhaoli* rent was payable. Therefore the Collector had jurisdiction under S. 69 to appraise or divide the crops, as the case may be, and he has a right to determine as to whether the system of payment of the landlord's share was by appraisement or division and as a matter of fact the finally published

(4) [1899-00] 4 C. W. N. 230.

Record-of-Rights showed that the crops used to be divided by the landlord and tenant. The record was prepared and published in the year 1916 (1323) and it records the existing state of affairs and until that entry in the Record-of-Rights is disturbed and set aside by a proper authority the system of payment of rent would be as provided in the Record of Rights; and the presumption in favour of the continuity of that system arises. In this connection S. 51 of the Bengal Tenancy Act may be usefully referred to, which says:

"If a question arises as to the amount of a tenant's rent or the conditions under which he holds in any agricultural year, he shall be presumed, until the contrary is shown, to hold at the same rent and under the same conditions as in the last preceding agricultural year."

Therefore if up to 1323 the payment of rent of the holding was by division of the crops, the presumption will be that in the following years the same condition prevailed. This is an additional presumption to that afforded by the Record-of-Rights; therefore in giving effect to the entry in the finally published Record of Rights and to the continuity of the condition of the holding the Collector was justified in holding that the *batai* system of payment of the produce or *bhaoli* rent prevailed and in so doing he acted well within the jurisdiction vested in him by Ss. 69 and 70 of the Bengal Tenancy Act. In this connection see the case of *Thakur Singh* v. *Pardip Singh* (5). I would, therefore, overrule the objection of Mr. Mullick that the orders in question were not such as are contemplated by cl. (5) of S. 70.

The result is, that the landlord's claim for the entire crops, paddy, sugar canes and *rabi* of 1325 and the paddy crop of 1326 is barred by Ss. 69 and 70 of the Bengal Tenancy Act and must be dismissed. She is entitled to have from the Collector the money in deposit in the treasury as representing her share of the produce of those years.

It is conceded that there was no final order passed under Ss. 69 and 70 of the Bengal Tenancy Act as regards the claim for the remaining years, that is, 1324, and the *rabi* crop of 1326 and that, therefore, the landlord is entitled to the rent as found by the Subordinate Judge for the years in question. The landlord is entitled to the amount of rents due to her as found by the Court below, for those years.

The result is that the landlord's Appeals Nos. 49, 51, 54, 60, 64, 67, 69, 71, 73, 75, 79, 80, 81 and 83 of 1922, 90 of 1921 and 101 of 1922 are dismissed without costs, and the tenants' Appeals Nos. 50, 52, 55, 61, 65, 68, 70, 72, 76, 117 of 1922 and 91 of 1921 succeed partially. Therefore the decrees will be prepared allowing the landlord only proportionate costs upon the amount found due to her in both the Courts below. Damage will be allowed at 12½ per cent. and cess six pies in the rupee in the amended decree.

Kulwant Sahay, J.—I agree.

Landlords' appeals dismissed.

Tenants' appeals partly allowed.

(5) [1917] 2 Pat. L. J. 183=39 I. C. 645.

★ 1925 PATNA 512

MULLICK AND ROSS, JJ.

Dulhin Binodini Debi—Petitioner—Appellant.

v.

Parameshwar Dayal Singh and others—Objectors—Respondents.

Appeal No. 122 of 1924, Decided on 20th April, 1925, from Original Order of the Sub. J., Daltonganj, D- 22nd February, 1924.

★ *Civil P. C., O. 9, R. 13—Guardian negligent in the conduct of suit—Minor can apply to have* ex parte *decree set aside.*

Courts will allow a minor to intervene for the purpose of setting aside an *ex parte* decree, provided he can show negligence on the part of his guardian in the conduct of the suit. 6 *C. L. R.* 69 *Foll.* [P. 514, C. 1.]

Parameshwar Dayal—for Appellant.

Kailaspati—for Respondents.

Mullick, J.—On the 24th March 1924, Parmeshwar Dayal and others brought a suit against Surendra Bakhsh Rai through his guardian, the manager of the encumbered estates, for a declaration that certain entries in the settlement record regarding the jungle and other lands of mauza Simaria were incorrect. Surendra Bakhsh Rai died shortly afterwards and his widow Dulhin Binodini Debi was substituted in his place on the 7th July 1922. The written statement was filed by the Defendant on the 6th December 1922.

Issues were framed on the 5th January 1923 and on the 5th February 1923 an application was made to the Subordinate Judge for permission to call for certain papers which had been filed with the record of Case No. 32 of 1919 which was then pending in appeal before the Judicial Commissioner of Chota Nagpur. The record and the papers were not produced and finally on the 28th August 1923 the suit was decreed *ex parte* against the Defendant.

An application was then made under Or. 9 R. 13 of the Civil Procedure Code for the restoration of the case; but the Subordinate Judge on the 22nd February 1924 found that sufficient cause had not been shown by the Appellant and the application was dismissed; hence this appeal before us.

It is to be observed that on the 8th April 1924 the estate came out of the Court of Wards and Srimati Binodini Debi thereafter became entitled to conduct the litigation herself.

Now the first question is whether there was in fact sufficient cause for the manager's failure on the 28th August 1923. In order to determine this point it is necessary to refer shortly to Suit No. 32 of 1919 which was decided by the Subordinate Judge on the 18th July 1921. That suit was instituted by Surendra Bakhsh Rai against Brij Behari Saran, Lakhi Koer, Parmeshwar Dayal and others. It was there alleged that certain lands on the boundary between mauza Simaria and mauza Donda had been wrongly included within the boundaries of mouza Donda and the Plaintiff claimed a declaration of his title and recovery of possession. He succeeded in the Court of the Subordinate Judge and also in the Court of the Judicial Commissioner of Ranchi who dismissed the appeal on the 21st May 1923. Therefore at the time when the Defendant in the suit, with which the appeal now before us is concerned, made his application for the production of the documents, the record of Suit No. 32 of 1919 was still in the Court of the Judicial Commissioner. It was subsequently sent to the High Court in consequence of a second appeal having been perferred and on the 28th August 1923 one of the reasons given by the manager for his failure to produce the documents was that the record had been sent to the Paper-book Department of the High Court and therefore the documents which were required by him were not available. It is quite clear that the manager would have had sufficient time to produce the documents if he had been diligent. In the first place, he should have taken copies of the documents before the record in Suit No. 32 of 1919 left the Court of Subordinate Judge of Daltonganj. In the second place he had time to take copies in the Court of the Judicial Commissioner and there was no reason, except procrastination, for his failure to produce them on the 28th August 1923 when his case was taken up by the Subordinate Judge. It is said that a law agent called Parasnath Lal sent *tahsildar* several times to obtain the copies and each time the *tahasildar* came back and reported that he was unable to get the copies. The *tahsildar* has not been examined and all that can be gathered from Parasnath's evidence is that both he and his superiors seriously neglected the interests of the ward. That was the view of the Subordinate Judge who refused to restore the suit and I think upon the evidence before us it was fully justified.

The question then is whether in the circumstances the ward was entitled to any relief. I think the authorities are clear that she was. As early as *Kesho Pershad* v. *Hirday Narain* (1) it was held that an application for restoration was maintainable by a minor against whom, by reason of the guardian's neglect, an *ex parte* decree had been passed. It was held that such negligence was sufficient cause for his non-appearance. Later the law was fully considered in *Lalla Sheo Charan Lall* v. *Ram Nandan Dubey* (2). There the question was whether a suit lay and it was held that a minor was competent to sue to set aside a decree in respect of which there had been gross negligence on the part of his guardian. To the same effect are *Cursandas Natha* v. *Ladkavahu* (3) and *Parmeshwari Pershad Narain Singh* v. *Sheo Dutt Rai* (4). In *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (5) the question was whether a suit lay by reason of the guardian's negligence and the learned Judges while holding that the practice of the English Courts was to reopen the proceedings in the original suit

(1) [1880] 6 C. L. R. 69.
(2) [1894] 22 Cal. 8.
(3) [1895] 19 Bom. 571.
(4) [1907] 6 C. L. J. 448.
(5) [1885] 12 Cal. 69.

by motion, were of opinion that in India a separate suit would not lie except on the ground of fraud or collusion. At the same time the learned Judge expressed the view that the minor could avail himself of the procedure for setting aside *ex parte* decrees or for review. The law therefore seems to be settled that acting upon the principles of justice, equity and good conscience, the Courts here will allow a minor to intervene for the purpose of setting aside an *ex parte* decree provided he can show negligence on the part of his guardian in the conduct of the suit.

Here it is quite clear that there was negligence. It is contended on behalf of the Respondent that there might not have been negligence and that the manager might have been under the honest belief that he had no case and that for that reason he did not produce either the documentary or oral evidence. The fact however, that the written statement in this case was not filed till it had been approved by the Legal Remembrancer to the Government and that on the 28th August 1923 the manager made strenuous efforts to get the suit adjourned in order to obtain the necessary evidence, clearly shows that far from thinking that he had no case he was anxious to contest it to the end. Unfortunately he had been dilatory and negligent and the Defendant is entitled to have the decree set aside and the case restored for re-trial.

The result is that the appeal is decreed with costs and it is directed that the case be restored to the file of the Subordinate Judge and be disposed of according to law.

Ross, J.—I agree.

Appeal decreed.

1925 PATNA 514

BUCKNILL AND KULWANT SAHAY, JJ.

Munni Lal and others—Petitioners.

v.

Gatti Ahir and others—Opposite Party.

Criminal Revision No. 72 of 1925, Decided on 6th March, 1925, from an order of the Sub. Div. Mag., Buxar, D/- 19th December, 1924.

(a) *Criminal P.C., S. 145—Dispute* bona fide—*Magistrate should proceed under S.* 145.

Where the Magistrate finds that there is a *bona fide* dispute between the parties, he ought to initiate proceedings under S. 145. 1922 *Patna* 435 (*F. B.*) *and* 4 *Pat. L. W.* 354 *Foll.* [P 516 C 1]

Where the presumption of the record of rights and of the partition papers was in favour of the petitioners, and the Police report was in favour of the opposite party,

Held: that there was clearly a case in which there was a *bona fide* dispute between the parties as regards possession. [P 516 C 1]

(b) *Criminal P. C., S.* 144 — *Order under—Incidental observation as to possession has not force of order under S.* 145.

Where a Magistrate while making an order under S. 144 makes an incidental observation as to possession of the property, the observation cannot have the force of an order under S. 145. [P 516 C 2]

(c) *Criminal P.C., S.* 144—*Order under—Setting aside—Order need not be set aside after* 2 *months.*

An order under S. 144 being operative only for two months need not be set aside after the period of 2 months is over. [P 516 C 2]

K. P. Jayaswal and *Manohar Lal* — for Petitioners.

P. C. Roy—for Opposite Party.

Kulwant Sahay, J.—This is an application on behalf of the second party in a proceeding under S. 144 of the Criminal Procedure Code against an order of the Subdivisional Magistrate of Buxar, dated the 19th of December 1924, whereby he declared the first party to be in possession of the land in dispute and made an order restraining the second party from interfering with the possession of the first party.

The petitioners went before the District Magistrate against this order under clause (4) of S. 144 of the Criminal Procedure Code, praying that the order passed by the Subdivisional Magistrate might be rescinded. The learned District Magistrate has rejected the application by his order dated the 17th of January 1925.

The point raised by the learned Counsel for the petitioners is that the dispute in the present case was a *bona fide* dispute concerning 120 bighas of land in the village and that the Magistrate had no jurisdiction to initiate proceedings under S. 144 of the Code of Criminal Procedure, but he could only act under S. 145 of the Code. The question as to the power of the Magistrate to act under S. 144 or under S. 145 Cr. P. C., has been considered by this Court in several cases. In the Full Bench case of *Sheobalak Singh* v.

Kamaruddin Mandal (1) Mullick, J. observed as follows: "S. 144 is of general application and contains nothing which ousts the Magistrate's jurisdiction in cases of *bona fide* disputes as to possession of land. But where S. 107 or S. 145 will meet the requirements of the case, S. 144 is not an appropriate remedy and if it is found that the danger was not so imminent that it could not be otherwise averted an order under S. 144 will generally be held to have been made without jurisdiction. Where it is clear upon the materials before the Magistrate that one party is in possession and that another whose claim to possession is a mere pretence is threatening to interfere with that possession, the Magistrate is clearly entitled to resort to the special summary procedure of S.144 if immediate prevention or speedy remedy is desirable". Jwala Prasad, J. in considering the same question agrees with Mullick, J. that it is open to a Magistrate to take proceedings under S. 144 in cases of disputes relating to possession of land when there is an imminent danger of a breach of the peace in connection with land disputes ; but his Lordship observed as follows "To me it appears that when, in the course of a proceeding under S. 144 of the Code of Criminal Procedure, the Magistrate finds that there is a *bona fide* dispute as to possession of land likely to cause a breach of the peace he is bound immediately to take action under S. 145. Chapter XII comprising that section is headed "Disputes as to immovable property". Then his Lordship quotes S. 145. He is of opinion that in such cases the proper procedure to adopt is a proceeding under S. 145 and not one under S. 144 of the Criminal Procedure Code. The same view was expressed by Rce and Imam, JJ. in *Kaniz Amina* v. *The King Emperor* (2) Their Lordships laid down the following two propositions ; first, that the Magistrate is not required to take proceedings under S. 145 if he is satisfied that by other methods he can avoid a breach of the peace ; and, secondly, that the use of S. 144 Cr. P. C. is a suitable method of avoiding a breach of the peace only if it is clear upon a reading of the Police reports that the claim of the party creating the disturbance is not a claim made in good faith. It is therefore necessary to see in the present case whether the dispute between the parties was a *bona fide* dispute relating to the possession of the land in dispute. Now it appears from the orders of the Courts below that the land in dispute was originally *parti*, and full of thorn and belonged to Musammat Sheobasi. Ramanand Sahu who was her son-in-law used to look after the property on her behalf. The petitioners Nos. 1 and 2 are mortgagees in possession of the village. The other petitioners claim to have taken settlement of the land in dispute from petitioners Nos. 1 and 2. The case of the petitioners was that the land was the bakasht land of the proprietors. The case of the opposite party was that they had taken settlement of this land from Ramanand Sahu thirteen or fourteen years ago and that they have been since then in possession on payment of rent to the landlords, but that recently the landlords have been trying to oust them from possession of the land because they refused to pay enhanced rent. On the 23rd of September 1924 the opposite party filed an application before the Subdivisional Magistrate stating the fact of their possession and the fact that there was a likelihood of a breach of the peace as the landlord and his men would try to cut and remove the crops grown by them ; and they prayed for proceedings under S. 144. The learned Magistrate referred the petition to the Police for report. The Police submitted a report on the 11th of October 1924 in which they reported that the opposite party were in possession ; and they recommended that proceedings under S. 144 might be taken against the first party. The learned Magistrate, however, on a perusal of the Police report, made an order on the 24th of October 1924 that no action was necessary. On the 17th of November 1924, a telegram appears to have been sent by Bijay Singh, who is one of the petitioners in this case, to the Subdivisional Magistrate, stating that the opposite party were threatening to commit rioting and murder and to damage the crops ; and asking the Magistrate to protect peace. Upon the receipt of this telegram the Sub-divisional Magistrate again asked the Police for a report and on the Police report he, on the 17th of November 1924, passed the following order : "Police report dated the 11-10-24 re-

(1) 1922 Patna 435=2 Pat. 94=(1922) P.H.C. C. 241 = 3 P. L. T. 573 = 1 Pat. L. R. Cr. 2=23 Cr. L. J. 549 (F. B.)

(2) (1918) 3 P. L. J. 243=4 Pat. L. W. 354= 47 I. C. 65=19 Cr. L. J. 869.

considered. Restrain the second party under S. 144 Cr. P. C. from interfering with the possession of the first party over the plots named in police report. Cause may be shown against the order on or by 27. 11". Now upon the authorities, just referred to, this order of the 17th of November 1924, was a perfectly proper order and it was within the competence of the Magistrate to pass this order to prevent a breach of the peace. The telegram sent by one of the petitioners showed that there was an urgent necessity of taking action to prevent a breach of the peace and the Magistrate was perfectly justified in taking emergency step by making order under S. 144 on the 17th of November 1924. In compliance with this order both parties appeared before him and showed cause. They produced documentary evidence and it appears that the documents produced by the present petitioners consisted of the finally published Record-of-Rights, certain Batwara papers and other documents. The survey khatian showed the land in dispute to be the proprietor's bakasht land. The partition papers also showed the land to be the proprietor's bakasht land. It was therefore clear upon the evidence produced by the parties that there was a *bona fide* dispute as regards the possession of the land. The presumption of the record of rights and of the partition papers was in favour of the petitioners; on the other hand, the Police report was in favour of the opposite party, and their allegation was that they had taken settlement of this bakasht land from Ramanand Sahu and that they had reclaimed the *parti* land. There was therefore clearly a case in which there was a *bona fide* dispute between the parties as regards possession. Upon the authorities referred to, when the Magistrate saw that there was a *bona fide* dispute between the parties, he ought to have at once initiated proceedings under S. 145 of the Criminal Procedure Code. Instead of doing that, he considered the statements filed by the parties and the documents produced by them, heard arguments and in effect made an order finding the first party to be in possession and declaring their possession and restraining the second party from interfering with the possession of the first party. I am of opinion that when the Magistrate found that there was a *bona fide* dispute between the parties he ought to have called upon the parties to produce their evidence on the question of possession and to have proceeded to determine the question of possession in the manner provided by S. 145 of the Code. The order, however, of the learned Sub-divisional Magistrate is dated the 19th of December 1924; and, after two months from that date, the order had no force; and it is contended by the learned Counsel for the opposite party that two months having expired and the order having spent its force, it is unnecessary to consider the legality of this order.

As I have said the order purports to be one under S. 144 Cr. P. C. and therefore after the expiry of two months this order has absolutely no force. The observation of the learned Sub-divisional Magistrate as regards possession of the first party is simply an incidental observation in order to enable him to make an order under S. 144. This observation cannot have the force of an order under S. 145, of the Code and is therefore of no use in determining the question of actual possession, if the question arises in a subsequent proceeding.

The order having spent its force it is not necessary to set it aside. Under these circumstances the application must be dismissed.

Application dismissed.

1925 PATNA 516

ROSS AND SEN, JJ.

The Official Assignee of the High Court of Judicature at Fort William in Bengal—Opposite Party—Appellant.

v.

Mt. Jaga Bibi and others—Petitioners-Respondents.

Appeal No. 218 of 1923, Decided on 1st August, 1924, from Original Order, of the Sub. J., Shahabad, D/- 26th May, 1923.

Execution of Decree—Executing Court cannot investigate into maintainability of suit after a decree is passed.

Once a decree is passed, the judgment-debtor cannot, in execution, contend that the suit was not maintainable.

Abani Bhusan Mukerji—for Appellant.

Siveswara Dayal and *Brij Kishore Prasad*—for Respondents.

Sen, J.—The facts necessary for the decision of this appeal are as follows:—

On the 26th of July, 1911, the judgment-debtor executed a mortgage bond in favour of the decree-holder respondent. The mortgagor having executed the document refused to register it. Hence the creditors applied for compulsory registration and the document was duly registered on the 8th of August 1912. Before registration, however, on the 24th of November 1911, the mortgagor was adjudicated an insolvent and a vesting order was made under S. 17 of the Presidency Insolvency Act vesting the property of the insolvent in the Official Assignee. A suit was then instituted by the mortgagee being Suit No. 214 of 1918 on foot of the mortgage. This suit was resisted by the Official Assignee on various grounds. First, it was contended that in view of the vesting order the mortgagee could not bring a suit, but must prove the debt in insolvency. The mortgagee on the other hand, relied on the proviso to S. 17 of the Presidency Insolvency Act. Secondly, the character of the mortgage was assailed and it was contended that the mortgage was not a *bona fide* transaction, nor for consideration. Thirdly, it was also contended that in any event the mortgagee should not be ranked as a secured creditor inasmuch as the mortgage in his favour, though executed before the vesting order, was registered after it, and was, therefore, inoperative at the time of the vesting order.

The learned Subordinate Judge of Patna went into all these matters and decided in favour of the mortgagee and passed a decree on the 29th of March 1921. On the first and second points he held that the mortgage was executed *bona fide* by the mortgagor as *karta* of a joint family for family necessities and that the properties mortgaged were joint family properties. In view of the definition of "property" in S. 2 of the Presidency Insolvency Act, he further held that the joint family property of the mortgagor, who was *karta*, was not property over which the insolvent mortgagor could be said to have disposing power for his own benefit. He further held that in view of S. 47 of the Indian Registration Act, the mortgage must be deemed to have operated from the time from which it would have commenced to operate if no registration thereof had been required or made. On the above grounds the Court held that the plaintiffs were entitled to the usual mortgage-decree and a decree was made in the presence of all the defendants. In the Executing Court the same grounds were urged by the Official Assignee but his objections were disallowed. Hence this appeal.

The difficulty in the way of the appellant is that none of these grounds can be urged at this stage. The Executing Court cannot get behind the decree. The learned Vakil for the appellant contends that this is one of those cases where the decree may be considered to be a nullity; and, therefore, the Executing Court may go into the question as to whether there is a decree to execute. In my opinion this contention is not tenable. The Court decreeing the suit went into all these matters carefully and the decree cannot be challenged in execution proceedings. The learned Vakil has cited a number of cases in support of his contentions mentioned above which are identically the contentions urged by the official assignee before the learned Subordinate Judge at the trial of the suit. In view of the above conclusion that we have come to, I think it is unnecessary to deal with those cases.

The appeal is dismissed with costs.

Ross, J.—I agree.

Appeal dismissed.

1925 PATNA 517

MULLICK AND ROSS, JJ.

Ram Gobind Singh—Defendant—Appellant.

v.

Shashi Sekhar Prasad Singh—Plaintiff—Respondent.

Appeals Nos. 749, 750, 1016 and 1017 of 1923 and Nos. 1333 to 1338 of 1922, Decided on 22nd April 1925, from Appellate Decrees, from the decisions of the Sub. J., Arrah, D/- 7th May 1923 and 20th July 1922 respectively.

(a) *Civil P. C., O. 22, R. 4—Suit by landlords for assessment of fair rent decreed—Appeal—Abatement as against one respondent operates as abatement against all.*

Where a suit by landlords for the assessment of fair and equitable rent was decreed and during the pendency of the appeal by the tenants, one of the respondents died,

Held; failure to bring within time his legal representatives on record caused the appeal to abate as against the other respondents also, because the decree was a joint and indivisible one.

(*b*) *B. T. Act*, (1885) *S.* 158—*Rate of rent not ascertained at the time of application for settlement of fair rent—S.* 158 *applies.*

Cl. (d) of S. 158 entitles a Court to determine the rent payable by the tenant at the time of application, and there is no reason why this should be restricted to cases where the rate of rent has already been ascertained. If the contract is that the tenants shall pay a fair and equitable rent, then that is the existing rent payable and it is the business of the Court to ascertain it. [P. 519, C. 1]

(*c*) *B. T. Act, Ss.* 158 *and* 188—*S.* 158 *does not oust the general jurisdiction of Court under Civil P. C., S.* 9 *to entertain a suit for settlement of fair rent — Hence suit by some only of the co-sharers is competent.*

S. 158 is not restrictive and the right to claim a fair and equitable rent is an obligation arising out of the contract between the parties and is enforceable in the ordinary Civil Courts under the provisions of S. 9 of the Civil P. C. Hence S. 158 of the B. T. Act is no bar to the maintenance of a suit for fair and equitable rent, by plaintiffs who are not the entire body of the landlords. It cannot be held that the only jurisdiction for assessing a fair rent, where no rent has at any time been previously assessed, is that conferred by Ss. 52, 105 and 157, 158 and similar sections of Act VIII of 1885. [P, 519, C. 1, 2]

(*d*) *Landlord and tenant—Relationship of landlord and tenant without arrangement for payment of rent—Tenant impliedly contracts to pay reasonable compensation or rent.*

In general where the relationship of landlord and tenant exists, without any arrangement for the payment of rent properly so called, there is always an implied promise on the part of the tenant to compensate the landlord for use and occupation of the premises. The relationship has been sometimes called in English law a *quasi-tenancy* and that law always implies a contract or promise by the occupier to pay the landlord a reasonable sum for use and occupation. In Bengal and Behar the conditions are special and the law implies a contract to pay not compensation but rent. [P. 520, C. 2]

Janok Kishore, Atul Krishna Ray, Sashi Shekar Prasad Singh, B. N. Singh, W. H. Akbari and *N. C. Ghosh*—for Appellants.

Atul Krishna Ray, Sashi Shekar Prasad Singh and *B. N. Singh*—for Respondents.

Mullick, J.—Appeals Nos. 1016 and 1017 arise out of Suits Nos. 621 and 622 respectively of 1920 in the Court of the third Munsif of Arrah, in which the landlords asked for the assessment of fair and equitable rent. The Munsif assessed the rent at Rs. 7 per bigha in each case. Eventually after certain orders made in appeal by the Subordinate Judge and in second appeal by the High Court, to which it is not necessary to refer in detail, the Subordinate Judge reduced the rent to Rs. 5 per bigha ; but before this judgment was passed another batch of cases regarding lands in the same neighbourhood came up in appeal before another Subordinate Judge and he, agreeing with the lower Court, found that the fair and equitable rent was Rs. 7 per bigha. Appeals Nos. 1333 to 1338 relate to this second batch and are preferred by the tenants. Appeals Nos. 749 and 750 are appeals by the tenants in Suits Nos. 621 and 622 who are not satisfied with the decree of the Subordinate Judge reducing the rates from Rs. 7 to Rs. 5 per bigha.

I will take appeals Nos. 749 and 750 first. These appeals are concluded by findings of fact. The Subordinate Judge has upon evidence found that Rs. 5 per bigha is a fair and equitable rate. He has rejected the decrees, upon which the Munsif relied, on the ground that some are under appeal and that others were made as against tenants, who were themselves co-sharer landlords, and he has preferred to rely upon the profit made by the sale of mangoes which are the only crop grown upon the lands.

There is also another defect which is fatal to these appeals. One of the Respondents Surendra Narain Singh died on the 31st July 1924, and no substitution of heirs has yet been made in his place ; the decree being joint and indivisible the abatement of the appeal against the heirs of Surendra Narain Singh causes the appeals to fail also as regards the other Respondents. It is urged by the Appellants that they were not aware of the death of Surendra Narain Singh till about a week ago; but that is no excuse, for it is obligatory upon an Appellant to see that the necessary parties are on the record. It appears that the landlords in their appeals Nos. 1016 and 1017 substituted the heirs of Surendra Narain Singh within the time allowed by law and no reason has been assigned why the tenants in their appeals could not have done the same.

The Appellants, however, urge that the suits are not maintainable as the Plaintiffs are only co-sharer landlords. It is said that this is a suit under S. 158 of the Bengal Tenancy Act (Act VIII of 1885) and all the landlords must sue. This contention requires careful examination. The lands have been recorded in the Cadastral Survey *khatian* as occupancy holdings liable to be assessed with rent. The Settlement Officer found that the ten-

ants had occupancy rights but that the rent had not been fixed by express contract and that none was being paid. He thought there was therefore no existing rent which could be declared to be the fair and equitable rent. It is said that as S. 158 of the Bengal Tenancy Act only empowers a Court to record the existing rent, it does not apply. But cl. (*d*) of S. 158 entitles a Court to determine the rent payable by the tenant at the time of the application, and there is no reason why this should be restricted to cases where the rate of rent has already been ascertained. If the contract is that the tenants shall pay a fair and equitable rent, then that is the existing rent payable and it is the business of the Court to ascertain it. S. 158 therefore in my opinion applies.

But then S. 158 requires that the application must be made by the whole body of landlords, and therefore if the suit is not maintainable under the general or any other law but is one sanctioned exclusively by the Tenancy Act, then the Plaintiffs must fail. To this the Plaintiffs reply that S. 158 is not restrictive and the right to claim a fair and equitable rent is an obligation arising out of the contract between the parties and is enforceable in the ordinary Civil Courts under the provisions of S. 9 of the Civil Procedure Code. If this contention is accepted then the fact that the Plaintiffs are only cosharer landlords will not be a bar to the suit.

In my opinion this contention is well founded. S. 24 of the Bengal Tenancy Act directs that an occupancy raiyat shall pay for his holding at a fair and equitable rate. If a rent is fixed by the demise, that rent is presumed to be "fair and equitable," an expression first used in S. 5 of the Rent Act of 1859 (Act X of 1859). If no rent has been fixed, then the tenant is under a liability arising out of the contract to pay such rent as the Court may deem to be fair and equitable. The landlord does not require the authority of the Tenancy Act to bring a suit to enforce the liability and therefore S. 188 does not apply. The argument that the landlord cannot ask the Civil Court to make a contract between the parties is really not relevant, because here there is in fact a contract. I am unable to hold that the only jurisdiction for assessing a fair rent where no rent has at any time been previously assessed is that conferred by Ss. 52, 105 and 157, 158 and similar sections of Act VIII of 1885.

Therefore here there is no necessity to seek the aid of the Tenancy Act at all. So far back as 1864 it was held in *Nityanund Ghose* v. *Kissen Kishore* (1) that by the universal custom of the country mere occupation of land without express permission on the part of the landlord or express condition to pay rent on the part of the occupier constituted the relationship of landlord and tenant and that the tenant was bound to pay a fair rent and the landlord to give him a *puttah*. That was a suit by the tenant under S. 5 of Act X of 1859 to compel the landlord to give him a *puttah* and the following observations of the learned Judges of the Calcutta High Court appear to me to lay down what is still the law, although the provisions for the exchange of *patta* and *kabuliyat* have been since repealed :—

"The lands, (say their Lordships) then, being lands of which the Plaintiff is the proprietor and the Defendant never having paid rent for the same or acknowledged the zemindar's right to treat him as a tenant, do the parties stand in the relation of landlord and tenant ?

"The Defendant holds and cultivates the Plaintiff's lands, and had the present suit been one for rent during the occupancy, there is little doubt that the Defendant would be deemed to be a tenant and be adjudged liable to payment of rent ; for it is an acknowledged principle that every zamindar has an inherent right to the rent of any and all lands held and cultivated within his zamindari. In the same way, is he not entitled to receive from the person who holds and cultivates any land within his zamindari a *kabuliyat* ?

"We think, that, though by the Law of landlord and tenant, as applied in England, a person who takes and cultivates the lands of another (there being no express permission to cultivate on the side of the landlord, nor any express condition to pay rent on the part of the cultivator) would not be allowed to be regarded as a tenant, but treated as a mere trespasser, the peculiar circumstances of this country precludes the applicability of the technical doctrine of the English Law of landlord and tenant to such a case. Here it is a very usual thing for a man to squat on a piece of land, or to take into cultivation

(1) W.R. 1864, Act X Rulings 82.

an unoccupied or waste piece of land. Tenancy, in a great many Districts in Bengal, commences in this way, and where it does so commence, it is presumed that the cultivator cultivates by the permission of the landlord, and is under obligation to his landlord to pay him a fair rent when the latter may choose to demand it. Thus, the established usage of the country regards these parties as landlord and tenant, and unless the landlord chooses thus to treat him, the cultivator is not regarded, as he would be by the law administered in England, as a trespasser, but as a tenant, and he would be so, although he may never have expressly acknowledged the landlord's right, or entered into any express contract with him for the payment of rent. If he chooses to cultivate the zamindar's lands and the zamindar lets him, there is an implied contract between them creating a relationship of landlord and tenant."

What then is the rent the tenant should pay in such a case? At the time of the Permanent Settlement competition rents were unknown and the fair and equitable rate was the customary rent, that is to say, the Pargana rate. Reg. VII of 1822, which was the first legislative measure for making a survey and settlement, gave the Settlement Officer no power to enhance rents for the simple reason that enhancements beyond the Pargana rate were not then contemplated : see *Ishur Chandra Sarkar* v. *Trolykhya Nath Singha* (2) and it was not till 1879 and 1885 that general powers were given to Settlement Officers to settle their rates.

As for the civil tribunals, it was not till 1859 that rules were made for enhancement and reduction of rents : (see Ss. 13, 14, 15 and 17 of Act X of 1859). These rules have with modification been repeated in the Tenancy Act of 1885 ; but in cases such as we have here the power of the Civil Court to assess a fair and equitable rate, be it the Pargana rate customary before 1859 or the prevailing rate or a rate depending on the price of food-grains, has never been in doubt. In *Berhamdut Misser* v. *Ramji Ram* (3), the learned Judges, while holding that the Settlement Officer was not the only authority who could now assess a fair and equitable rent, expressed some doubts as to whether the jurisdiction of the Civil Court fell under the general law relating to declaratory suit or under the special law contained in S. 158 of the Bengal Tenancy Act of 1885. In my opinion both jurisdictions are available and as S. 158 does not expressly bar the operation of the general law, S. 9 of the Civil Procedure Code operates.

If therefore the Bengal Tenancy Act does not exclude the operation of S. 9 of the Civil Procedure Code, then S. 188 of the former Act is no bar and the Plaintiffs, as they are co-sharer landlords, are entitled to maintain the suit.

In general where the relationship of landlord and tenant exists without any arrangement for the payment of rent properly so called, there is always an implied promise on the part of the tenant to compensate the landlord for use and occupation of the premises. The relationship has been sometimes called in English law a *quasi*-tenancy and that law always implies a contract or promise by the occupier to pay the landlord a reasonable sum for use and occupation ; *Hellier* v. *Sillcox* (4). In Bengal and Behar, as pointed out in *Nityanund Ghose* v. *Kissen Kishore* (1) the conditions are special and the law implies a contract to pay not compensation but rent.

The result therefore is that Suits Nos. 621 and 622 are maintainable in their present form and the appeals Nos. 749 and 750 must be dismissed with costs.

Appeals Nos. 1333 to 1338.—In these appeals also the right to proceed against Surendra Narain Singh's heirs has abated and for the same reasons as in appeals Nos. 749 and 750 it must be held that the appeals cannot proceed. They are therefore dismissed with costs.

It appears to have been admitted by the parties when these appeals came up on the 6th August 1924 before another Division Bench of this Court that they would be governed by the decision in appeals Nos. 1016 and 1017 and 749 and 750. But in the circumstances that have occurred this argument cannot be enforced as the appeals are at the outset incompetent. Kulel Singh, one of the Appellants in Appeal No. 1336, is reported to be dead ; but it is unnecessary to give time for the substitution of his heirs, because the abatement of the appeal against the heir of Surendra Narain Singh, before the death of Kulel Singh took place renders

(2) [1913] 17 C.W.N. 865=19 I.C. 675.
(3) [1913] 18 C.W.N. 466=20 I.C. 910.
(4) 19 L.J., Q.B. 295=14 Jur. 573.

the whole appeal liable to dismissal and it is immaterial whether Kulel Singh's heirs are now substituted or not. The same objection as in appeals Nos. 749 and 750 was taken in these appeals regarding the maintainability of the suits by co-sharer landlords, but for the reason given above the objection is decided against the Appellants.

The result is that appeals Nos. 1333 to 1338 are dismissed with costs.

Appeals Nos. 1016 and 1017.—These are appeals by the landlords, and they ask that the decree of the Munsif at the rate of Rs. 7 per bigha be restored. The Subordinate Judge has found on evidence that the fair and equitable rate of rent is Rs. 5 per bigha and the case is concluded by that finding. The appeals are dismissed. There being no Respondent, there will be no costs

Ross, J—I agree.

Appeals dismissed.

★ 1925 PATNA 521

DAS, J.

Bajrang Prasad Singh—Petitioner.

v.

Mt. Sonejhari Kuer and others—Opposite Party.

Civil Rev. No. 226 of 1924, Decided on 12th November, 1924, from an order of the Sub. J., Muzaffarpur, D/- 25th March, 1924.

(a) *Civil P. C., O. 21, R. 90—Fraud is essentially different from irregularity.*

Fraud is essentially different from irregularity in the conduct of sale. [P 521 C 2]

Where there was gross undervaluation of the property sought to be sold and the processes were not served on the judgment-debtor,

Held: that these facts alone did not by themselves constitute fraud. 16 *C.W.N.* 894 *Foll.*

★ (b) *Limitation Act, S. 18—Fraudulent concealment of execution proceedings on the part of decree-holder is necessary under the section.*

The view that fraud antecedent to the accrual of the right of action can never be considered under S. 18 is erroneous. Such fraud can and must be considered because fraud is a continuing influence and until that influence ends it retains its power of mischief. 17 *B.* 341 *Foll.*

[P 522 C 2]

Unlese there is fraudulent concealment of the execution proceedings on the part of decree-holder limitation could not be extended under S. 18.

S. P. Sen and *A. K. Gupta*—for Pettioner.

S. K. Mitra—for Opposite Party.

1925/P 66 & 67

Judgment.—This application is directed against the order of the learned Subordinate Judge of Muzaffarpur, dated the 25th March 1924 by which he set aside a sale which took place on the 13th June 1918. The application under O. 21, r. 90 was presented sometime in April 1923 and this has encouraged the contention on behalf of the decree-holder that the application is barred by time. The learned Judge in the Court below has come to the conclusion that the auction-sale was brought about by practising fraud and that the applicant is entitled to the benefit of S. 18 of the Limitation Act. In that view differing from the learned Munsif, he allowed the application and set aside the sale.

In my opinion the finding of the learned Judge in the Court below must be regarded as a finding to the effect that all the circumstances were present to entitle the judgment-debtor to have the sale set aside provided the application was made within time. I am not for the moment considering the question as to whether the decision of the learned Judge on the question of limitation can be supported; but his finding that there was gross irregularity in the conduct of the sale and that the judgment-debtor sustained substantial injury by reason of such irregularity is binding upon me in this Court. It is true that the learned Subordinate Judge has gone much further and said that there was fraud on the part of the decree-holder. I am not quite satisfied whether upon his decision it is possible to say that there was fraud on the part of the decree-holder. It is quite true that there was gross undervaluation of the property sought to be sold. It is quite true that the processes were not served on the judgment-debtor; but fraud is essentially different from irregularity in the conduct of sale. This was pointed out very forcibly by Sir Lawrence Jenkins in *Narayan Sahu* v. *Mohant Damodar Das* (1). But in any case I am satisfied that there was gross irregularity on the part of the decree-holder and that the applicant sustained substantial injury by reason of such irregularity, and that if there was no question of limitation raised in the case, the judgment-debtor would undoubtedly be entitled to succeed.

This brings me to the consideration of the question whether the learned Judge in

(1) [1912] 16 C.W.N. 894=16 I C. 464.

the Court below is right in the view that the judgment-debtor is entitled to the benefit of S. 18 of the Limitation Act. The view of the learned Subordinate Judge may be stated in his own words: "The applicant alleges in her petition that she came to know of the sale on the 5th April 1923. In her evidence she says that she came to know about it on 4th *Baisakh* 1330 which corresponded to the above date. As it has been found that the sale was brought about by the decree-holder's fraud, it is for the decree-holder or his tenant to show that the applicant had knowledge before the 5th April 1923 in order to succeed on the plea of limitation. I find, therefore, that the application was not barred by limitation."

I am unable to agree with the view as presented in this part of the order of the learned Subordinate Judge. In the first place, I am not sure that the facts referred to by the learned Subordinate Judge established a case of fraud. It is, therefore, necessary for the learned Subordinate Judge to deal with all the evidence again and to come to a conclusion on the question whether there was really any fraud on the part of the decree-holder. If he comes to the conclusion that there was irregularity but not fraud within the meaning of that term as was in the decision of Sir Lawrence Jenkins, then clearly the application is barred by limitation. If he comes to the conclusion that there was fraud then the next question which he must consider is, whether upon the facts proved the judgment-debtor is entitled to the protection of S. 18 of the Limitation Act. Now S. 18 provides that "Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded...the time limited for instituting a suit or making an application—(*a*) against the person guilty of the fraud or accessory thereto, or (*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby." In order to succeed the judgment-debtor must establish that there was some contrivance on the part of the decree-holder by which the judgment-debtor was kept from the knowledge of her right to apply under O. 21 r. 90 of the Code. It is, in my opinion, not sufficient to say that as there was fraud in the conduct of the sale, therefore, it must follow that there was a contrivance on the part of the decree holder to keep the judgment-debtor from the knowledge of the fraudulent sale. Indeed in some of the cases it has been broadly laid down that fraud precedent to the accrual of the right of action can never be considered under S. 18: but whether this view can be maintained in view of the decision of the Judicial Committee in *Rahimbhoy Habibhoy* v. *Charles Agnew Turner* (2) is very doubtful. This was pointed out by Sir Lawrence Jenkins in the case to which I have referred but as was suggested by Sir Lawrence Jenkins fraud is a continuing influence and until that influence ends it retains its power of mischief. It was directly held by the Judicial Committee in the case to which I have referred that where a man has committed fraud and has kept property thereby, it is for him to show that the person injured by the fraud and suing to recover the property has had clear and definite knowledge of those facts which constituted the fraud at a time which is too remote to allow him to bring a suit. In view of what was decided by the Privy council, I am unable as at present advised to accept the view that fraud antecedent to the accrual of the right of action can never be considered under S. 18. In my opinion it can and must be considered, because as pointed out by Sir Lawrence Jenkins, fraud is a continuing influence and until that influence ends it retains its power of mischief.

But although I am unable to agree with the extreme contention which has been put forward before me, I think that the petitioner is entitled to succeed on the ground that the judgment of the lower Appellate Court does not show that there was any fraudulent concealment of the execution proceedings on the part of the appellants. As this matter has not been very carefully considered by the learned Judge in the Court below, I am unable to decide the contention between the parties in this case. I think the best course will be to send the case back to the lower Appellate Court and ask it to come to a conclusion on the evidence in the case. The learned Judge must first consider

(2) 17 B. 341=20 I.A. 1=6 Sar. P. C. J. 256=17 Ind. Jur. 40=9 Ind. Dec. (N. S.) 222.

whether there was fraud as distinct from material irregularity in the matter of the sale. If he comes to the conclusion that there was no fraud, then he must dismiss the application on the ground that it is barred by limitation. If he comes to the conclusion that there was fraud still, he must consider whether there was any fraudulent concealment of the execution proceedings on the part of the appellants. In considering this matter he must not ignore what had taken place before the sale. He must consider the general conduct of the decree-holder both before and after the sale and he must deal with the question whether, to quote the language of S. 18, the judgment debtor has been kept from the knowledge of her right to apply by means of fraud perpetrated by the decree-holder.

Costs of this application, hearing fee two gold mohurs, will be costs in the proceeding before the Court below and will be disposed of by that Court.

Case remanded.

★ 1925 PATNA 523

DAWSON MILLER, C. J. AND FOSTER, J.

Jagmohan Singh and others—Plaintiffs —Appellants.

v.

Prayag Narayan Singh and others—Defendants—Respondents.

Second Appeal No, 154 of 1922, Decided on 11th December, 1924, against a decision of the Dt. J., Gaya, D/. 9th November, 1921.

★ *Hindu Law—Stridhan — Property held by widowed daughter-in-law — Property is not stridhan.*

Property held by a Hindu widowed daughter-in-law claiming as the widow of her deceased husband becomes an accretion to her late husband's estate and not her stridhan and any alienation by her of such property is voidable at the option of the heirs of her father-in-law.

[P 524 C 1]

Shiveshwar Dayal—for Appellants.

L. N. Singh and *Brij Kishore Prasad* —for Respondents.

Dawson Miller, C. J.—The suit out of which this appeal arises was instituted on the 11th March, 1920 by the plaintiffs who are the appellants in this appeal claiming certain lands in *mauza* Indarpur Kochaisa against the defendant No. 1 who is the superior landlord of the interest in suit.

The land in suit originally belonged to one Deochand Singh who died in or about the year 1882. Deochand Singh had two sons Prabhu and Bigan, the former being married to *Mt.* Deomurat Kuer and the latter to *Mt.* Marno Kuer. Both these sons, it is now found, predeceased their father and upon the death of Deochand in 1882 some question appears to have arisen as to the possession of this property. The two widows of Prabhu and Bigan, who had survived their husbands, were also alive at the death of Deochand. Upon that event the property would in the oridinary course go to Deochand's heirs and the widows would not be entitled to any interest therein because their husbands had predeceased Decochand. The only right which they would have in the property, if any, would be the ordinary Hindu widows' right to maintenance. One thing is quite clear in this case and that is that the widows were put in possession of the property and remained in possession for a number of years and one of the questions, which was in issue at the trial of this case, was whether the property which was acquired by the two widows in 1882 was acquired by them as their *Stridhan* or, as the plaintiffs alleged, whether they were merely allowed to remain in possession of the property during their joint lives by way of maintenance. I may add that the property is a very small one being valued in the plaint at something under Rs. 1,000. The heirs of Deochand were somewhat distant collateral relations and presumably had other property of their own. They were no longer joint with him. There is therefore nothing surprising in the fact that these two ladies should have been allowed to remain in possession of the whole of the property left by their father-in-law, by way of maintenance after his death. That was the case of the plaintiffs. If that case is made out then there can be no doubt that the plaintiffs ought to succeed in this suit It is necessary to add what happened subsequently. *Mt.* Marno Kuer the widow of Bigan predeceased her sister-in-law *Mt.* Deomurat Kuer. Deomurat Kuer sometime before the year 1907 after the death of Marno Kuer appears to have parted with her interest whatever it may have been in

this property to the landlord the present defendant. Subsequently about the year 1907 there was some further question as between the heirs of Deochand and a sister-in-law of Deomurat on the one hand and the landlord, the present defendant on the other and an arrangement was entered into whereby the landlord was allowed to remain in possession. He appears to have acquired the property from Deomurat because she was not able to pay her rent. It does not appear that an actual suit was brought nor was any rent decree passed. However that may be he got possession of the property. Now the question which arises in this appeal depends upon the determination of the question whether Deomurat Kuer was in possession of the property merely by way of maintenance or whether she was in possession of the property by adverse possession as against the heirs of her father-in-law. If she acquired adverse possession after her father-in-law's death then no dubt the property would become her *Stridhan*. The authority for that proposition is to be found in the decision of *Kashi Ram* v. *Mt. Amri* (1). The facts of that case were very similar to the present and it was held there relying upon a decision of their Lordships of the Privy Council in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (2) that property acquired by a Hindu lady by adverse possession becomes her separate *Stridhan* property. As a general proposition that however required some limitation for if the property is acquired by a Hindu widow claiming as the widow of her deceased husband then no doubt, according to the ruling of their Lordships in the case of *Mt. Lajwanti* v. *Safa Chand* (3) the property becomes an accretion to her late husband's estate and on her death would pass not to her heirs but to the heirs of her deceased husband. Although in the present case there was no specific finding that these two widows had come into possession of the property in lieu of maintenance with the consent of the heirs of Deochand nevertheless that was the case put forward by the plaintiffs in their plaint. As against that the case put forward by the defendant was that this property had been acquired by them as *Stridhan* and of course it would follow that if the property were in fact their *Stridhan* any alienation of that property to the landlord would be binding not only against the heirs of Deochand who would have no right to it but against the whole world. On the other hand if the land in suit were merely the property of the widows given to them for their life-time by way of maintenance then the only interest they had in it and certainly the only interest which they could alienate would be their interest for life. The result would therefore be in the event of this being their life interest only that the alienation made to the landlord, the present defendant, would enure to his benefit only during the life-time of the widows or the survivor of them.

Although as I have just stated there was no specific finding that the property was granted to the widows by way of maintenance still there was an issue raised whether the property was *Stridhan* or not, and it was found by the trial Court and the finding was upheld by the first Appellate Court that this property was not the *Stridhan* of the widows. It seems to me therefore to follow upon that finding that the only interest which the widows could have was the interest asserted by the plaintiffs, namely, that of maintenance only. Although this interest was alienated still that alienation would not be binding upon the heirs of Deochand who would acquire a vested right in the property after the death of the widows and the question, therefore, which becomes important is whether the widows or the survivor of them died within 12 years of the present suit. If Deomurat who was the surviving widow died more than 12 years before the suit then there can be no doubt that the defendant would have acquired adverse possession against the plaintiffs. It is found as a fact however in the case that she died within 12 years of the suit and, therefore, in my opinion, the suit is not time-barred.

It is argued by the learned Government Pleader on behalf of the respondents that there was nothing really to show on the evidence in this case whether the widows had acquired this property by virtue of

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(1) [1910] 32 All. 189=5 I. C. 207=7 A. L. J. 153.

(2) [1877-78] 5 I. A. 1=1 C. L. R. 318 = Bald 148=R and J's. No. 48=3 Suther 474=3 Sar. 763.

(3) 1924 P. C. 121=5 Lah. 192=51 I. A. 171=22 A. L. J. 304 = 47 M. L. J. 935=3 P. L. T. 1=34 M. L. T. 87=5 L. R. P. C. 94=20 M. L. W. 10=28 C.W.N. 960=(1924) M. W. N. 442=2 Pat. L. R. 245=26 Bom. L. R. 1117.

their right to maintenance or whether they had acquired it by adverse possession that is to say, by some title asserted by them which had not been interfered with by the person entitled to inherit the property. But it is clear that if they were asserting an adverse title other than a title as widows of their deceased husbands they would be asserting a title which after 12 years would give them a right to hold the property as part of their *Stridhan*, but in the face of the finding of the lower Appellate Court that this was not their *Stridhan* it seems to me that we are bound to come to the conclusion that the only manner in which they would have acquired the property was as maintenance. In this state of affairs it seems to me that the appeal must succeed, the decree of the lower Appellate Court will be set aside and a decree will be entered in favour of the appellants declaring their title to the property and their right to recover possession. The plaintiffs are entitled to their costs throughout.

Foster, J.—I agree.

Appeal allowed.

1925 PATNA 525

MULLICK AND ROSS, JJ.

Raghunandan Pandey — Petitioner—Appellant.

v.

Garju Mandal and another—Opposite Party—Respondents.

Civil Rev. No. 42 of 1925, and Misc. Appeal No. 34 of 1925, Decided on 8th April, 1925, from the order of the Dt. J., Bhagalpore, D/-12th January, 1925.

(a) *Bengal Tenancy Act, S. 174—Judgment-debtor's holding sold in execution to third party—Payment of 5 % made within thirty days—Decree-holder joining with judgment-debtor in applying to set the sale aside—S. 174 was held to be no sufficiently complied with.*

Where in execution of a decree of rent the tenant's holding was sold and was purchased by a third party, but within thirty days of the sale the deposit of 5 per cent, of the purchase money for payment as compensation to the auction purchaser was made in Court and the deposit was accompanied by a petition stating that the amount recoverable under the decree had been paid to the decree-holder who himself joined in this petition.

Held: that the provisions of S. 174 were not sufficiently complied with. [P. 526, C. 1]

(b) *Bengal Tenancy Act, S. 174—Question between judgment-debtor and the auction purchaser-No appeal lies.*

On a question under S. 174 between the judgment-debtor and the auction purchaser no appeal lies. [P. 526, C. 1]

(c) *Civil P. C., 115—Appellate Court entertaining appeal in a non-appealable case—Revision lies.*

Where the Appellate Court entertains an appeal from an order from which no appeal is allowed its order is without jursdiction and is open to revision. [P. 526, C. 1]

S. Saran—for Petitioner.

N. C. Ray—for Opposite Party.

Ross, J.—This is an application in revision against an order of the learned District Judge of Bhagalpore, reversing an order of the Munsif of Bhagalpore passed under S. 174 of the Bengal Tenancy Act. There is also an appeal for admission.

It appears that in execution of a decree for rent the tenant's holding was sold and was purchased by a third party. Within thirty days of the sale the deposit of 5 per cent. of the purchase money for payment as compensation to the auction-purchaser was made in Court and the deposit was accompanied by a petition stating that the amount recoverable under the decree had been paid to the decree-holder and the decree-holder himself joined in this petition. The judgment-debtor therefore prayed under S. 174 of the Bengal Tenancy Act that the sale should be set aside. The learned Munsif was of opinion that there had been no compliance with the provisions of the section and he declined to set aside the sale. On appeal the learned District Judge thought there had been substantial compliance with the terms of S. 174 imasmuch as after the admission of the decree-holder that he had received the money, nothing more was recoverable under the decree, and only the compensation payable to the auction purchaser remained to be deposited. He therefore set aside the sale.

It is contended on behalf of the auction-purchaser that no appeal lay to the District Judge. It is to be noticed that in this case the decree-holder and the judgment-debtor were at one and there was no question to be decided between them. The question for decision was a question between the judgment-debtor and the auction-purchaser and therefore the case did not fall within the provisions of Sec. 47 of the Code of Civil Procedure. It was

held in *Raziud-din Hussain* v. *Bindeswari Prasad Singh* (1) that in such a case no appeal lies. In *Akhouri Prem Narain* v *Mt. Fahinunnissa* (2) the question for decision was a question between decree-holder and judgment-debtor and on this ground it was held that an appeal did lie. With reference to the case just cited, it was observed that "all the authorities recognize and decide that in a case where an auction-purchaser is not a party to the suit, then no appeal lies against an order under Sec. 174, but if he is a party to the suit and is a decree-holder in fact then Sec. 47 comes into play and an appeal lies, it being a matter arising between the parties to the suit touching the execution, satisfaction or discharge of the decree." The same view was taken in Miscellaneous Appeal No. 215 of 1924 where it was held that on a question under Sec. 174 between the judgment-debtor and the auction-purchaser no appeal lay.

The order of the learned District Judge must therefore be treated as having been made without jurisdiction. It is therefore subject to revision under Sec. 115 of the Civil Procedure Code. The learned vakil for the Opposite Party, however, contends that even if the order was without jurisdiction, this Court should not interfere with it in revision if it is substantially a just order. It is therefore necessary to consider whether the decision of the learned Munsif or that of the learned Judge was correct decision. This question is concluded by the decision of the Calcutta High Court in *Kabilaso Koer* v. *Raghu Nath Sakan Singh* (3) where on facts precisely similar to those of the present case it was held that Sec. 174 had not been sufficiently complied with.

The application in revision must therefore be allowed and the order of the learned District Judge must be set asid and the order of the Munsif restored and the sale confirmed.

The Petitioner is entitled to the costs of this application: hearing fee, one gold mohur.

The appeal is dismissed.

Mullick, J.—I agree.

Application allowed.

(1) [1916] 36 I. C. 769.
(2) [1917] 2 P.L.J. 525=3 P.L.W. 18=40 I. C. 662=(1917) P. H. C. C. 244.
(3) [1891] 11 Cal. 481.

1925 PATNA 526

MACPHERSON, J.

Akhtar Hussain—Petitioner.

v.

King Emperor—Opposite Party.

Criminal Rev. No. 131 of 1925, Decided on 25th May 1925, against a decision of the S. J., Bhagalpur, D/-19th February 1925.

(a) *Criminal P. C., S. 428—Negligence on the part of the prosecution is no ground for not taking additional evidence against the accused where justice will fail if such additional evidence is not taken.*

The scope S. 428 is *prima facie* not limited by any consideration save that the Appellate Court should be of opinion that additional evidence is necessary and should record its reasons. The object of the section is just as much the prevention of the escape of a guilty person through some carelessness or ignorant procedure of the Court, Sub-Inspector or the magistrate as the vindication of the innocence of a person wrongfully accused where the same carelessness or ignorance has omitted to bring on the record circumstances essential to the elucidation of truth. It is impossible on the plain words of the enactment to differentiate between these two cases. It would not be a sound exercise of discretion to do so in the circumstances of India, where justice when it fails does so by erroneous acquittal at least as much as by erroneous conviction. [P 528, C 1]

In India the onus is placed on the Court not merely to listen to the evidence, but to inquire to the utmost into the truth of the matter, and so to secure justice. Accordingly if any restriction is to be placed upon the power conferred on the Appellate Court by S. 428, it certainly cannot be that negligence or inadvertence on the part of the prosecution is to be allowed to effect a miscarriage of justice: on the contrary the enactment is, like the other provisions referred to, directed to the attainment of justice even at a late stage in the proceedings, by the introduction of further materials which the Court judges to be essential to a just decision of the case. [P 528, C 2]

(b) *Criminal P. C., S. 428—Order allowing additional evidence will not be interfered with in revision except in case of error of law affecting merits of the case.*

The Court of Revision will not always interfere with an order of the appellate Court allowing evidence. Where it might itself in the exercise of its discretion as the Appellate Court, have declined to admit additional evidence. To justify interference in revision the Court must be satisfied that the Appellate Court committed an error of law which has prejudiced the accused on the merits. [P 528, C 2]

W. H. Akbari—for Petitioner.

H. L. Nandkeolyar—for the Crown.

Macpherson, J.—This application in revision is directed against the conviction

of the petitioner by the Deputy Magistrate of Bhagalpur under S. 47 A of the Bihar and Orissa Excise Act, 1915, in respect of being in possession of cocaine contrary to the provisions of that Act and the sentence imposed upon him of three months' rigorous imprisonment, which conviction and sentence were upheld in appeal by the Sessions Judge of Bhagalpur.

In support of the rule Mr. Akbari advances two pleas. The first of these is that the conviction is wrong on the merits, or that at all events the Sessions Judge has not adequately examined the evidence adduced to prove that the petitioner was in possession of the cocaine.

The prosecution case was that when the petitioner and Sujaet Ali, a prosecution witness, left a house in the town of Bhagalpur and were walking along the road, an excise petty officer and peon came up to them and arrested them, that when the Excise Sub-Inspector arrived soon afterwards, the petitioner dropped a match-box which he had been holding in his hand and which on being picked up by the Sub-Inspector was found to contain a white powder eventually reported by the Chemical Examiner to the Government to be cocaine hydrochloride, the possession of which by the petitioner is an offence under S. 47 A.

Mr. Akbari urges that though there are discrepancise in the prosecution evidence with regard to the time when the petitioner threw away the match-box, these have only been lightly dealt with by the Appellate Court whereas (he contends) that Court should have inferred from them that the petitioner was not in possession of the match-box or its contents. I have accordingly examined the evidence carefully and find that there are in fact discrepancies. The essential question, however, is whether the petitioner dropped the match-box containing the white powder. On this point there is no discrepancy at all. Indeed the evidence is that Sujaet, when walking with him, saw him carrying something in his hand, that the sixth prosecution witnes saw the match-box in his closed right fist before he dropped it and that several other witnesses saw him drop it. The witnesses unconnected with the Excise Department all say that the petitioner dropped the match box after the Sub-Inspector came and the evidence of the Sub-Inspector is to the same effect. The only evidence to the contrary is that of the petty officer. The learned Sessions Judge has dealt with it and has come to the conclusion that in stating that the petitioner threw down the match-box before the arrival of the Sub-Inspector and that it was lying on the ground when the latter arrived, the petty officer made a misake. His discussion of the point has been adequate. Moreover his conclusion is, in my opinion, correct and there is not the faintest doubt that the petitioner was in possession of the match-box containing the white powder.

The second contention is that the action of the learned Sessions Judge in directing further evidence to be taken under S. 428 of the Code of Criminal Procedure was illegal. When the appeal came up for hearing the Sessions Judge found that some of the connecting links in the evidence to prove the identity of the packet examined by the Chemical Examiner were missing. Considering that additional evidence was necessary on this point he recorded his reasons and directed the Magistrate to take the necessary further evidence on the point. The Magistrate accordingly examined two witnesses. The first, who is the Sub-Inspector of police in charge of the Magistrate's *malkhana*, testified that he received the packet from the Excise Sub-Inspector and had it packed for despatch by post in a packet which was sealed with the private seal of the trying Magistrate and addressed to the Chemical Examiner, and the second is the constable who despatched the packet by registered post. It is not denied that this testimony supplies the links which the learned Judge found missing from the original evidence as to the identity of the material examined by the Chemical Examiner with the white powder contained in the match-box But Mr. Akbari contends that S. 428 of the Code of Criminal Procedure does not empower the Sessions Court to bring this evidence on the record. He maintains that S. 428 is only to be utilised in a case where there is some evidence upon which the appellant could be convicted though that evidence is not satisfactory, and he suggests that "this is a *via media* which the Courts in India have worked out for themselves". In support of his contention he cites the decision in *Queen Empress*

v. *Fateh* (1), the opinion of Sundara Ayyar, J. in *Jeremiah* v. *Vas* (2) and the opinion of Sadasiva Ayyar, J. in *Varadarajulu Naidu* v. *King Emperor* (3). In reply the Assistant Government Advocate relies upon the majority view in *Varadarajulu Naidu* v. *King Emperor* (3) and on the terms of S. 428. In my judgment the contention of Mr. Akbari is unfounded and cannot prevail.

The scope of S. 428 is *prima facie* not limited by any consideration save that the Appellate Court should be of opinion that additional evidence is necessary and should record its reasons. Indeed Sadasiva Ayyar, J. in his judgment in *Varadarajulu Naidu* v. *King Emperor* (3), wherein he quotes with approval the two earlier views cited on behalf of the petitioner, does not deny the power of the Appellate Court to take additional evidence under S. 428 even where it considers that though the prosecution fails on the evidence on record negligence on the part of the prosecution should be excused, but holds that as a matter of discretion the power should only be exercised against the accused in very exceptional cases, for instance in a case where,

"There is evidence, which, if reliable, proves a relevant fact but the Appellate Court feels a doubt on the point and thinks that additional evidence might throw light which would enable it to arrive at a definite and satisfactory conclusion."

But the object of the section is just as much the prevention of the escape of a guilty person through some carelessness or ignorant procedure of the Court, Sub-Inspector or the Magistrate as the vindication of the innocence of a person wrongfully accused where the same carelessness or ignorance has omitted to bring on the record circumstances essential to the elucidation of truth. It is indeed impossible on the plain words of the enactment to differentiate between these two cases. And indeed it would not be a sound exercise of discretion to do so in the circumstances of this country, presumably well-known to the legislature, where justice when it fails does so by erroneous acquittal at least as much as by erroneous conviction. Reference may also be made in this connection to S. 540 of the Code of Criminal Procedure and S. 165 of the Indian Evidence Act. Under the former the Court is empowered at any stage of an inquiry or trial to summon a person as a witness or examine any person in attendance or recall a person previously examined and it is expressly laid down that the Court shall summon and examine and recall and re-examine any such person, if his evidence appears to it essential to the just decision of the case. Under the latter the Judge is armed with very extensive powers of asking any question in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant and may order the production of any document in order to discover or to obtain proper proof of relevant facts. It is clear that the legislature endorsed the view :—

"That the English theories that the public have no interest in arriving at the truth and that even criminal proceedings ought to be regarded mainly in the light of private questions between the prosecutor and the prisoner, are not at all suited to India, if indeed they are the result of anything better than carelessness and apathy in England."

In India the onus is placed on the Court not merely to listen to the evidence, but to inquire to the utmost into the truth of the matter, and so to secure justice. Accordingly if any restriction is to be placed upon the power conferred on the Appellate Court by S. 428, it certainly cannot be that negligence or inadvertence on the part of the prosecution is to be allowed to effect a miscarriage of justice : on the contrary the enactment is, like the other provisions referred to, directed to the attainment of justice even at a late stage in the proceedings, by the introduction of further materials which the Court judges to be essential to a just decision of the case. The conditions for the exercise of the power are set out in the section itself, and within these limits it is contemplated that the power will be exercised. The criminal law of India is, to use the words of Sadasiva Ayyar, J. "against allowing mere technicalities to stand in the way of a decision on the merits, if it can be reasonably helped."

(1) [1883] 5 All. 217.
(2) [1913] 36 Mad. 457 = 22 M. L. J. 75 = 10 M. L. T. 506 = 12 Cr. L. J. 585 = 12 I. C. 961=(1911) 2 M. W. N. 576
(3) [1919] 42 Mad. 885 = 37 M. L. J. 81 = (1919) M. W. N. 669 = 51 I. C. 343 = 20 Cr. L. J. 455.

and the Appellate Court is by no means condemned to countenance a miscarriage of justice because the prosecutor or even the trial Court fails to realise the necessity of bringing certain evidence on the record, even if that evidence is not purely formal. In this case the evidence cannot be said to be merely formal though it is of the kind which is not infrequently, and in the present instance was, so regarded by the parties and even by the Magistrate. There is thus no foundation in principle for the view advanced by Mr. Akbari.

Authority also when carefully examined is against the contention. It may here be indicated that all the rulings cited related to the stage of appeal, not to the stage of revision. A close examination of the case of *Queen Empress* v. *Fateh* (1) casts a different light on that decision. In that case the accused had been committed to Sessions on charges under S. 471 and 193 and had been convicted only on the former. In appeal Mahmood, J. held that the facts did not constitute an offence under S. 471. When the Government Pleader asked for a conviction under S. 196 and apparently that additional evidence be taken, the Court further held that the facts did not constitute an offence under S. 196. The learned Judge then went on to indicate that not only had the prosecution not insisted on the second charge or supported it by evidence but that it was not even pointed out in appeal what further evidence would be forthcoming against the appellants, and remarked that in the circumstances where accused had been committed to the Sessions on distinctly framed charges the High Court would not, except in very exceptional circumstances, direct that further inquiry should be made or that additional evidence should be taken. Thus *Queen Empress* v. *Fateh* (1) clearly falls within the category which I have referred to, where there are special peculiarities which would induce any Court to refuse to put S. 428 in operation. There had been a Sessions trial where no effort had been made to establish one of the charges and the Appellate Court very properly, if I may say so with respect, refused to allow the production, in appeal, to establish that charge, of additional evidence which the Public Prosecutor could not even specify at the time when he applied to the Court for action under S. 428. There was thus abundant ground for refusing to act under S. 428 (or rather S. 282 of the Code of 1872 which, for some reason which is not clear, is referred to) without reference to any general proposition as to the intention of S. 428. There was also no occasion for formulating such a proposition and a case is only an authority for what it decides.

Then *Jeremiah* v. *Vas* (2) was not decided on the observation of Sundara Ayyar, J. which is reminiscent of *Empress* v. *Fateh* (1). Moreover, the majority of the Bench of three Judges in *Varadarajulu Naidu* v. *King Emperor* (3) expressed themselves as follows regardig that observation :

"When the Appellate Court has statutory power to prevent such a miscarriage (of justice) by directing fresh evidence to be taken on the point, I am unable, with great respect, to agree with the observation of one of the learned Judges in *Jeremiah* v. *Vas* (2) in so far as it questions the propriety of taking action under S. 428 in such a case to supply a defect in formal proof."

Similarly the dissentient judgment of Sadasiva Ayyar, J. in that case is not an authority on the point for decision in that case. The majority of the Bench of which he was a member held that the powers given by S. 428 are perfectly general and are subject only to the condition that the Court shall record its reasons, and that where a conviction on a serious charge would, though otherwise sustainable, have to be upset for want, owing to a misconception, of formal proof of sanction, the case was a fit one in which to supply under S. 428 the defect in formal proof of the sanction. The reference to a defect in the formal proof was all that was necessary for the purposes of that case. Since the appeal must have been allowed if the defect could not be remedied by additional evidence, it follows that the principle supported by the views cited on behalf of petitioner, namely, that the power conferred by S. 428 " is not intended to be exercised in cases in which the prosecution having had ample opportunities to produce evidence " either " have done so and that entire evidence falls short of sustaining the charge " [*Emperor* v. *Fateh* (1)] or " have failed to do so " [*Jeremiah* v. *Vas* (2)] is overruled and has no authority or value behind it.

Reference may here be made to the ruling of the Court of Appeal in *William James Robinson* v. *The King* (4) as showing that though the power to admit evidence is to be exercised with great care, it extends even to the admission of evidence which was not even in existence at the date of the trial and so could not have been produced at all. The Crown sought the admission of evidence to show that the appellant since his conviction had written a letter from prison which had a material bearing on the case, being indeed an admission that he had committed the crime. The crown relied upon S. 9 of the Criminal Appeal Act which gives the Court of Criminal Appeal the same powers as the Court of Appeal possesses in civil matters. Reading, L. C. J., said :—

"It is clear that the Court of Appeal in civil matters has power to admit evidence which would throw material light on the issue. It is a power which must always be exercised with great care. As it is admitted that the evidence will, throw a light on the matter in question we have decided to admit it. The value of the evidence will be a matter for subsequent consideration."

The Indian legislature has not restricted the powers conferred by S. 428 by reference to the powers under Order 41 rule 27 of a civil Court in appeal, but it is clear from the decision of the Judicial Committee in *Raja Indrajit Bahadur Sahi* v. *Amar Singh* (5) that in a civil appeal even where the Appellate Court itself has discovered an inherent *lacuna* or defect, the Court may admit evidence to fill up the gap or remedy the defect.

The powers given by S. 428 are certainly not less than are given to a civil Court in the matter of admission of evidence at the appellate stage and Courts of appeal ought not to circumscribe them where the legislature has not seen fit to do so.

A further point is that there is a distinction between the case where a Court of Criminal Appeal is asked to take action under S. 428 and the case where such Court having taken such action, interference with its order is sought in revision. Even where it might itself, in the exercise of its discretion as the Appellate Court, have declined to admit such evidence, the Court of Revision will by no means always interfere with the order of the appellate Court allowing additional evidence. To justify interference in revision the Court must be satisfied that the Appellate Court committed an error of law which has prejudiced the accused on the merits. But in this case I am satisfied that not only has there been no error of law and no prejudice on the merits but further that a proper discretion has been exercised and indeed that a failure to take the additional evidence which was "essential to the just decision of the case" would have constituted a grievous disregard of the interests of justice. Accordingly the second plea also fails.

The rule is accordingly discharged. The petitioner must surrender forthwith to undergo the unexpired portion of his sentence,

Rule discharged.

(4) 12 Cr. App. Reports 226.
(5) 1923 P. C. 128=2 Pat. 676=50 I. A 183=21 A. L. J. 554=4 P. L. T. 447=1 Pat. L.R. 345=25 Bom. L. R. 1253=28 C.W.N. 277=45 M. L. J. 578=33 M.L.T. 233=18 M.L.W. 725=4 L. R. P. C. 123=39 C.L.J. 318 (P.C.)

1925 PATNA 530

DAWSON-MILLER, C. J. AND MACPHERSON, J.

Parmeshwar Singh and others —Plaintiffs—Appellants.

v.

Mt. Sureba Kuer and others—Defendants—Respondents.

Second Appeals Nos. 94 and 95 of 1924, Decided on 19th May 1925, against the decision of the Dt. J. Shahabad, D/- 30th June 1923.

(a) *T. P. Act, S.* 111 (d)—*Law previous to T. P. and B. T. Acts—Law was not same as that which is contained in B. T. Act—Even if it was same as T. P. Act, S.* 111 (d), *no merger could take place, on one co-proprietor ackuiring lessee's interest in whole land.*

When neither the Transfer of Property Act of 1882 nor the Bengal Tenancy Act of 1885 were in existence the law of merger with regard to the interests of landlords and tenants was not the same as exists at the present day under the provisions of the Bengal Tenancy Act Even assuming that the law laid down in S. 111 (d) of the T. P. Act was the same as that which previously existed, that section only applies to a case where the interests of the lessee and of the lessor in the whole of the property become vested at the same time in one person in the same right. Where a co-proprietor who merely had a one anna share in the property purchased for himself, the interests of the lessees of the whole property, there could be no merger. [P 532 C 2, P 533 C 1]

. (b) *Civil P. C., S. 105—High Court remanding case for retrial—No appeal from High Court's decision filed—Finding in remand order is binding in appeal from lower Court's decision after remand.*

Where the High Court remands a case to the lower Court for retrial and there is no appeal from the decision of the High Court, the finding of the High Court at the time of remand is binding in the appeal from the decision of the lower Court after remand. [P 533 C 1]

(c) *T. P. Act, S. 111 (d)—No merger taking place—Burden of proving that distinction between the two interests was kept alive subsequently is not on party averring same—Evidence Act, Ss. 101-103.*

When a landlord purchases a tenant's interest but there is no merger of the two interests, the onus of proving that the distinction between the interests continued to be kept alive subsequently also is not on the party alleging that the distinction was so kept alive. [P 533 C 1]

(d) *Record of Rights—Onus of proof is on party denying correctness of entry in record of rights.*

Where a party on whom the onus of proof of a certain matter lies puts in evidence the record of rights which favours that party the onus shifts to the other party to disprove the presumption raised by the Record of Rights. [P 533 C 1 2]

S. M. Mullick, N. N. Sinha and *S. S. Prasad*—for Appellants.

S. Sultan Ahmad and *A. B. Mukerjee*—for Respondents.

Dawson Miller, C. J.—The suit out of which these appeals arise was instituted as far back as the 7th September 1917 and it has had an unfortunate history. The Plaintiffs who are descendants and representatives of one Balgobind Singh instituted the suit against Daroga Singh and others claiming to recover possession of 17 *bighas* 16 *cottahs* of land on the ground that the land was held by the Defendants as the under-raiyats of the Plaintiffs who in turn held the land as raiyats from the proprietors who are known as the Kulharia Babus. The lease under which the Defendants held expired within three months of the date of the institution of the suit and notice was given to the Defendants to quit. They refused to go out, hence the present suit was brought for possession.

The learned Subordinate Judge before whom the case came for trial decided the issues in favour of the Plaintiffs and passed a decree in their favour declaring their right to possession of the land.

The District Judge of Arrah before whom the case came on appeal overruled the decision of the Subordinate Judge and from that decision a second appeal was brought to this Court. The learned Judge who heard that appeal considered that the decision of the District Judge could not be supported, he having taken a wrong view as to the doctrine of merger, and he remanded the case to the Court of the District Judge to be re-heard in appeal.

The District Judge has re-heard the appeal and has again overruled the decision of the Subordinate Judge and dismissed the Plaintiffs' suit.

From that decision the present appeal is brought. The facts of the case in so far as they are material for present purposes and in so far as they are known, for the history of the matter goes back to the year 1866, are these: One Parbesh Singh and others had a holding of some 30 *bighas* in *mauza* Jalpura which they held under Mitrajit Singh and Balgobind Singh who were co-sharer landlords in the *mauza*. In that year, the tenants having failed to pay their rent and a rent decree having been obtained, the land was put up for sale in execution of the rent decree. It was purchased by Balgobind Singh who was a co-sharer landlord in the *mauza*, he having a 1 anna share out of the 16 annas. There is no evidence to show what exactly took place immediately after that sale, that is to say, whether Balgobind Singh took actual *khas* possession of the land and turned the defaulting tenants out or whether he re-let it to others or whether he permitted the tenants to remain in as his under-tenants or whether, which is the case contended for by the Defendants, he did not in fact attempt to turn them out or in any way to alter their status as occupancy tenants but allowed them to remain in on exactly the same terms as they had been before, that is to say, occupancy raiyats holding under the same landlords. It appears, however, from a document dated the 20th September 1866 that in addition to the rent which was the subject of the rent decree in execution of which the property had been sold there was further rent due from these tenants and a petition was filed in Court stating that they had no means of paying the subsequent rent due but that the *maliks* might realise their rent from the crops grown on the land which had been planted apparently by the tenants and which are still standing and that the *maliks* had accepted that prayer and the petition was filed praying that it might be placed with the record of the execution case of Babu Mitrajit Singh and others as

evidence, I presume, of the payment of the subsequent rent. The next evidence we have as to the relationship between the parties is a *kabuliyat* dated in the year 1889 executed by the tenants or those who at that time represented them acknowledging that Balgobind Singh was the *guzashtadar* of the property in suit and that they had taken settlement of 17 *dighas* 17 *cottahs* under him as *shikmi* tenants. That document was for a term of years: in due course it expired and afterwards up to the present day further leases have been entered into between the Plaintiffs or their predecessors and the Defendants or their predecessors in practically the same terms, that is to say, the Defendants taking as under-raiyats of the Plaintiffs who are acknowledged to have a raiyati interest under the present landlords.

I ought to mention that some 9 years after the sale in question, namely in the year 1875 the proprietary interest in *mauza* Jalpura was partitioned amongst the various co-sharers and separate *takhtas* were allotted to the proprietors respectively. Of the 30 *bighas* which had been held originally by Parbesh Singh 19 *bighas* 9 *cottahs* fell to the share of Mitrajit who is now represented by the persons known under the name of the Kulharia Babus. Another portion amounting to 8 *bighas* or thereabout fell to the share of Balgobind Singh. What happened to the small remaining share is not very clear but 2 or 3 *bighas* or there about appear to have been an orchard and this may have been left *ijmal* or it may have been either then or subsequently divided amongst the different proprietors. The property which is the subject of the present suit, namely, 17 *bighas* 16 *cottahs*, is a part of the 19 *bighas* 9 *cottahs* which fell to the share of Mitrajit Singh now represented by the Kulharia Babus. They were undoubtedly from that time the sole proprietors of this property and in so far as there is any evidence on the point they have always treated the Plaintiffs as their immediate tenants and the Plaintiffs have always treated the Defendants as *shikmi* tenants holding under them.

In the year 1911 or thereabout survey and settlement operations took place in the village and in the finally published record-of-rights published in 1911 the land in suit is described as the *guzashta* land of the Plaintiffs and the Defendants are described as *shikmidars* holding under them. Therefore it would appear that so far as the evidence before the Court was concerned there can be little doubt that for a long time, that is to say, from the year 1889, at the latest, this relationship between the Plaintiffs and the Defendants has been in existence.

When the Plaintiffs instituted the present suit the Defendants raised the plea that they were not under-tenants at all but that they were occupancy tenants although it is not very clear from their written statement whether they claimed to be occupancy tenants holding under the Plaintiffs or occupancy tenants holding under the proprietors. They further raised a plea that by the custom prevailing in the *mauza* under-tenants could also acquire occupancy rights by long possession. This plea, however, has been found against them, by all Courts and it is no longer urged in this appeal. In fact it was a question of fact which the lower Appellate Court was alone competent to determine and we are not concerned with it.

I have already said that when the case first of all came on appeal from the District Judge before this Court on the previous occasion the Court took the view that in the particular circumstances of this case there could be no merger of the raiyati interest with the proprietary interest of the purchaser Balgobind Singh. It is important to bear in mind that at that time neither the Transfer of Property Act of 1882 nor the Bengal Tenancy Act 1885 were in existence and the law of merger as it then existed with regard to the interests of landlords and tenants was not the same as exists at the present day under the provisions of the Bengal Tenancy Act. Whether it was the same as was enacted in the Transfer of Property Act is not a matter which we need discuss, for even assuming that the law laid down in S. 111 (*d*) of the Transfer of Property Act was the same as that which previously existed, that section only applies to a case where the interests of the lessee and of the lessor in the whole of the property become vested at the same time in one person in the same right. In the present case it is quite clear that, unless

Balgobind Singh purchased on behalf of his co proprietors, the interests of the lessor and lessee did not become merged in one person. Balgobind was not the proprietor of the whole property. He merely had a one anna share in it and the evidence which is clear and has been accepted is that he purchased for himself and not on behalf of the co-proprietors. Whether he could do that at the present day under the Bengal Tenancy Act or not we are not concerned with. Therefore I consider that Mr. Justice Das in the judgment he delivered when the case was remanded was right in the view he took, but we are not really concerned with that question because I think we are bound by the finding of Mr. Justice Das in the case as he set aside the decree of the learned District Judge and remanded the case for re-trial. There was no appeal from that decision and it was no longer open to us to question the finding come to by the learned Judge in that appeal. It must be taken therefore that when Balgobind purchased the Defendants' holding in 1866 the interest which he purchased did not merge in the proprietary right.

The learned District Judge on remand, whilst accepting the directions of the High Court on the question of the merger, has dealt with the case as if the onus were entirely upon the Plaintiffs to make out that they had in fact kept alive the interest which they purchased at the auction sale in 1866 and had not given up the right which they then acquired by allowing the Defendants to remain in possession of the property upon exactly the same terms and in the same right as they had before the auction sale. In my opinion the learned District Judge was wrong in the view he took.

Whatever onus there may have been upon the Plaintiffs to make out their case I think they had clearly discharged that onus by putting in evidence the record-of-rights. The record-of-rights shows that their position was that of tenants under the landlord and the position of the Defendants was that of sub-tenants under them.

The evidence of the *kabuliyats*, documents signed by the Defendants themselves or their predecessors, was also to the same effect. Therefore the onus wherever it may have rested originally was clearly shifted to the Defendants to show that the record-of-rights and their own documents did not really disclose the true state of affairs. Now the way the learned District Judge dealt with the case was this. He said that the Plaintiffs had failed to call any evidence to show exactly what took place between the year 1866 and the date of the first *kabuliyat* in 1889 and having failed to do that he said, "I cannot but presume that the auction sale was never given effect to and that Parbesh Singh coutinued to remain in possession of the holding as before as if no sale had been practically brought about". He goes on: "The Plaintiffs relied on the recitals in the *kabuliyats* but to my mind such recitals cannot affect the interest of the Defendants in the disputed land if it remained unaffected by the auction sale itself." If it remained unaffected by the auction sale itself no doubt the learned District Judge might be right in saying that the *kabuliyats* could not alter their status but it seems to me that the learned Judge was in no way justified in presuming that a state of affairs existed, of which there was absolutely no evidence whatsoever and with regard to which the only evidence before him was entirely the other way including the record-of-rights which raised a presumption the other way. It seems to me that that presumption has not been rebutted in this case by the Defendants and however much one may regret that after all these years they can no longer remain in possession of the property, the only conclusion to which I can come is that they have been holding all this time merely as under tenants of the Plaintiffs and according to the law at the termination of the existing agreement between them they are liable to be ejected if the Plaintiffs should desire to bring the lands into their own possession. In these circumstances, though it is with some regret that I arrive at this conclusion, I am satisfied that the learned District Judge's decision cannot stand and that it should be set aside and the decree of the learned Subordinate Judge restored. As there were two appeals from the decision of the Subordinate Judge by different sets of Defendants there

have consequently been two appeals to this Court. They are numbered at present 94 and 95. The judgment which I have just pronounced will apply to both appeals. There will be one set of costs throughout.

Macpherson, J.—I agree.

Appeals allowed.

★ 1925 PATNA 534

ROSS AND KULWANT SAHAY, JJ.

S. N. Mullick—Plaintiff—Appellant.

v.

Ganga Gope and others—Defendants—Respondents.

Civil Revs. Nos. 228 to 240 of 1924 and Appeals Nos. 943 to 951 of 1924, Decided on 20th May 1925, from Appellate decrees of the Dt. J. of Gaya, D/- 13th February 1924.

★ (a) *Civil P.C., S. 105, O. 9 R. 13 and O. 17 R. 1—Adjournment improperly refused and* ex parte *decree passed—Application under O. 9, R. 13 dismissed—Appeal from* ex parte *decree can be set aside on ground of improper refusal of adjournment, apart from question of sufficient cause for defendant's non-appearance on date of passing* ex parte *decree.*

Where an adjournment is improperly refused and an *ex parte* decree is passed and where an application to set aside the *ex parte* decree is dismissed, the propriety of the order refusing adjournment can be questioned in an appeal from the *ex parte* decree and the decree can be set aside, apart from any question raised in any application under O. 9, R. 13, as to whether the defendants had sufficient cause for non-appearance on the date on which the decree was passed. [P 534, C 2 ; 325, C 1]

(b) *Civil P. C., O. 17 R. 1—Case transferred without notice to defendant—Defendant should be granted adjournment if he pleads unpreparedness to go on.*

Where after a case has been posted for trial to a certain date, but prior to the latter date, the case is transferred to another Court, but the defendant is not informed of this, and on the date to which the case has been posted, the defendant applies for time on the ground that he was not aware of the transfer and is not prepared to go on with the case, the adjournment should be granted. [P 534, C 2 ; P 535, C 1]

S. N. Bose—for Appellant.

N. K. Prasad and *D. L. Nandkeolyar*—for Respondents.

Ross, J.—These are appeals against the decree of the District Judge of Gaya in certain rent suits which were decreed *ex parte* by the Additional Munsif of Gaya, and there are also applications in revision in certain of the cases. It appears that on the 19th of July 1923 the cases were fixed for trial on the 3rd of August 1923. In the meantime on the 31st of July they were transferred from the Court of the third Munsif where they had been instituted to the Court of the Additional Munsif. On the 3rd of August the Defendants applied for time on the ground that they were not aware of the transfer and were not ready to go on with the case. This application was refused and the cases were heard on the 3rd of August *ex parte* and decided on the 7th of August. On the 5th of September the Defendants filed petitions under Or. 9, r. 13, to set aside the *ex parte* decrees and on the 29th of September 1923 they also filed appeals against the decrees themselves. On the 3rd of October the Munsif rejected the petitions under Or. 9. r. 13, and no appeal was presented against that order. On the 13th of February 1924 the District Judge decreed the appeals and remanded the suits for hearing on the merits.

It is contended on behalf of the Plaintiff-Appellant that it was not competent to the District Judge in appeal from the *ex parte* decrees to enter into questions which fell within the scope of the applications under Or. 9, r. 13, and that even if he could do so, he was not entitled to do so in these cases where the applications under Or. 9, r. 13 had been rejected. The learned Counsel for the Respondents relies on S. 105 of the Code of Civil Procedure and contends that, where a decree is appealed from, any error defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal and that he is entitled to question the propriety of the order of the 3rd of August refusing an adjournment as well as the propriety of the order of the 3rd of October dismissing the application for re-hearing under Or. 9, r. 13. The latter contention raises a question of some difficulty and there is a decision of the Madras High Court in *Badvel Chinna Asethu* v. *Vattipalli Kesavayya* (1) which is against the Respondents. It is not necessary, however, to decide that question in these appeals because it is, in my opinion, clear that the Respondents may question the propriety of the order of the 3rd of August refusing an adjournment.

(1) [1920] 39 M.L.J. 697=12 L.W. 507=60 I. C. 215=(1920) M.W.N. 780=29 M.L.T. 63.

The learned District Judge has found that the Defendants were not informed of the order transferring the case from the Court of the third Munsif to the Court of the Additional Munsif. In my opinion therefore the application for adjournment made on the 3rd of August ought to have been granted. As the improper refusal to grant time on that date affected the decision of the case, the Respondents were entitled to have the decrees set aside and the cases re-heard, apart altogether from any question raised in any application under Or. 9 r. 13 as to whether they had sufficient cause for non-appearance on the 7th of August when the decrees were passed.

There was a further defect in the proceedings in the Court below in that the suits were consolidated after evidence for the Plaintiff had been taken.

On these grounds I think that the decision of the learned District Judge was right and that these appeals must be dismissed with costs. The applications in revision are also dismissed with costs. There will be one set of costs in the appeals and one set of costs in the revision applications. Hearing fee one gold mohur.

Kulwant Sahay, J.—I agree.

Appeals and applications dismissed.

1925 PATNA 535

FOSTER, J.

Mewa Lal Jha—Petitioner.

v.

King Emperor—Opposite Party.

Criminal Rev. No. 477 of 1924, Decided on 5th November 1924, from an order of the S. J., of Bhagalpur.

(a) *Railways Act, S.* 122 — *Unlawful entry is essential for liability—'Unlawful" means contrary to law laid down by the Act or rules framed thereunder.*

The most important words in S. 122 are the words "unlawfully enters", for unless and until a person has made an unlawful entry upon the railway premises he cannot be brought within this penal provision. The word "unlawful" means "contrary to the law laid down in the statute". [P. 535, C. 1]

If the railway made a general rule under the Act (by virtue of S. 47 (1) of the Act) that nobody should enter upon railway platforms except passengers with tickets, any other persons entering upon the platform might be guilty of unlawful entry. But where no such rule exists, and where the Station Master leaves the platform gate open, those who enter upon the platform can hardly be considered to be other than licensees. A person who enters in this manner may be quite lawfully ordered to leave the railway premises, but as he has not entered unlawfully he can never be brought within the mischief of S. 122 of the Railway Act. [P. 536, C. 1, 2]

Sambhu Saram and B. P. Singh—For Petitioner.

Foster, J.—The petitioner has been convicted under S. 122 (2) of the Indian Railway Act (IX of 1890) in the following circumstances. On the 28th March last the petitioner entered upon the platform of the Bhagalpur Railway Station when the 9 Up Passenger was about to arrive. The Ticket Collector went up to the petitioner and asked to see his ticket, but the petitioner had no ticket to show. The Ticket Collector is at disagreement with the petitioner in his account of what happened after this ; the former saying that the petitioner admitted that he had no ticket and had also no intention of travelling on the railway, whereas the petitioner states that he told the Ticket Collector that he was going to Nathnagar and that his ticket was being purchased for him. The Ticket Collector also deposes that he told the petitioner to get a platform ticket, but the petitioner refused. Thereupon the Ticket Collector told the petitioner to leave the platform and when the petitioner refused, the Ticket Collector informed the District Inspector who had come up. The petitioner refused to obey the Inspector's order to leave the platform. On these facts the prosecution has been instituted. The petitioner's case is that he had entered on the platform with the intention of travelling to Nathnagar and that a fellow traveller was at that moment securing his ticket, and the ticket was in fact brought to him by his companion at the time when the Inspector was speaking to him.

The section under which the petitioner has been convicted reads as follows :

122 (1) If a person unlawfully enters upon a railway he shall be punished with fine which may extend to Rs. 20.

(2) If a person so entering refuses to leave the railway on being requested to do so by any railway servant or by any other person on behalf of the railway administration, he shall be punished with fine which may extend to Rs. 50 and may

be removed from the railway by such servants or other person.

It is manifest that the most important words in this section are the words "unlawfully enters," for unless and until a person has made an unlawful entry upon the railway premises he cannot be brought within this penal provision. It appears to me that a provision in a statute which is of a special nature and not a penal statute in itself should be interpreted with a great caution and that the most reasonable construction to be put on any such general term as "unlawful" would be with reference to the general provisions of the statute: In other words, I am inclined to take the word "unlawful' to mean "contrary to the law laid down in the statute." Now, there is one form of unlawful entry for which a special punishment is provided in S. 112 read with S. 68 of the Act, namely, entry upon a railway carriage without the permission of a railway servant and without a proper pass or ticket for the purpose of travelling thereon as a passenger. Another form of entry made unlawful under the Act might be such as is made in contravention of the rules and by-laws promulgated under S. 47(1) of the Act. If the railway made a general rule under the Act that nobody should enter upon railway platforms except passengers with tickets, no doubt any other persons entering upon the platform might be guilty of unlawful entry. The learned Vakil who has appeared for the petitioner has put before me a rule of the East Indian Railway which reads as follows: "84. Platform Tickets.—As a rule passengers only are admitted to the station platform but Station Masters have discretion to admit a limited number of persons who are not passengers. At the following stations platform tickets are issued on payment of one anna each and these may be had on application to the booking clerk...Howrah, Allahabad, Jubbulpore, Cawnpore and Delhi."

A third form of unlawful entry which occurs to me is where the railway Station Master or some subordinate of his closes the platform gate or excludes passage through the gates of passengers who have not tickets. A person entering in resistance of such exclusion would no doubt make an unlawful entry upon railway premises. But there are numerous cases where entry upon the platform can be perfectly lawful. If the Station Master leaves the platform gate open, those who enter upon the platform can hardly be considered to be other than licensees. It is absurd to think of them as trespassers. No doubt a person who enters in this manner may be quite lawfully ordered to leave the railway premises, but the point is that he has not entered unlawfully and he can never be brought within the mischief of S. 122 of the Railway Act. As was pointed out by the learned Vakil, it may happen that an intending passenger proceeds on to the platform, leaving a man to obtain his ticket. The trial Court has made an error in law in two respects; in the first place there is no finding that the entry upon the platform was unlawful within the meaning of the Act. In the second place the learned Magistrate goes so far as to say "even granting that the accused was an intending passenger he should not have entered on the platform without taking a ticket and when found without a ticket he had no right to remain on the platform when he was asked by the railway servant to leave it." I am not disputing the second part of this sentence. But his statement amounts to this, that an intending passenger entering upon a railway platform makes an unlawful entry unless he has a ticket in his possession. My opinion is the exact contrary. He enters lawfully, but if the railway staff orders him to leave, and he has no ticket, his refusal to go would possibly make him a trespasser and he could be expelled by force. But as I have said before, he could not be made guilty under S. 122 of the Railway Act, as sub-sections require as a necessary preliminary that the person upon whom the penalty is imposed has entered unlawfully.

For these reasons I consider that the conviction is not in accordance with law. The rule is made absolute. The conviction and sentence are set aside and the fine, if paid, shall be refunded.

Rule made absolute.

★ 1925 PATNA 536

BUCKNILL AND ROSS, JJ.

Golam Mohammad Khan—Appellant.

v.

King Emperor—Opposite Party.

Criminal Appeal No. 170 of 1924, Decided on 22nd December 1924, from the decision of the J. C. of Chota Nagpur, D/- 6th July 1924.

★ *Criminal P. C., S. 164—Accused's statement of exculpatory character is admissible in evidence against him.*

Where an accused person makes a statement before a Magistrate under S. 164 of the Cr. P. C. and the statement is not a confession but is of an exculpatory character, it is not admissible in evidence in favour of the accused but is admissible against him as evidential of a fact relative to the prosecution story. [P 439 C 1]

Hasan Jan—for Appellant.

H. L. Nandkeolyar—for the Crown.

Facts.—This was an appeal made by a man named Golam Mohammad. He was tried by the Judicial Commissioner of Chota Nagpur together with another man, upon a charge of having committed dacoity, an offence punishable under the provisions of S. 396 of the Indian Penal Code (dacoity with murder). The appellant and the other man were both found guilty and sentenced to transportation for life. The Judicial Commissioner, who presided at the trial, was assisted by four assessors, all of whom considered that the appellant was guilty.

Bucknill, J.—[His Lordship after setting out facts as stated above, proceeded :—]

Now there is, in this appeal, only one short, but by no means simple, point. It is unnecessary to set out the facts in this case at any length as they are not needed for the purposes of explaining the single argument which has been addressed to us by the learned Vakil who appears for the appellant. It is sufficient to say that on the night of the 21st March last there was a dacoity at the house of one Chethu Ahir ; Chethu was terribly beaten and was killed : his skull was smashed and he had many other injuries.

Now the appellant only purported to be recognized by one witness for the prosecution. This person was one Palu who was the son of the deceased man. Palu, who was himself very roughly handled—he was stabbed in the buttock and covered with bruises—and although the dacoits were closely muffled up in *galmochas*, claims to have recognized some of the dacoits ; at any rate he picked out the appellant at an identification parade : he did not know his name.

This was the only direct evidence given by the prosecution against the appellant : and had the matter rested there I think it is certain, or, at any rate, very probable, that the Judicial Commissioner would have hesitated to convict him. It is often and wisely, not thought safe to convict a person upon his identification by one individual under circumstances of strain and terror accompanying violent crime. But —and this is the crux of the present case —the appellant, after he had been apprehended and whilst the police enquiry was in progress, went before a Magistrate and made a statement which was recorded under the provisions of S. 164 of the Criminal Procedure Code.

The Magistrate, I imagine, thought he was going to receive a confession and in fact recorded it as such : and, I gather, thought it was in fact some form of confession. The Judicial Commissioner designates it as : "A statement of the nature of a confession".

There is no doubt, however, to my mind that it was not, in terms, a confession but it admitted the presence of the appellant at the occurrence. I need not set the appellant's statement out at length but its tenour is equite unequivocal. It is simply to the effect that a person called "Ganausi Khan" asked the appellant one afternoon to accompany him in order to try and help him to find and catch one of his (Ganausi Khan's) labourers who had run away. The appellant acquiesced and went with Ganausi Khan to Ganausi Khan's house. They reached there about 7 p. m. At Ganausi Khan's house were some other men and after having had some food they and Ganausi Khan and the appellant went off in search of the absconding labourer. Some more men were picked up and eventually they came to the village where the dacoity took place. When close to the village Ganausi Khan for the first time disclosed to the appellant that the objective of the party was really dacoity. The appellant refused to participate in it but Ganausi Khan threatened to kill the appellant if he tried to run away. He was thus forced to remain a fearful spectator of what took place : he took no part in the affair but watched under duress : he saw the whole terrible business and the unfortunate Chethu murdered : the appellant was ten or fifteen paces away. He emphasized his own innocence. I think it is obvious that the story of duress makes his statement one in the main essential of exculpatory character.

The Judicial Commissioner has admitted this statement in evidence and has used it against the appellant as corrobora-

tive of Palu's identification of the appellant. Palu says the appellant actually slapped him.

At the trial the appellant retracted his statement and said that he was tutored by the police to make it ; but I see no reason to think that that was the case : nor did the Judicial Commissioner. The Magistrate who took the statement was examined. The admission of this statement was objected to. The Judicial Commissioner was not very clear how he admitted the statement : he seems to have thought it was a sort of confession and therefore admissible : if it was a confession it certainly would have been admissible. It certainly is admissible if it is of a confessional character. Its value, of course, is, as against the appellant, to show that he was in the company of the dacoits at the occurrence. The Judicial Commissioner adds that if it is not admissible under S. 164 (I presume he means as a sort of confession) " the statement could be proved and admitted under the ordinary law just like any other fact." I am not quite sure what the learned Judicial Commissioner here means ; but I suppose that he contemplates that what an accused person says to a Magistrate would be admissible if the Magistrate gives evidence of the statement. Although we have had little definite authority placed before us in this case, it would seem doubtful whether, if this is what the learned Judicial Commissioner intended to convey, his view is altogether correct. In the case of *Legal Rembrancer* v. *Lalit Mohan Singh Roy* (1) it would seem to have been decided somewhat contrary to, at any rate, what may be a part of the learned Judicial Commissioner's view. In that case an accused person came before a Magistrate and made a statement. The Magistrate finding that the statement was not a confession, did not apparently, take it down in writing or, if he did so, destroyed it. However he was called as a witness at the trial and gave evidence as to what the accused person had said to him. The Calcutta High Court held that this oral evidence was not admissible ; that S. 164 of the Criminal Procedure Code contemplated not only the taking of statements in the nature of a confession but also any kind of statements whether made by an accused person or by anybody else : that it was not competent for a Magistrate who was asked to take a statement under the provisions of S. 164 to give oral evidence of any such statement made to him by an accused person (or apparently by anybody else) if he had not in fact complied with the provisions of the section by taking down the statement in writing and in the prescribed form. The decision in that case does not really deal directly with the question of the admissibility at a trial of statements made to a Magistrate in accordance with the provisions of S. 164 by an accused person or by anybody else ; although, inferentially, one might perhaps gather that their Lordships contemplated that such statements of whatever nature they might be, would be admissible : though this inference is doubtful. However, it is, now, at any rate, strenuously argued before us by the learned vakil who appeared for the appellant, that this statement which was made by the appellant to the Magistrate under the provisions of S. 164 should not have been admitted by the trial Court and used as against the appellant to corroborate the evidence of the witness who says that he identified the appellant at the time of the dacoity. Of course, if one examines S. 164 it will be seen at once that the section contemplates more than one kind of statement ; it distinctly refers to confessions and portions of the section deal specifically with confessions. But it also contemplates other statements. At one time it would seem to have been the view of the Calcutta High Court that S. 164 only contemplated the confessions of an accused person and the statements made by persons who were or who were designed to be witnesses [vide *Queen-Empress* v. *Bhairab Chandra Chakravarty* (2)] ; but from this view express dissent was taken in the case quoted above [*Legal Rembrancer* v. *Lalit Mohan Singh Roy* (1)].

It will be observed that S. 164 does not say what statements or confessions made under its provisions are admissible in evidence at a trial. I take it that what statements or confessions made under S. 164 are admissible at a trial must depend upon the law of evidence itself. It would, I think, be a mistake to suggest that any statement of confession made under S. 164 is, simply because it may have been made under the provisions of that section, admissible at a trial for any or

(1) 1922 Cal. 342=49 Cal. 167.

(2) [1897-98] 2 C. W. N. 702.

every purpose. As for confessions by an accused person there is ample provision for their admissibility at a trial for certain purposes : his confession is as capable, of course, of being used against an accused. But what is to be considered here is a different proposition, If an accused person makes a statement before a Magistrate which is not in fact a confession but is wholly of an exculpatory character, can that statement made by him before the Magistrate under the provisions of S. 164 be admitted at his trial as evidence in his favour. We have had no clear authority quoted to us on this point, In this country, however, it seems to me that the law contemplates that an accused person can open his mouth to produce matter which can be used at his trial only in a few ways ; one is a confession properly recorded ; another is when he is examined and makes his statement orally or files a written statement after the close of the case for the prosecution ; and his last, if the circumstance occurs, before the final trial Judge. If he goes before the Magistrate and under the provisions of S. 164 makes a statement to him which is of an absolutely exculpatory character I do not think that that statement could be used at his trial as evidence in his favour ; for if this course was adopted, it would mean that the accused is competent to give evidence on his own behalf. He has the opportunity of saying at his commitment and at his trial what he wishes to say. It is true that such statements have been utilized by Judges on the evidence of Magistrates who took the statement that the accused had at perhaps an early stage, given his explanation of what had taken place. But, although I have certainly seen exculpatory statements thus used, I am not sure whether such can properly be used for such a purpose, and I doubt it very much. Now if a statement of this kind could not be used even in the appellant's favour, could it then be used against him in any way ? It must be borne in mind that the statement here is not a confession but of an exculpatory character and does not intrinsically contain anything definitely evidential or inferential of guilt. At the utmost it is an admission that he was present, unwillingly, at the scene of the occurrence. In the case of *Queen-Empress* v. *Jagrup* (3) it was held by Straight, J., that a statement made by a person to the effect that he had witnessed and protested against the perpetration of a crime of which he was accused was not a confession but was admissible in evidence against him. In that case the statement was apparently made not under S. 164 but whilst he was in the custody of the police ; and, although it is not quite clear, apparently to the police. The report of the case is not a very lucid one but it would seem that the learned Judge was considering the point which was argued before him that the statement was a confession made to the police whilst the accused was in custody and that therefore it was inadmissible. The learned Judge, however, held that it was not a confession and therefore presumably considered that it was admissible. If the learned Judge was right in this view it would certainly seem that a statement made before a Magistrate under the provisions of S. 164 by a person in custody who is an accused person (such statement not being a confession but merely an admission of a relevant fact from which intrinsically no inference of guilt against the accused could be drawn) can *a fortiori* be utilized by the prosecution in evidence to prove that relevant fact ; and if that relevant fact can be coupled up with other evidence for the prosecution, it can be used as against the accused person who made the statement. Although I have not been able to ascertain that Straight, J.'s decision has been regularly followed I can see no reason whatever why a statement such as has been made in this case now before us could not be given in evidence by the prosecution and utilized as against the accused as evidential of a fact relative to the prosecution story : namely, that the accused who made the statement was in fact at the scene of the dacoity and actually saw it take place. I have therefore, after careful consideration, come to the conclusion that the accused's statement in this case is admissible. The only remaining question is, assuming that this statement may be taken in evidence, of what value it really is to the prosecution as being indicative of the guilt of the appellant. In itself and by itself it is not indicative in any way of his guilt ; it simply proves that he was present at and saw what took place ; he himself admits this. But can it be said that his admission that he was there so corroborates his indentification by the witness Palu that it

(3) [1885] 7 All. 646=(1885) A.W.N. 131

must be taken that what this single witness states with regard to the active participation by the accused in the dacoity can be sufficiently relied upon in such measure as to justify the appellant's conviction ? The witness does not suggest that the appellant had done more than slap him ; what he says is :

" Both these accused (identifies them) were amongst the dacoits : I do not know their names. One pressed on my neck and other slapped me. That bearded one (the appellant here) slapped me."

One must not forget that whilst it is quite possible that the witness may have seen the appellant hanging about (as he himself says he was) on the outskirts of the gang, the attribution to him of any certain specific act is a very easy matter to allege and very difficult to refute ; in a time of terror and confusion, when he had been stabbed on the back with a spear and beaten, one can well understand that a witness might be greatly inclined to attribute some overt act to any individual whom he thought he recognized as being in the company of the gang of robbers. I have, however, some hesitation in coming to the conclusion that the appellant's admission that he was, although under duress, at the occurrence, can be regarded as sufficiently corroborative of the single witness's statement that he (the appellant) took any overt part in the proceeding, to justify his conviction. On the other hand I am far from saying that, in certain circumstances, such an admission by an accused person might not be sufficient, when coupled with other evidence, to secure his conviction. In this case, the evidence of indentification of the appellant admittedly rests primarily upon the evidence of the single witness Palu ; the evidence that the appellant took any active part is not very convincing nor to my mind effective. If Palu's evidence had been, for example, that the appellant had been engaged in struggling with him or had been in such a special position with regard to him that he had particular good opportunities for observing his physiognomy, the case against the appellant would undoubtedly have been somewhat stronger ; as it is, the evidence given by the witness that the appellant committed an overt act is not of such a specific character but only of, what I may call, a somewhat, though not altogether, generalized nature.

Taking everything into consideration, I am of opinion that, although the case is one of great suspicion against the appellant, I hardly think that the evidence is sufficient to justify his conviction. His appeal must therefore be allowed and the appellant must be set at liberty.

Ross, J.—I agree.

Appeal allowed.

1925 PATNA 540

BUCKNILL AND ROSS, JJ.

Madaran Kassab—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Rev. No. 558 of 1924, Decided on 18th December, 1924, from an order of the Sub-Div. Mag. Dhanbad, D/- 30th June, 1924.

Bihar and Orissa Municipal Act, (7 of 1922), S-259—Renewal of license refusel—No reason assigned—Refusal is not illegal.

The provisions of sub-S. (2) of S. 259 of the Municipal Act themselves supply the only reason for which refusals of certain licenses can be made. But the omission of the commissioners to give the only reason which they could give for such refusal cannot be regarded as making their refusal illegal. [P541, C 2]

The Municipality has the right to declare that within the whole area of the municipality, certain offensive or dangerous trades cannot be carried on without a license. 17 *C. W. N.* 531 *Foll.* [P 542, C 1]

Azizul Fakhruddin—for Petitioner.

H. L. Nandkeolyar—for the Crown.

Bucknill, J.—This was an application in criminal revisional jurisdiction. It was made by one Madaran Kassab, who is a butcher by trade carrying on his business within the municipal limits of Dhanbad. The applicant was charged with having carried on his trade without license—an offence punishable under the provisions of S. 263 of the Bihar and Orissa Municipal Act, 1922. He was convicted and sentenced to pay a fine of Rs. 25 on each charge (of which there were two) and, in default of payment of such fines, to one month's rigorous imprisonment.

The town of Dhanbad is controlled by a municipality which is subject to the Act which I have mentioned above. This Act is a very lengthy one and amongst its provisions is S. 259 which deals with the power given to the commissioners of a municipality to prohibit, within such limits as they may think fit, the carrying on of certain offensive or dangerous

trades without a license. Amongst these trades is the trade which the applicant carries on, that is to say, not the trade of a butcher, but the skinning or disembowelling of animals and the storing of hides, horns or skins. He (the applicant) himself states that his license, which he used to possess, was for storing hides, horns and skins of the slaughtered animals. The Dhanbad municipality appears to have been incorporated in 1919 and the applicant seems to have, since that year, held a license from the municipality without demur. But on the 24th of March of this year a renewal of his license was refused. It does not appear that any definite reason was given by the commissioners for refusing the renewal; but the only good ground which the commissioners could have had for refusing the renewal is contained in sub-Section (2) of S. 259 of the Bihar and Orissa Municipal Act, 1922. This sub-section reads thus:

"A license for any of the purposes mentioned in sub-section (1) shall not be withheld unless the commissioners have reason to believe that the business which it is intended to establish or maintain would be offensive or dangerous to persons residing in or frequenting the immediate neighbourhood."

Now if the commissioners had, in refusing to renew the applicant's license, definitely said that it was an offensive trade (as it undoubtedly is) and that it was offensive to persons residing in or frequenting the immediate neighbourhood (of which there seems in this case adequate evidence), there would, I think, have been no possibility of this application having been contemplated. The applicant, after his license had been refused, continued to carry on his business. A complaint was made and sanction was given by the Vice-Chairman of the municipality for his prosecution. He was accordingly prosecuted and convicted as I have indicated before and his appeal from the order of the magistrate, by whom he was convicted, to the Additional District Magistrate was rejected.

Now two points of a preliminary nature may here perhaps be mentioned. It was suggested that there was some irregularity in the sanction which had been accorded by the Vice-Chairman for the prosecution of the applicant in that it was not definitely stated by the Vice-Chairman as to of what offences the applicant was alleged to be guilty. I do not think there is any substance in this point in view of the fact that the whole circumstances are set out in great detail in the report, which was made as to the applicant's doings, to the Vice-Chairman upon which the Vice-Chairman sanctioned the prosecution.

The second point is that as the refusal of the applicant's license was unaccompanied by any reason, such refusal was illegal. I need hardly say that it would of course have been much more courteous if the municipality had given its only reason which it could give for the refusal of the license, namely, that it was a trade of a character offensive, to persons residing in the neighbourhood. But, in pointing out that the provisions of sub-S. (2) of S. 259 of the Municipal Act themselves supply the only reason for which refusals of these licenses can be made, I think that it must be taken that the commissioners had a right to refuse the renewal of the license and that their omission to give the only reason which they could give for such refusal cannot be regarded as making their refusal illegal.

Now this case has been somewhat complicated and confused by several issues which have perhaps not really very much to do with the prosecution of this individual. In the first place it has been said that the Act contemplates that a municipality should establish its own slaughter-house for animals and that unless and until it does so it cannot prohibit the slaughter of animals within the municipality itself. That would appear to be true enough but it will be observed that the mere slaughter of animals is not a trade which is in itself one falling within the category of offensive and dangerous trades within the meaning of S. 259 of the Municipal Act, 1922. The added fact that in this case, it is admitted, that the Dhanbad municipality has not established any slaughter-house under its own control does not, to my mind affect the position here; for although the applicant is a butcher yet skinning or disembowelling of animals is undoubtedly a necessary concomitant to the action of killing whilst his license was not only for those purposes but also for the storage of hides, horns and skins. The position, therefore, of the municipality as regards

the duties of that municipality in the provision of slaughter-houses, which is dealt with in S. 279 of the Act, is not material to the matter which is now before this Court's consideration.

Now the second circumstance which has been introduced here ralates to the attitude of the municipality with regard to, not the storage of hides and skins or even the slaughter of animals generally, but with regard to the killing of cattle. It will be observed that under S. 259 of the Act it is contemplated that within the limits of the municipality (the commissioners shall fix such local limits as they think fit) no place can be used for one of these offensive or dangerous trades without a license being obtained ; and it is noticeable that on the 30th of July 1923, a resolution was duly passed by the Dhanbad municipality that the whole of the municipality should be fixed as the local limits contemplated under S. 259 of the Act within which no trade of the class mentioned in that section could be carried on without any license. That this in itself is permissible there seems to be no doubt. It must be patent to any one that there may be trades which it would be highly undesirable to be allowed to be carried on within the municipality at all ; and it may well be that such businesses as tanning or a slaughter-house would be much better situated outside the limits of a town than within its limits. It seems to have been decided in the case of *Syed Mokram Ali* v. *The Cuttack Municipality* (1) that a municipality has the right to declare the local limits contemplated under such circumstances as are given in S. 259 of the Act to be the whole area of the municipality.

Now the applicant't application for renewal of his license came up before the commissioners on the 24th of March 1924. On the same day the Vice-Chairman appears to have moved a resolution at the meeting to the following effect :

" In view of the fact that our country is suffering a great loss and innumerable miseries by the indiscriminate slaughter of cows and other animals of the bovine species, I propose that the existing slaughter-houses should be abolished and no license should be granted for that purpose in future."

(1) [1913] 17 C.W.N. 531=18 I.C. 651=14 Cr. L.J. 91

The commissioners appear to have passed this resolution ; and, after that resolution had been passed, the applicant's petition for the renewal of his license was rejected ; it is said by a majority of one vote.

Now it has been argued strenuously that the real reason why the applicant was refused a renewal of his license was because of this resolution and, indeed, it may be the fact that that was so. The refusal of a license, which he had hitherto received for some years without demur, no doubt is a hardship to the applicant who, I take it, is a Muhammadan butcher and admittedly kills cattle such as cows and oxen : doubtless he kills other animals as well, such as goats and sheep. It is difficult, however, to see how, if the commissioners had a good reason for refusing the applicant's license, the fact that what might have moved in their minds was not in itself a good reason could be held to render their refusal illegal. Beyond the passage of the resolution there was nothing at this stage when the refusal was made to show whether it was the sentimental consideration contained in that resolution which operated on their minds or, whether, as has been suggested, there was basically an idea that the applicant was carrying on a trade which was offensive within the meaning of sub-sec. (2) of S. 259 of the Municipal Act.

Now it is contended by the learned Vakil who has appeared for the applicant that this is a case of very great hardship. I am not in a position to say whether it is one of hardship or not, I think that the conviction is legal and, I think, it must be upheld. I should further point out that in so saying I have taken the occasion to look into the evidence and there I find considerable testimony quite ample to show that the trade cr business which the applicant was carrying on was in fact an offensive one within the meaning of sub-sec. (2) of S. 259 of the Act.

Now it is asked what remedy has the applicant and have others who may be situated in a similar position in this or any other municipalities ; for it is pointed out, that although there may be possibly, a power in municipalities to prohibit, by the refusal of these licenses, the killing of cattle throughout the municipal area, such procedure, based as it may be upon religious or sentimental grounds, is not such as was ever contemplated under any

of the provisions of the Bihar and Orissa Municipal Act. I think, however, that such questions have very little to do with the matter. We have to construe the Act as we find it. If there is power given by the Act to the municipalities to do certain things, obviously they are in a position to do them unless the Act is changed or unless the commissioners bring themselves within the provisions of certain sections to which I now propose to draw attention.

It may be said at once that the applicant has endeavoured to draw public attention to his position. He has applied in the first place to the Additional Deputy Commissioner asking that he should take action under S. 383 of the Bihar and Orissa Municipal Act This section gives the District Magistrate power to suspend the execution of any order made by the Commissioners of any municipality where he thinks that its effect might be to cause a serious breach of the peace or to cause serious injury to the public or to any class or body of persons. The District Magistrate, however, refused to entertain the application. He, in the course of a long decision, did not think that the effect of this resolution by the municipality of Dhanbad would be likely to cause any of the results which would have justified him in taking action under the provisions of the section which the applicant has invoked. The applicant, also I understand, applied to the District Magistrate of Manbhum who also refused to take any steps in the matter.

Now it was suggested that there were other remedies. In the first place it was thought by the learned Assistant Government Advocate that the applicant might have appealed to the Board of Commissioners contemplated under the provisions of S. 373 of the Municipal Act, which can be called into being for the purpose of hearing the complaints of any person aggrieved by any prohibition, notice or order made by the commissioners under powers conferred upon them by virtue of certain provisions of the Act. Now it is curious that although in some corresponding sections of similar type to sub S. (2) of S. 259 of the Act, the Board is expressly empowered to deal with matters which are contemplated under those sections, yet for some reason (which may perhaps be a slip) sub-S. (2) of S. 259 is not included within the purview of S. 373 of the Act. It therefore appears as if the provisions of S. 373 were not perhaps available to the applicant as a means of redress.

There is, however, still a further section which gives the local Government the right to intervene in certain circumstances. These are Ss. 384 and 385 of the Act. It is conceivable that if it was thought necessary that there should be either public slaughter-houses within the confines of a municipality or, that in the alternative, the municipality should provide a slaughter-house itself within or outside the municipal limits, the provisions of S. 384 of the Act might be brought into operation. It is also possible that if it could be said that the refusal to grant licenses under the provisions of S. 259 of the Act was carried to such an extent as to constitute an excess of the use or an abuse of the use of the commissioners' powers, that the provisions of S. 385 might be brought into operation. It must be admitted that merely on such religious or sentimental grounds as are contained in the resolution of the Dhanbad municipality licenses under S. 259 of the Act could not be refused.

It is of course quite open to the applicant to draw the attention of the local Government to what he conceives is in fact a grievance and a hardship affecting not only himself but a class of respectable persons in the municipality. Whether there really is any serious hardship or not and whether any case can be made out for the interference by the local Government under the powers which it possesses seems of course a matter which depends in each case upon the evidence which can be produced to justify such a contention. All I can say in this case is that according to the decision of the Additional Deputy Commissioner of Dhanbad, dated the 7th of April, 1924, declining to interfere or to exercise any of his powers under S. 383 of the Act, it would appear that he was well satisfied with the decision to refuse this applicant's license and, indeed, was of the opinion that the general view which the municipality had taken in refusing this and other licenses for offensive trades within the confines of the municipality was a sound and sensible one. At the same time, one cannot help feeling that it is quite natural that the applicant felt somewhat aggrieved at the sudden refusal to renew a license under which he

was for some years carrying on his business.

The case is one which has been considered as a test case. I think that, in view of the somewhat equivocal manner in which the municipality appears to have acted, that is to say, in giving no reason or appearing perhaps to give a wrong reason for a right act, the penalty which has been inflicted upon the applicant is altogether too high. It was desirable that he should have taken some other course and, instead of deliberately flouting the order of the municipality and carrying on his business without a license, he might have chosen to try and obtain one of the remedies to which I have drawn attention or, possibly, have commenced some civil proceedings to enable him to obtain what he wants. In these circumstances, I think, that it is only fair that the fine in each case here should be reduced to Re. 1. I trust that the applicant will clearly understand that in thus reducing the fines I am not expressing any satisfaction at his action. I do, however, feel that there is some possible danger that resolutions of the character which have been passed (if they are made the ground for refusing licenses of this nature) are not only worthless as reasons for such refusals but in themselves are incapable of having any legal effect; and in addition might, I think, give rise not only to some hardship in certain instances but also possibly to some disturbance between those whose ideas are against the slaughter of cattle and those whose ideas are not against the slaughter of cattle.

The application, therefore, must be rejected and the convictions will stand; but the penalties will be reduced to the amounts which I have already indicated.

Ross, J.—I agree.

Application rejected.
Penalties reduced.

★ 1925 PATNA 544

MULLICK AND ROSS, JJ.

Syed Diljan Ali—Plaintiff—Appellant.

v.

Bibi Akhtari Begum—Defendant—Respondent.

Appeal No. 107 of 1924, Decided on 21st April 1925, from Original Order of the Sub. J., Bhagalpur, D/- 24th March 1924.

(*a*) *Religious Endowments Act,* (20 *of* 1863) *S.* 14—*S.* 14 *applies where object is to protect endowment—Trusts created before* 1863—*S.* 14 *applies.*

Where the object of the suit is to protect an endowment against misfeasance, breach of trust or neglect of duty, S. 14 is applicable. [P 546 C 1]

S. 14 of the Act is general and it applies to endowments created both before and after 1863. [P 546 C 1]

(*b*) *Civil P. C., S.* 92—*Relief under Rel Endowments Act, S.* 14 *differs from S.* 92 *Civil P. C.,—Scheme can be made only under S.* 92, *Civil P. C.*

The reliefs granted under S. 14 of Act 20 of 1863 are slightly different from those accorded under S. 92 of the Civil P. C. The power of appointing a new trustee and of making a scheme for the administration of the property is restricted to S. 92 only. [P 546 C 2]

(*c*) *Civil P. C., S.* 92—*Reliefs mentioned in section can only be enforced by procedure prescribed in section.*

S. 92 is mandatory and the reliefs specified in the section can only be enforced now by resort to the procedure of the section. The cases which before 1908 held to the contrary and decided that the founder of an endowment or his heirs had the right to sue the trustees for the due performance of the trust and to remove them and to appoint new trustees without invoking the aid of S. 92 are no longer good law. [P 547 C 1]

(*d*) *Civil P. C., S.* 92—*Suit between trustee and non-trustee for recovery of trust property and for submission of accounts—Preliminary formalities are unnecessary.*

A suit by an admitted trustee against one who is not a trustee for the recovery of trust property and submission of accounts is cognisable by the ordinary Civil Court without any preliminary formalities mentioned in S. 92. [P 547 C 1]

★ (*e*) *Civil P. C., S.* 92—*Suit for establishing right to office of* Mutwalli—*S.* 92 *does not apply.*

A suit for an establishment of the right to act as *mutwalli* is cognisable by the ordinary Civil Court without any preliminary formalities. But it is otherwise where the appointment of a trustee has been recognised and it is sought to remove him for a breach of trust. [P 547 C 2]

Muhammad Hasan Jan—for Appellant.

Sultan Ahmed, S. M. Naim, N. C. Roy, Khursed Husain and *Syed Ali Khan*—for Respondent.

Mullick, J.—The Subordinate Judge of Bhagalpur having on the 24th March 1924 returned the plaintiff's plaint dated the 30th April 1923 for presentation to the proper Court, this appeal is preferred by the plaintiff under R.1, Cl. (*a*) of O. 43 of the Civil Procedure Code. The litigation arises out of a *wakfnamah* executed by Mir Imam Bux in the year 1874, who dedicated certain immovable property for the maintenance of a certain *masjid* and *khankah* at Bhagalpur and appointed the Plaintiff's father Syed

Medhi Hussain to be the *mutwalli* thereof. The Plaintiff's case is that Mehdi Hussain was succeeded as *mutwalli* by his widow Bibi Umda Begum who upon her death left only one daughter Bibi Muhammadi Begum who was of unsound mind. The Defendant is one of the surviving daughters of Muhammadi Begum and upon her mother's death she took possession of the trust properties on the allegation that she was entitled to succeed thereto as *mutwalli*. The Plaintiff, however, denied her claim alleging that he was entitled to be the *mutwalli* as the heir of Mir Imam Bux upon the failure of the line of Syed Mehdi Hussain and on the 13th March 1914 he instituted a suit in the Court of the Subordinate Judge of Bhagalpur for a declaration of his title to the *mutwalliship* and for recovery of possession. The suit was dismissed in the trial Court but was decreed in the High Court on the 5th March 1919. The Defendant Bibi Akhtari Begum thereupon appealed to the Privy Council who on the 30th December 1922 set aside the judgment of the High Court and restored that of the Subordinate Judge. Thereupon application having been made on the 20th April 1923 to execute the decree of the Privy Council the Plaintiff in order to avoid making restitution of the trust properties of which he had taken possession since the High Court decree bethought himself of filing on the 30th April 1923 the plaint out of which this appeal arises. In this plaint he alleges that under the powers reserved to the founder of his heirs by the *wakfnamah* he on the 28th February 1923 has dismissed the Defendant from the post of *mutwalli* on the ground of misappropriation, slackness and negligence, and he asks for the following reliefs :—

"(*a*) That the Court may be pleased to decide that the Plaintiff being the heir of the donor is entitled to dismiss the Defendant from the post of *mutwalli* on the ground of his misappropriation, slackness and negligence (*Kheanat, Susti, Gaflat*) under the terms of the deed of endowment aforesaid.

"(*b*) That the Court may be pleased to decide that the Defendant has committed acts mentioned in paras. 23 to 32 of this plaint and was and is liable to dismissal from the post of *mutwalli* under the terms of the deed of endowment aforesaid.

"(*c*) That on adjudication of above matters the Court may be pleased to decree in favour of the Plaintiff declaring that the Defendant has been dismissed from the post of *mutwalli* of the mosque and *khankah* situated at *Takiya* Shah Mohammad Saidque Jafri and of the endowed properties appertaining thereto."

An application was made after the institution of the suit for an interlocutory order for an injunction to restrain the execution of the Privy Council decree, or in the alternative, for the appointment of a Receiver Both prayers were rejected and possession was duly delivered.

Thereafter objection having been taken to the maintainability of the suit, the Subordinate Judge on the 24th March 1924 held that he had no jurisdiction to entertain the plaint on the ground that it was in effect an application for the removal of a *mutwalli* for misfeasance or breach of trust or neglect of duty and that by reason of S. 14 of the Religious Endowments Act (XX of 1863) the proper Court for presentation was the principal Civil Court of the District.

On behalf of the Appellant it is contended that his suit is neither under S. 14 of the Religious Endowments Act nor under S. 92 of the Civil Procedure Code but one for the enforcement of a civil right cognisable by a Civil Court under the general law as declared by S. 9 of the Civil Procedure Code.

The first question therefore is, what is the meaning of the plaint and the reliefs claimed therein. As it stands the plaint does not expressly ask for any relief of a civil nature or for the adjudication of any contest as to a right of property or an office. It is not understood why any Court should decide whether the Plaintiff is entitled to dismiss the Defendant or declare that the Defendant was and is liable to dismissal from the post of the *mutwalli* or that she has in fact been dismissed. If the *wakfnamah* creates a right in the Plaintiff to dismiss the Defendant the Plaintiff is at liberty to exercise that right without the intervention of the Court and there is no reason why the Court should be asked to declare that he has in fact exercised that right. If the Defendant accepts the dismissal, there is nothing further to be done. If she does not, then it is open to the Plaintiff to ask for the administration of the trust and for her removal and the suit

would then be one cognizable under S. 9 of the Civil Procedure Code by the Civil Court.

The declarations asked for by the Plaintiff cannot even be construed as coming within the purview of S. 42 of the Specific Relief Act. If the Plaintiff had desired a declaration as to some legal character, which had been denied, and if consequential relief had not been possible, the Subordinate Judge would have had jurisdiction to take cognizance; but here there is no such case.

The fact is that in essence the plaint is one for the removal of the trustee and for the administration of the trust. When he asks the Court to declare that the Defendant has been duly dismissed he means either, that the Court is required to remove her in the event of refusal to vacate and otherwise arrange for the administration of the trust. It is inconceivable that a person of the plaintiff's experience in litigation would have filed a plaint which does not ask for any relief of a Civil nature, and in my opinion, the Subordinate Judge was right in holding that the object of the suit being to protect the endowment against misfeasance, breach of trust or neglect of duty, S. 14 of the Religious Endowments Act is applicable.

But it is said that this section cannot apply because the Act has no aqplication to trusts established after 1863. It is said that the authorities, which hold that S. 14 of the Act is general and that it applied to endowments created both before and after 1863, were *obiter dicta*, but it is clear that this contention cannot be accepted. See *Dhurrum Singh* v. *Kissen Singh* (1), *Fakuruddin Sahib* v. *Ackeni Sahib* (2), *Sheoratan Kunwari* v. *Ram Pargash* (3) and *Sivayya* v. *Rami Reddi* (4). By Reg. 19 of 1810 all public endowments in this province were declared to be under the control and superintendence of the Board of Revenue which was entitled to take charge of their properties and to administer the same, although it sometimes did not do so. In respect of some of the endowments the Local Government had the power to nominate or confirm the manager or superintendent. In others the Local Government did not appoint but had powers of supervision. Act XX of 1863 made rules for the management of both these classes. Reg. 19 if not repealed would have been applicable to endowments created after 1863 also and it is reasonable to suppose therefore that Act XX of 1863, which repealed it, was intended to have the same scope, and that while some parts of it provided for endowments over which the Local Government were then exercising control,, S. 14 was intended to have wider scope and to apply to endowments coming into existence in the future.

It is to be noticed that the reliefs granted under S. 14 of Act of XX 1863 are slightly different from those accorded under S. 92 of the Civil Procedure Code. The power of appointing a new trustee and of making a scheme for the administration of the property is restricted to S. 92 only and in the present case if the object of the Plaintiff is to provide for the administration of the estate after the removal of the Defendant, S. 92 would appear to be the proper machinery of securing it. The Respondent therefore contends that the Plaintiff should first obtain the sanction of the Advocate-General and join some other person with him as Plaintiff as required by the provisions of S. 92. I agree that this would have been the proper course, but if the Plaintiff chooses to adopt the procedure of S. 14 of Act XX of 1863 rather than S. 92 of the Civil Procedure Code, the risk is his and the Court cannot take any objection. The Subordinate Judge appears to have thought that as the Plaintiff was suing alone and had not obtained the sanction of the Advocate-General or other officer empowered to give sanction under S. 92, C. P. C., it was his intention to cast the suit as one under S. 14. Probably the learned Judge was right but even if he had held the suit to be one under S. 92, C. P. C., then also would he have been compelled to return the plaint.

But the Appellant's reply is that he has a right to sue independently of the Religious Endowments Act and S. 92 of the Civil Procedure Code. He contends that so far as Act 20 is concerned it is cumulative and not restrictive and that so far as S. 92 of the Civil Procedure Code is concerned it deals only with suits brought in a representative capacity, and

(1) [1881] 7 Cal 767=9 C. L. R. 410.
(2) [1878] 2 Mad. 197.
(3) [1896] 18 All. 227=(1896) A. W. N. 37.
(4) [1899] 22 Mad. 223.

that it does not affect a suit to enforce a right conferred by the deed of endowment itself. He relies upon cases decided previously to 1908 and in particular upon *Budree Das Mukim* v. *Chooni Lal Johurry* (5) in which it has been held that the founder of an endowment or his heirs have the right to sue the trustees for the due performance of the trust and to remove them and to appoint new trustees without invoking the aid of S. 92. These cases, however, are no longer law and the second clause of S. 92 makes it clear that the section is mandatory and the reliefs specified in the section can only be enforced now by resort to the procedure of the section. Neither the founder nor his heirs are now entitled to sue for the removal of the trustee and the appointment of a new trustee if he alleges a breach of trust or requires directions for the administration of it. The jurisdiction of the High Court over suits relating to the management of trust property has been derived from the Supreme Court and was in the first instance independent of the Civil Procedure Code. As for the Mofussil Courts, their jurisdiction appears to have been based upon justice, equity and good conscience. But that jurisdiction in respect of both sets of tribunals is now affirmed and controlled by Act XX of 1863 and S. 92 of the Civil Procedure Code. The fact is that the trustee, though by a legal fiction, is vested with the legal ownership of the property the legislature will not allow the Civil Court to divest him unless and until certain preliminaries have been strictly observed. In one sense a suit for the removal of a trustee may not strictly speaking be a suit of a civil nature, and perhaps for that reason the legislature has removed all doubts by enacting the statutes above referred to and has declared that no such suit can now be instituted except under the special jurisdiction conferred thereby.

It is contended that *Venku Chettiar* v. *Darasami Chettiar* (6) is authority to the contrary. But that case was one between an admitted trustee and one who was not a trustee for the recovery of trust property and submission of accounts. Such a suit would obviously be cognisable by the ordinary Civil Court without any preliminary formalities. So would a suit for the establishment of the right to act as *mutwalli*. But it is otherwise where the appointment of a trustee has been recognised and it is sought to remove him for breach of trust. But says the Appellant "I may not wish to sue for breach of trust, and I may have the right to dismiss the *mutwalli* for mere misconduct not amounting to a breach of trust. Why may I not enforce my right to remove him?" The answer is that we are not concerned now to discuss a hypothetical case and whether in certain events a declaratory suit will lie. What we have to decide here is whether the plaint as it stands is one which can be entertained by the Subordinate Judge. I have no doubt that the answer is in the negative. The Subordinate Judge has held the plaint to be an application within the purview of S. 14 of Act XX of 1863. It is for consideration whether if and when the application has been admitted, the principal Civil Court will be able to give the relief which the Plaintiff seeks. If the Court is not competent to appoint or cause to be appointed a new trustee, it will probably not remove the Defendant and will probably direct the Appellant to sue under S. 92 of the Civil Procedure Code. Therefore it is for consideration whether the Plaintiff will be better advised to adopt the procedure under S. 92, C. P. C., instead of that under S. 14 of Act XX of 1863. However, it is not for us to advise the Plaintiff as to how he should proceed. All that we can do is to affirm the Subordinate Judge's order and to dismiss the appeal with costs.

Ross, J.—I agree.

Appeal dismissed.

(5) [1906] 33 Cal. 789=10 C. W. N. 581.
(6) [1921] 14 L. W. 38=62 I. C. 761=(1921) M. W. N. 439.

1925 PATNA 547

ROSS AND KULWANT SAHAY, JJ.

Lala Bambahadur Lal and others—Defendants—Appellants.

v.

Mt. Gungra Kuer—Plaintiff — Respondent.

Second Appeal No. 897 of 1922, Decided on 22nd May 1925, from the decision of the Sub. J., Saran, D/- 7th August 1922.

B. T. Act, S. 22 (2)—Co-sharer purchasing occupancy holding and subsequently ceasing to be a co-sharer—He cannot retain possession of the holding afterwards.

The status of a co-sharer landlord purchasing an occupancy holding is not the status of a raiyat but a peculiar status created by S. 22 (2). His right is that of a proprietor entitled to retain possession of the land subject to payment to his co-proprietors their shares of the rent. It is not the status of a raiyat inasmuch as if he sub-lets to a third person, such third person is deemed to be a raiyat in respect of the land and ordinarily a raiyat sub-letting to a third person does not confer a raiyati but an under-raiyati interest. It he ceases to be co-sharer and his proprietary interest is lost he has no right to retain possession of the land and it would pass on to the person who would acquire the interest of at co-sharer. 2 *P. L. T.* 163 and 1922 *Patna* 193 *f. to.* [P 549 C 1]

Murari Prasad—for Appellants.

Har Narayan—for Respondents.

Facts.—The plaintiff was the proprietor of 8 annas of Mauza Chandura bearing Tauzi No. 435, and Hanuman Sahay and Lal Narayan were the proprietors of the remaining 8 annas share. Hanuman Sahay and Lal Narayan instituted a suit for rent against two raiyats Aklu and Juman who had a holding of 1 *bigha* 7 *kathas*, 10 *dhurs* within this Tauzi. They obtained a decree and sold the holding in execution and purchased it themselves in 1909. Delivery of possession was given to them on the 21st of June, 1909. The defendant No. 1 who is one of the appellants in this case—the other appellants being his co-sharers—obtained a settlement of the holding from Hanuman Sahay and Lal Narayan. The plaintiff brought a suit for her share of the rent in the year 1911. This suit was against the original tenants Aklu and Juman, and Hanuman Sahay and Lal Narayan were also made parties to the suit. A decree was obtained by the plaintiff, and in execution thereof the holding was again sold and purchased by the plaintiff in November 1913 and she alleges to have taken delivery of possession on the 17th of May, 1914. The Record-of-Rights of the village in dispute was finally published in 1918 and in the *Khatian* the defendants were entered as being in possession of the land in dispute, but as trespassers. The plaintiff brought the present suit for a declaration of her title as purchaser and for a declaration that the defendants had no right or interest in the land in dispute and that the entry in the Record-of-Rights as regards the possession of the defendants was wrong. Subsequently the plaintiff's proprietary interest was sold and purchased by one Bikramjit Misser In the plaint as originally framed the plaintiff wanted a declaration of her title as proprietor; but at the hearing she tried to amend the plaint by claiming a raiyati interest in respect of the land in dispute, her proprietary interest as already said, having been sold and purchased by Bikramajit Misser. The learned Munsif found that the status of the plaintiff in respect of the land in dispute was that of a *bakasht* holder and that she was not the raiyat of the land and that as her proprietary interest had been sold she had had no interest subsisting in the land in dispute. He accordingly, dismissed the suit. On appeal by the plaintiff the learned Subordinate Judge set aside the decree of the Munsif and held that the status of the plaintiff was that of a raiyat and that the sale of her proprietary interest did not affect her raiyati interest. He accordingly made a declaration in favour of the plaintiff as regards her title to the land as a raiyat and directed that she be put in possession thereof. Hence this second appeal by defendants.

Judgment.—[After stating facts as set out above the judgment proceeded:—]

The principal point for consideration in the present case is as to what was the status of the plaintiff in respect of the land in dispute. This depends on a construction of S. 22 (2) of the Bengal Tenancy Act. The learned Subordinate Judge has relied upon the decision of this Court in *Ram Prasad* v. *Munshi Gopal Chand* (1) *Nand Kishore Singh* v. *Chander Dip Singh* (2) *Emamuddin* v. *Saiyid Rashidul Haq* (3). On the other hand reliance has been placed on behalf on the appellants upon the cases of the *Midnapur Zamindari Company Limited* v. *Naresh Narayan Rai* (4) *Roshan Ali* v. *Chandra Mohan Das* (5) *Stonewigg* v. *Dwarka Singh* (6) *Basudeo Narayan* v.

(1) [1921] 2 Pat. L. T. 163=58 I. C. 955.
(2) 1922 Patna 19 =3 P. L. T. 13.
(3 [1919] 4 P. L. J. 510=53 I. C. 110.
(4) 1924 P. C. 144=51 Cal. 631=51 I. A. 293=47 M. L. J. 23=26 Bom. L. R. 651=35 M. L. T. 169=23 A.L.J. 76=5 L. R. P. C. 137=29 C. W. N. 34=20 M. L. W. 770=(1924) M. W. N. 723 (P. C.)
(5) 1923 Cal. 701 = 50 Cal. 749 = 27 C. W. N. 759.
(6) [1918] 4 P. L. W. 428=45 I. C. 703.

Radha Kishun (7) *Raja Ram Sahu* v. *Jhanti Gope* (8). In my opinion the status of a co-sharer landlord purchasing an occupancy holding is not the status of a raiyat but a peculiar status created by S. 22 (2). His right is that of a proprietor entitled to retain possession of the land subject to payment to his coproprietors their shares of the rent. It is not the status of a raiyat inasmuch as if he sublets to a third person such third person is deemed to be a raiyat in respect of the land and ordinarily a raiyat subletting to a third person does not confer a raiyati but an under-raiyati interest. Therefore the status created is a peculiar status which attaches to the co sharer so long as he remains a co-sharer. In my opinion if he ceases to be co-sharer and his proprietary interest is lost he has no right to retain possession of the land and it would pass on to the person who would acquire the interest of that co sharer. In *Ram Prasad* v. *Munshi Gopal Chand* (1) there was a partition amongst the co-sharers and by that partition the land purchased by one co-sharer was allotted to another co-sharer and it was held that the co-sharer who had purchased the holding was entitled to retain possession of the land under the provisions of S. 22 (2) of the Bengal Tenancy Act, inasmuch as the section provides that he was entitled to hold the land on payment of rent to the other co-sharers. The facts of the case in *Nand Kishore Singh* v. *Chander Dip Singh* (2) were also similar. In these cases the interest of the co-sharer who had purchased the holding did not cease ; he continued to be the proprietor after the partition, and hence it was held that he was entitled to retain possession. In the present case the plaintiff has ceased to be the proprietor of the village and she claims a raiyati interest in the land. In my opinion she has no right to remain in possession of the land as a raiyat when her proprietary interest has ceased. She can only continue to retain possession of the land under S. 22 (2) of the Bengal Tenancy Act so long as she remains a proprietor, and whatever right she acquired contiuned only so long as her proprietary interest continued. The other cases cited at the Bar have no direct application to the facts of the present case.

(7) 1922 Patna 62=3 P. L. T. 22=(1922) P.H. C. C. 55.

(8) [1916] 34 I. C. 75.

I am, therefore of opinion that the proprietary interest of the plaintiff having admittedly ceased to exist she has no title left in the land in dispute and she is not entitled to a decree declaring her title or awarding possession to her. In my opinion the decision of the Munsif was correct. The decree of the Subordinate Judge will be set aside and that of the Munsif restored with costs throughout.

Ross, J.—I agree.

Appeal allowed.

1925 PATNA 549

KULWANT SAHAY, J.

Pallakdhari Thakur and others—Plaintiffs—Appellants.

v.

Bankey Thakur and others—Defendants-Respondents.

Appeal No. 610 of 1922, Decided on 21st April 1925, from Appellate decree of the Sub, J., Muzaffarpore, D/- 26th April, 1922.

Lim. Act, S. 3—Limitation—Question as to, raised in written statement but not pressed in trial Court—Defendant can press it in appeal—B. T. Act, S. 184.

Where the question as to limitation was raised in the written statement and an issue was framed, but it was not pressed in the trial Court,

Held: that the defendants respondents were entitled to press that point on appeal. S. 3 of the Limitation Act, and S. 184 of the Bengal Tenancy Act, are clear upon the point.

[P 450 C 2]

S. M. Mullick and *S. N. Ray*—for Appellants.

K. P. Jayaswal and *Murari Prasad*—for Respondents.

Kulwant Sahay, J.—This is an appeal on behalf of the plaintiffs against a decision of the Subordinate Judge of Muzaffarpur, dismissing their suit for possession of 7 *bighas* and odd land. The plaintiffs contended that they had acquired right of occupancy in the land and that they were dispossessed by the defendants in 1326 which corresponds to some time in May or June 1919. Their case was that the land in dispute was formerly the holding of certain tenants, and, in execution of rent decrees against these tenants, the landlords who are the defendants second party in these suits sold the

holding and purchased the same in execution and took possession thereof. On the 4th of June 1910, the plaintiffs took settlement of the land in dispute from the defendants second party under a Kabuliat in which they described the land as zerait land of the proprietor and the term of the settlement was from Jeth 1317 to Baisakh 1324. They alleged that they were settled raiyats of the village and, although the settlement was for a term of years, yet under the law they acquired a right of occupancy in the land and that they were entitled to retain possession. Their case was that they were dispossessed in may or June 1919 by the landlords, who gave a settlement of the land to the defendants first party in the year 1326. They accordingly brought the present suit for possession. Two sets of written statements were filed, One by the landlords and the other by the defendants first party, who are the new settlement-holders from the landlords. The landlords in their written statement stated that the plaintiffs were not settled raiyats of the village and did not acquire any right of occupancy in the land. They further alleged that the disputed land was settled with the plaintiffs as zerait for a period upto 1324 F. S., and that the plaintiffs in accordance with the agreement contained in the Kubuliat, gave up possession at the end of 1324 and the landlords took possession thereof in 1325 and settled the lands with the defendants first party. They pleaded limitation and want of title in the plaintiffs. The defendants first party alleged that the plaintiffs gave up the land in suit just on the expiry of the terms of the Kabuliat and the defendants took settlement thereof on the batai system from the amlas of the landlords and then, in the next year 1326, they took nakdi settlement under the Kabuliats.

The learned Munsiff framed a large number of issues in the suit. Issue No. 2 was as to whether the plaintiff's suit was barred by the law of limitation. Issue No. 5 was whether the plaintiffs surrendered the disputed land to the defendants second party after the termination of the terms of the Kabuliat ; and issue No. 3 was as to whether the plaintiffs were the settled raiyats of the village and whether they have got any right in the disputed land. On the question of surrender the Munsiff came to a finding that the plaintiffs did not surrender the land after the expiry of the term of the Kabuliat, but held over and were dispossessed by the defendants after the decision of a case under S. 145 cf the Code of Criminal Procedure which was in May 1919. On the question of status of the plaintiffs the learned Munsiff came to the conclusion that the plaintiffs were settled raiyats of the village and as such they acquired a right of occupancy in the land in suit. On the question of limitation the learned Munsiff stated that the pleaders had not addressed any argument on this question. He accordingly decreed the suit.

On appeal the learned Subordinate Judge has dismissed the suit on the ground of limitation.

Against this decision the present second appeal has been filed on behalf of the plaintiffs and the point taken by the learned vakil for the appellants is that upon the findings arrived at, the Court below was wrong in holding that the suit was barred by limitation. It has also faintly been argued that the question of limitation not being pressed in the trial Court the learned Subordinate Judge ought not to have allowed the defendants to raise the question on appeal. As regards the last point it is clear that the question was raised in the written statement and an issue was framed and even if it was not pressed in the trial Court, it was open to the defendants to press that point on appeal. S. 3 of the Limitation Act and S. 184 of the Bengal Tenancy Act are clear upon the point.

On the merits the findings of the learned Subordinate Judge are that there was an ouster of the plaintiffs, that the landlords had a hand in the ouster of the plaintiffs and that the ouster took place more than two years before the suit. Upon those findings the suit was clearly barred by the provisions of Article 3, Schedule 3 of the Bengal Tenancy Act. It has however, been cortended by the learned Vakil for the appellants that the learned Subordinate Judge has come to a finding upon a case different from that made by the defendants in their written statement. He refers to the written statement of the defendants second party, who are the landlords, where they state that the plaintiffs were in possession up to the end of 1324 and that land passed into the possession of the landlords after-

wards. He points out that the last date of the Fasli year 1324 corresponds to the 1st of September 1917, and the present suit was brought on the 1st of September 1919 and therefore within two years from the date of the ouster ; and therefore the suit was not barred by limitation. Now although the defendant second party state that the plaintiffs remained in possession up to the end of 1324, the evidence given in the case was that the plaintiffs remained in possession up to Baisakh 1324, that is, when the term of the lease expired. The defendants 1st party in their written statement have expressly stated that the plaintiffs gave up possession immediately after the expiry of the term of the *Kabuliat* and that the defendants first party took settlement of the land thereafter. There was evidence in the case at least of three witnesses, namely, the defendants' witnesses Nos. 2, 5 and 6, as would appear on a reference to the decision of the trial Court, who stated that the settlement with the defendants first party was made in Jeth 1324. There was therefore evidence in the case upon which the Subordinate Judge could come to a finding that the plaintiffs ceased to be in possession from Jeth 1324 and the finding of the learned Subordinate Judge, on a consideration of the entire evidence in the case, that the dispossession took place in Jeth 1324, which will be more than two years from the date of the suit, is a finding which would justify the decree made by him.

It is next contended by the learned Vakil for the appellants that when there was no issue raised as to the special limitation under Article 3, Schedule 3 of the Bengal Tenancy Act, and, as there was no such issue raised, the learned Subordinate Judge ought not to have dismissed the suit on a plea of special limitation. The issue as framed did not specify as to whether the plea of limitation was under the Limitation Act or under the Bengal Tenancy Act ; but, on the face of the pleadings of the parties, it is clear that what was intended was plea of special limitation under the Bengal Tenancy Act.

Under these circumstances and having regard to the findings of the Subordinate Judge, I am of opinion that there are no merits in this second appeal and it must be dismissed with costs.

Appeal dismissed.

1925 PATNA 551

JWALA PRASAD AND ADAMI, JJ.

Shib Dutta Singh—Petitioner.

v.

Sheikh Karim Bakhsh—Opposite Party.

Application for substitution in Second Appeal No. 932 of 1922, Decided on 19th December, 1924.

Civil P. C., O. 22, R. 4—Only some heirs sought to be substituted—Appeal does not abate against others.

Where a respondent dies and the appellant applies for substitution of some of the heirs alone of the respondent of whose existence alone the appellant is aware, the appeal does not abate even as against the other heirs of the respondent if the appellant applies for impleading them within time from his becoming aware of their existence. 16 *All.* 211; 30 *All.* 117 and 26 *Bom.* 203 *Dist.*, 3 *All.* 517; 12 *Bom.* 48; 26 *M.* 230 *Foll.* [P 552 C 1]

Abani Bhusan Mukerjee—for Petitioner.

Sailendra Nath Palit—for Opposite Party.

Judgment.—It is clear upon the sworn petition of the appellant that he *bona fide* made an application for substitution of only two heirs of the deceased respondent No. 1 because he had no knowledge of the existence of the other two heirs, and after that when he came to know of their existence he made diligent inquiry and put in his application. Therefore there can be no doubt as to the *bona fides* and the application is within time from the date of knowledge of the appellant. In this view the application should be granted, and the two daughters of respondent No. 1 mentioned above be also made respondents along with the other two heirs already brought on the record.

An objection has been taken by the learned Vakil on behalf of the respondent that the appeal had already abated so far as the heirs of respondent No. 1 now sought to be brought on the record are concerned, and that the present application for bringing them on the record is barred by limitation. Upon this view there is divergence of opinion. Personally speaking we are of opinion that the appeal in the present case did not abate, inasmuch as an application for bringing upon the record some of the heirs of the deceased respondent No. 1 was already made within time. Rule 4 of Order 22, clause (3), directs that the appeal shall abate where within the time limited by law no application is made under sub-

rule (1). Here an application, as already observed, was made within time. Therefore the appeal did not abate as against the deceased respondent. The respondent No. 1 having died the appeal could abate only if it was not continued against his representative by an application made within time, and the moment the application was made within time the appeal was saved from abatement. The bringing on the record subsequently of the other heirs of the deceased will be simply an addition of the names in the category of respondents. This view is supported by the cases of *Ram Anuj Sewak Singh* v. *Hingu Lal* (1) and *Krishnaji Janardan* v. *Murrarray* (2). Some support is also lent to this view by the decision in the case of *Kadir Mohideen Marakkayar* v. *N. V. Muthukrishna Ayyar* (3). The other cases, however, are not exactly on the point. The cases relied upon on the other side, namely, *Ghamandi Lal* v. *Amir Begam* (4) *Haidar Husain* v. *Abdul Ahad* (5) and *Bai Full* v. *Adesang Pahadsang* (6) are not on all fours with the present case.

Even if there was abatement in the present case, the appellant is entitled, upon the facts clearly set forth in his sworn petition and not controverted by any counter-affidavit, to have the abatement set aside and to have the names of the fresh heirs added on the record. No doubt, in his application the appellant has prayed for substitution and addition of the daughters of the deceased respondent No. 1 as heirs in his place and has not clearly asked for setting aside the abatement; but reading the whole application and the prayer, the application can reasonably be construed as an application for setting aside the abatement and for substitution.

The application is, therefore, granted. Let the heirs proposed be brought on the record as respondents in place of the deceased respondent No. 1. In the circumstances of the case there will be no order as to costs.

Application granted.

(1) [1881] 3 All. 517.
(2) [1838] 12 Bom 48.
(3) [1903] 26 Mad 230=12 M. L. J. 363.
(4) [1894] 16 All 211=(1894) A. W. N. 22.
(5) [1908] 30 All 117=5 A. L. J. 62=(1908) A. W. N. 41=3 M L. T. 207.
(6) [1902] 26 Bom 203=3 Bom L. R. 736.

1925 PATNA 552

ROSS AND SEN, JJ.

Shaikh Mahamud Alam—Defendant—Appellant.

v.

Nathu Sahu and others—Plaintiffs—Respondents.

Civil Appeal No. 1505 of 1921, Decided on 25 July, 1924, from a decision of the Dt. J., Darbhanga D/- 29th August 1921.

Civil P. C., S 100-*Finding of fact.—Allegation in plaint not denied specifically in written statement—Finding cannot be challenged.*

Where the allegation in plaint was not specifically denied in the written statement and was supported by evidence,

Held: that a finding in support of such allegation cannot be said to be based on no evidence and cannot be challenged in second appeal.

[P 552 P, 2]

Muhammad Hasan Jan—for Appellant.

Janak Kishore—for Respondents.

Ross, J.—The only ground urged in support of this appeal is that there is no evidence to justify the finding of the learned District Judge that the plaintiffs' family were settled *raiyats* of the village from a very long time. In para. 2 of the plaint it was alleged that for a long time the plaintiffs' ancestor was and after him the plaintiffs had been *kashtkars* of a large area of land in *Mouza* Khanna, and further in para. 4 that the plaintiffs and their ancestors were *kaimi* settled *raiyats* of *Mouza* Khanna and they and their ancestors had acquired occupancy right in the disputed land and in the survey *khatian* they had been recorded as *kaimi raiyats*. In the written statement there was no specific denial of these allegations. There was only the general plea that the defendant did not admit any of the plaintiffs' allegations except those that were admitted by him in his written statement. Besides the pleadings there is the entry in the Record of the Rights which shows that the father of plaintiff No. 2 was recorded as a *kaimi raiyat* in respect of the land in suit. And further the plaintiff stated in his evidence that he had other old ancestral *kasht* land.

It seems to be that the learned District Judge was entitled to hold that the plaintiffs' family were settled *raiyats* of the village and that it cannot be fairly said that this finding rests on no evidence. Therefore, there is no point of law in this appeal which must be dismissed with costs.

Sen, J.—I agree.

Appeal dismissed.

★ 1925 PATNA 553

KULWANT SAHAY, J.

Gouri Shanker and others—Petitioners.

v.

The Collector of Muzafferpur—Opposite Party.

Criminal Misc. Case No. 64 of 1924, Decided on 29th August 1924, against an order of the Sub-Divisional Magistrate of Hajipur, D/-22nd July 1924.

★ (a) *Criminal P. C., S. 439—High Court staying proceedings—Lower Court informed by party but disposing of case—Lower Court's order is* ultra vires.

Once proceedings are stayed by the High Court and the matter is brought to the notice of the Court concerned it is its duty to stay its hands and stop further proceedings. [P 555 C 1]

Where an application was made to the lower Court to stay the proceedings on the ground that the High Court had ordered their stay and this application was supported by the certificate of the Vakil who had moved the application in the High Court.

Held: that it was the Magistrate's manifest duty to stay his hands and not to pass any order in the case and that if he did dispose of the case and pass final order, such order would be *ultra vires* and irregular. [P 555 C 2]

(b) *Criminal trial — Travelling allowance of witness ordered to be deposited—Amount should be specified—Cr. P. C., S. 257.*

A Court ordering a party to deposit the travelling allowance of a witness should state the amount of the travelling allowance to be deposited. [P 555 C 2]

(c) *Criminal P. C., S. 72—Sub-Inspector of Railway Police.*

Summons to a Sub-Inspector of Railway Police should be served through the Superintendent of Railway Police for the District [P 555 C 2]

(d) *Criminal P. C., S. 145—Source of information as to breach of peace is immaterial.*

A Magistrate is entitled to initiate proceedings if he receives information from any source whatever that there is likelihood of a breach of the peace relating to possession of immovable property. [P 556 C 1]

Nirsu Narayan Singh and *Bhuvaneshwar Prasad Sinha*—for Petitioners.

L. N. Singh—for Opposite Party.

Kulwant Sahay, J.—The petitioners were the second party in a proceeding under S. 145 of the Criminal Procedure Code initiated by the Sub-Divisional Magistrate of Hajipur. The proceedings were initiated on an application made by the Collector of Muzafferpur under the following circumstances. Certain plots of land which had been acquired by the Government under the Land Acquisition Act for the purpose of B. & N. W. Railway had been relinquished by the Railway Company on the ground that they did not require the land any longer. After such relinquishment those plots of land were resumed by the Government in September, 1923. In April, 1924 the Collector sold those lands by auction to one Khobari Choudhury, but when the Kanungo was deputed to deliver possession to the purchaser he was resisted by the petitioners who claimed those lands as their lands and not the lands belonging to the Railway Company. The Kanungo found certain structures on portions of the land and upon his report the Collector of Muzafferpur applied to the Sub-Divisional Magistrate of Hajipur for institution of proceedings under S. 145 Cr. P. C. On receipt of this application the learned Sub-Divisional Magistrate of Hajipur initiated proceedings under S. 145 of the Criminal Procedure Code by his order dated the 26th May, 1924 which runs thus :—

"The Collector's petition perused. Draw up proceedings under S. 145 Cr. P. C. at once for 16 6-24".

In these proceedings the Collector of Muzafferpur was the first party and the second party were the petitioners On the 16th June, 1924 Gauri Shanker of the second party appeared and represented before the Sub-Divisisonal Magistrate that copy of of the proceedings had not been served upon him or upon the other members of the second party and he wanted time to file written statement and to be ready to go on with the case. The learned Sub-Divisional Magistrate rejected the application with the following order :—

"Only Gauri Shanker is represented. In the case of others the copy of the proceedings was served by hanging the same on their residential houses on the 1st June. They and Gauri Shanker had enough time to be ready. Petition of Gauri Shanker for time rejected".

After rejecting the application for time the learned Sub-Divisional Magistrate at once proceeded to examine witnesses for the first party. He examined five witnesses and called upon Gauri Shanker to cross-examine them; Gauri Shanker expressed his inability to cross-examine them as he was not ready. The learned Sub-Divisional Magistrate refused to grant him time to cross-examine the witnesses and in the order-sheet he recorded the following order :—

"Examined 5 witnesses for the first party. Cross-examination by Gauri Shanker declined These witnesses are therefore discharged.

"To 2-7-24, for evidence of second party".

On the 17th June, 1924 the second party filed an application in which they stated that on the previous day they were not ready to go on with the case inasmuch as the proceedings were not served upon them and no written statement had been filed and no documents had been produced and they prayed that the witnesses for the first party who had been examined on the previous day might be re-called for cross-examination. The learned Magistrate rejected this application without assigning any reason whatsoever. On the same day, namely, the 17th June the second party filed another application giving a list of witnesses whom they wanted to be summoned on their behalf. Amongst the witnesses named in this application were two witnesses Babu Jogeshwar Prasad, Sub-Deputy Magistrate of Samastipure, and Maulavi Ishaq, Sub-Inspector of the Railway Police, whom they wanted to be summoned through the Superintendent of Police of the Railway Police at Samastipur. It was necessary to call these two witnesses in order to prove certain reports and enquiries made by them in a proceeding under S. 144 between the second party in the present proceedings and others in which proceedings the second party were found to be in possession of the land in dispute. The order passed upon this petition by the learned Sub-Divisional Magistrate was,

"Issue summons on payment of T. A. of the Sub-Deputy Magistrate".

Now the amount of the travelling allowance was not stated and the petitioners were not told as to what amount was necessary for them to deposit in order to issue summons upon the Sub-Deputy Magistrate. The case wes called on the 2nd July, 1924. On that day the second party filed another petition to recall the witnesses of the first party for cross-examination. This was rejected on the ground that the second party had already had an opportunity to cross-examine the witnesses for the first party. On that day the second party filed another petition to summon Babu Jogeshwar Prasad, Sub-Deputy Magistrate, and Maulavi Ishaq, Sub-Inspector of the B. & N. W. Ry. Police. The learned Sub-Divisional Magistrate rejected this application also on the ground that the second party were asked on the 17th June to deposit the travelling allowance of the Sub Deputy Magistrate which they had failed to do. As regards the Sub-Inspector Maulvi Ishaq, the reason given for not summoning him was that he had been summoned on the previous application but the second party had given wrong address and the summons was returned unserved and even on the 2nd July, when fresh application for summoning him was made no address was given of the Sub-Inspector. Having rejected this application of the second party the learned Sub-Divisional Magistrate proceeded at once to examine three witnesses of the second party who were present in Court and after cross-examining them these witnesses were discharged. He thereafter thought fit to make a local inspection and he fixed 6th July for a local inspection. Later on, on the same day after recording that he will hold a local inspection on the 6th July the learned Magistrate passed the following order :—

"The Assistant Government Pleader prays for an immediate local inspection. I will do it this evening. Inform parties."

He accordingly held the local inspection on that day and he postponed the case to the 23rd July, 1924 for order.

On the 22nd July the second party filed the application giving rise to the present revision case in this Court in which they prayed for quashing the proceedings or in the alternative for transfer of the case from the file of the Sub Divisional Magistrate of Hajipur and a Division Bench of this Court admitted the application and ordered the issue of the usual notice and directed further proceedings to be stayed pending the disposal of this application. This order was passed by the Division Bench of this Court on the 22nd July, 1924 and from the affidavit filed to-day on behalf of the petitioners it appears that on the same day Amir Singh, the *karpardaz* of the sencond party, who had come to Patna to move that application, went back to Hajipur with a certificate given to him by Mr. Nirsu Narain Sinha, the Vakil who had moved the application, stating that the application had been moved by him and that this Court had admitted the application and had ordered the stay of further proceedings. The certificate of

Mr. Nirsu Narain Sinha was filed before the Sub-Divisional Magistrate with an application in the first hour of the 23rd July, 1924 and it was stated that the petitioners had moved the High Court for quashing the proceedings and for the transfer of the case to some other Court and that a Division Bench of this Court had issued a rule and had directed further proceedings to be stayed and they prayed that further proceedings might be stayed, and that the learned Magistrate should refrain from hearing the arguments and deciding the case. The affidavit of Amar Singh filed to-day stated that this application was presented before the Sub-Divisional Magistrate on the 23rd July in the first hour before the case was called on. But it appears that the learned Sub-Divisional Magistrate took absolutely no notice of this application and of the fact that this Court had stayed further proceedings pending the disposal of the application, and, without hearing the arguments on either side, he proceeded to pronounce his final order in the case declaring possession of the first party. Notice of this affidavit filed to day was given to the Government Pleader on 20th August and the correctness of the facts therein stated are not denied.

At the hearing of this application a preliminary objection is taken by the learned Government Pleader that this petition has become infructuous inasmuch as the proceedings had terminated in a final order declaring the first party to be in possession. Having regard to the circumstances of the case I am clearly of opinion that the action taken by the Sub-Divisional Magistrate was wholly irregular and unwise, and he has laid himself open to grave censure. His attention may be drawn to the observations of Mookerjee, J. in the case of *Satinath Sikdar* v. *Ratanmani Naskar* (1). Once proceedings are stayed by this Court and the matter is brought to the notice of the Magistrate or the Court in which the proceeding is pending, it is his duty to stay his hands and stop further proceedings. In the present case an application was filed before him in the first hour before the case was called on supported by a certificate given by the Vakil who had moved the application in this Court and the matter was brought to his notice that this Court had stayed the proceedings. Under these circumstances it was his manifest duty to stay his hands and not to pass any order in the case. In spite of his being apprised of the fact that further proceedings had been ordered to be stayed by this Court he did proceed to dispose of the case and to pass final orders. This order cannot stand and must be treated as passed without jurisdiction. He had no power to pronounce the final order or to proceed with the case once the proceedings had been stayed by this Court. Courts have gone to the length of holding that whether orders of stay are communicated to the Court below are not, the moment such orders are made by the High Court, the Court in which the proceedings are pending has no jurisdiction to make any further order in the case. However, the fact that the learned Sub-Divisional Magistrate had thought fit to proceed with the case and to make a final order will in no way affect the decision of the present case. Having regard to the circumstances stated in the petition and to the fact that no proper opportunity was given to the second party to represent their case and to cross-examine the witnesses examined on behalf of the first party, or to produce their documentary evidence, it is clear that they were greatly prejudiced in the present proceedings.

As regards the Sub-Deputy Magistrate whom the second party wanted to examine in order to prove his report in a previous case, the second party were never informed as to the amount that was necessary for them to deposit, and when on the 2nd July they renewed their prayer, it was evidently the duty of the Sub-Divisional Magistrate to give them an opportunity to deposit the travelling allowance and to summon the Sub-Deputy Magistrate. As regards the Sub-Inspector of the Railway Police Maulvi Ishaq, the prayer of the second party was that the summons might be served through the Superintendent of Police of Samastipur. That is the way in which summonses are served upon Government servants and that is the provision in S. 72 of the Criminal Procedure Code and I do not see how the address given by the second party in their application of the 17th June was incorrect or why the summons was not served on the Sub-Inspector when it was sent to the Superintendent of Police at Samastipur.

(1) [1912] 15 C.L.J. 335=14 I.C. 808.

As regards the ground taken by the learned Vakil for the petitioner that the proceedings should be quashed inasmuch as the Collector had already sold the land to a third person and, therefore, had no interest left in the land and that, therefore, he cannot be made a party to the proceedings, I am clearly of opinion that this contention cannot be sustained. The Collector has no doubt sold the land to a third party, but he has not delivered possession to the third party and claims to be still in possession and the Sub-Divisional Magistrate was entitled to initiate proceedings if he received information from any source that there was a likelihood of a breach of the peace relating to possession of the immovable property. Therefore the prayer for quashing the proceedings cannot be granted. But in the circumstances of the present case it is desirable that the proceedings should be transferred from the Court of the Sub-Divisional Magistrate of Hajipur to some other competent Court.

The orders of the Sub-Divisional Magistrate passed by him after the 2nd July 1924 are all set aside. The case will be transferred to the District Magistrate of Patna which is the nearest place from Hajipur and he will make it over to a Magistrate at Patna competent to hear and decide this case. The second party will be given proper opportunity to cross-examine the witnesses produced by the first party and produce their own documentary and oral evidence.

Rule made absolute.

1925 PATNA 556

FOSTER, J.

Hankar Sonar—Petitioner.

v.

Basudeo Singh—Opposite Party.

Civil Rev. No. 380 of 1923, Decided on 9th April 1924, from a decision of the Dt. J., Arrah, D/- 27th July 1923.

(a) *Civil P. C., O. 21 R. 90—Heir presumptive of transferee of property is not entitled to apply.*

Heir presumptive of the transferee of portion of the property is not a person whose interests are affected by the sale. [P. 557, C. 1]

(b) *B. T. Act*, (1885) *S. 160—Landlord recognising person as tenant of portion of occupancy holding—The portion is "protected."*

Where a landlord recognises a person as the purchaser and tenant of a portion of a certain occupancy holding and permits the latter to pay rent in respect of such portion he gets an occupancy right in the portion of the holding, so that, that portion is a protected interest within the sense of S. 160 of the B. T. Act. [P. 557, C. 1]

(c) *Civil P. C., O. 21 R. 90—B. T. Act Ss. 160, 159 and 158-B—Sale under B. T. Act for arrears of rent—Holder of protected interest cannot apply under O. 21 R. 90.*

A person who holds a protected interest under the B. T. Act in a holding which has been sold under that Act for arrears of rent is not entitled to apply under O. 21 R. 90 as, by Ss. 159, and 158-B of the B. T. Act, a protected interest is not affected by such sale. [P. 557, C. 2]

D. N. Varma—for Petitioner.

Shashi Shekhar Prosad Singh—for Opposite Party.

Foster, J.—The petitioner in this revision case is the auction-purchaser in a sale held in accordance with S. 158B of the Bengal Tenancy Act. After the sale the opposite party Basudeo Singh came into Court with a motion under O. 21, R. 90 to set aside the sale on the ground of fraud and material irregularity. The question that was most prominently before the Court was whether Basudeo Singh had a *locus standi* under R. 90. The suit was for arrears of rent of an occupancy holding comprising *khata* No. 1080 standing in the name of Sawarath Singh. In the suit only Sawarath Singh was impleaded as defendant and the decree was passed against him. In his application under R. 90 Basudeo Singh stated that his mother Basmati Kuer purchased 10 *kathas* out of 22 *kathas* of *khata* No. 1080 from one Hari Singh and that Basmati Kuer remained in possession all along until her death and after her death he, Basudeo Singh, came into possession. The applicant has since then been subjected to cross-examination and has admitted that Basmati Kuer was not his mother but his aunt. He has admitted that she is not dead but alive. He makes some assertion as to his adoption by the lady but on that point there is no finding of fact. Now, it is obvious that if Basmati Kuer is the transferee, the fact that Basdeo Singh is her heir presumptive does not give him any interest in the property; for no man is heir to a living person. His position is quite different from that of a reversioner when the property is in the hands of a Hindu widow, for a reversioner has in law certain recognised rights to protect the reversion, whilst on the other hand, the presumptive heir stands outside the interest of the present holder. As heir

therefore of the transferee of portion of the holding he could not be by reason of this presumptive heirship a person whose interests are affected by the sale.

I come now to the other portion of Basudeo Singh's case in respect of his status. The two Courts have held that Basudeo Singh has a *locus standi* because he is heir presumptive, but in the original Court it was also held that he had an additional justification for coming in under R. 90, namely, the fact that he had been recognised as tenant by the landlord. The auction-purchaser who is appealing against the final order setting aside the sale has rested his case principally on the inconsistencies of the position of Basudeo Singh. His learned Vakil has urged that if, as Basudeo Singh avers, Sawarath Singh has no interest in the holding and is not the tenant, then the decree obtained against Sawarath Singh cannot, for a moment, affect, the interest of Basudeo Singh. So he states that Basudeo Singh is not such a person as has a right to come in under R. 90. No doubt the position of Basudeo Singh is somewhat inconsistent throughout, but it seems to me that the case should not be decided merely on a criticism of his pleading. The case is before an Execution Court and it is the duty of that Court to recognise the decree and carry it out and not go behind it, whatever may be said by Basdeo Singh as to mis-joinder or non-joinder of parties. The decree must be held to be good and also the sale unless Basudeo Singh is a person who can get it set aside. Now, the learned Munsif held as a finding of fact that Basudeo Singh has been recognised as purchaser and as tenant in respect of his portion of *khata* No. 1080. It has been held that he has been permitted by the landlord to pay rent for this portion along with the rent of the *khatas* held by him in the village. This appears to me to amount to a finding that Basudeo Singh has an occupancy right in a holding subject to rent, portion of which is the 10 *kathas* within *khata* No. 1080. If so, then that portion, being the subject-matter of an occupancy right, is a protected interest within the sense of S. 160 of the Bengal Tenancy Act.

Now reverting to Ss. 159 and 158-B we see that a protected interest is not affected by a sale held under the Bengal Tenancy Act for arrears of rent. The purchaser now petitioning this Court will take possession subject to the occupancy right existing in Basudeo Singh, if such right exists; but once Basudeo Singh asserts that he has a protected interest he is obviously admitting that he is not a person whose interests are affected by the sale. I hold, therefore, that Basudeo Singh had no right to move the Court under O. 21, R. 90 of the C. P. C. The Rule is made absolute. The order setting aside the sale is rescinded and the sale restored. The petitioner shall have his costs in all Courts. Let the costs be assessed as in second appeal.

Rule made absolute.

★ 1925 PATNA 557

KULWANT SAHAY AND SEN, JJ.

Ramsekhar Prasad Singh and others—Plaintiffs—Appellants.

v.

Mathura Lal and others—Defendants—Respondents.

Appeal No. 171 of 1922, Decided on 27th May 1925, from appellate decree of the D. J., of Shahabad, D/- 11th November 1921.

★ *Limitation—Starting point—Instalment bond enabling creditor to claim whole amount on default of any one instalment—Suit filed after limitation period from earliest default—Suit is not barred in respect of instalments which are within limitation.*

A suit on an instalment bond which enables the creditor to claim the entire amount on default of any one of the instalments is not time barred in respect of the instalments which fell due within the period of limitation, although the suit is filed after the expiry of the period of limitation from the date on which the earliest instalment in respect of which default was made fell due. [P. 557, C. 2]

Atul Krishna Ray and *Shashi Sekhar Prasad Singh*—for Appellants.

Parmeshwar Dayal and *S. C. Mozumdar*—for Respondents.

Judgment.—This is an appeal by the Plaintiffs against the decision of the District Judge of Shahabad, which confirmed the decree of the Munsif and dismissed the Plaintiffs' suit.

The suit was on the basis of a *kistbandi* mortgage bond, dated the 16th April 1909, executed by the Defendant No. 1 Mathura Lal in favour of the Plaintiffs. The principal amount secured was Rs. 291 and the stipulations contained in the bond were that this sum of Rs. 291 was to be paid in 9 annual ins-

talments, the first 7 instalments being of Rs. 33 and the last two of Rs. 30 each. The instalments were to be paid in the month of September each year. There was a condition attached that if default was made in payment of any one of the instalments the mortgagee would be entitled to demand the full amount secured by the bond with interest thereon at the rate of 12 per cent. per annum. The first instalment was payable on the 29th of September 1909. It appears that there was default in the very first instalment and the Plaintiffs brought the present suit on the 13th January 1920 to enforce the mortgage. In this suit not only the mortgagor, the Defendant No. 1, but also the other members of his family were made Defendants.

The defence of the Defendants other than Defendant No. 1 was that the debt was not contracted for any legal necessity of the family and therefore the mortgage was invalid. As regards the claim for a personal decree against the Defendant No. 1, it was pleaded that the suit was barred by limitation and the Defendant No. 1 further pleaded payment.

It has been held by both the Courts below that the debt has not been proved to have been contracted for any necessity of the family or for the benefit of the family and that the mortgage was therefore invalid. It has further been held that the personal claim against the Defendant No. 1 was barred by limitation.

It is contended on behalf of the Appellants that the finding of the learned District Judge on the question of limitation was erroneous. His finding on the question of legal necessity for the loan has not been challenged.

As regards the question of limitation, it is contended that the instalments which fell due within six years of the institution of the suit were not barred by limitation. The question as to whether those instalments which fell due within six years of the suit were or were not barred by limitation would depend upon the terms of the bond. The bond provides for payment of a sum of Rs. 291 in 9 annual instalments. The instalments which fell due within six years of the date of the suit, namely, the 13th January 1920, would therefore be saved from limitation. But it is contended that the entire amount fell due when there was default in the payment of the first instalment and therefore the suit ought to have been brought within six years of the first instalment which fell due on the 29th September 1909. In our opinion this contention is not sound. The contract was for payment of the debt by instalments extending up to the 29th September 1917. It was left to the option of the creditors to demand the entire amount if there was default in payment of any one of the instalments. It was open to the creditors to avail themselves of this right or not to do so. They could exercise their option and demand payment of the entire amount on default of any one of the instalments or they could under the terms of the bond wait until the last instalment fell due. It was not obligatory for the creditors to bring a suit for realisation of the entire amount as soon as any one of the instalments fell due. If they wait until the expiry of the time for payment of all the instalments, their claim would not be barred in so far as the instalments within the period of limitation were concerned. This view has been taken in a number of cases; *vide Mata Tahal* v. *Bhagwan Singh* (1) where the facts appear to be very much similar to the facts of the present case, *Rup Narain Bhattacharya* v. *Gopi Nath Mandol* (2) and *Narna* v. *Ammani Amma* (3). In this view of the case it is clear that the claim of the Plaintiffs in so far as the instalments from September 1914 to 1917 are concerned was not barred by limitation.

The Plaintiffs will, therefore, get a personal decree against the Defendant No. 1 for a sum of Rs. 126, being the instalments from September 1914 to September 1917, with interest thereon at the rate of 12 per cent. per annum from the date of default of each instalment, and proportionate costs of the suit throughout.

Decree varied.

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(1) [1921] 19 A.L.J. 406=63 I.C. 477.
(2) [1906] 11 C.W.N. 903.
(3) [1916] 39 Mad. 981=4 L.W. 77=20 M.L.T. 174=31 M.L.J. 865=35 I.C. 418=(1916) 2 M.W.N. 125.

1925 PATNA 559

DAS AND ADAMI, JJ.

Partap Mahton and others—Defendants—Appellants.

v.

Mt. Wazir-un-nissa and another—Plaintiffs—Respondents.

Appeal No. 178 of 1922, Decided on 24th February, 1925, from Appellate Decree, of the Sub. J., Patna, D/- 21st December, 1921.

(a) *Bengal Tenancy Act, S.* 188—*Rent claimed on separate holdings under separate agreement-Section does not apply.*

The right to sue for assessment is a right given by the general law and S. 188 will not apply in a case where rent is claimed for lands as forming separate holdings under separate agreements. [P 563 C 1,2.]

(b) *Co-sharers—Suit against tenant for assessment—All co-sharers must join.*

A suit by a co-sharer landlord for an assessment of the rent of a tenant's holding is not maintainable where the other co-sharers have not been made parties either as plaintiffs or defendants.

(c) *Landlord and tenant—Rent for past years claimed—Suit to determine fair and equitable rent does not lie.*

A suit for the determination of a fair and equitable rent proceeds on the assumption that no rent has hitherto been settled and paid by the tenant, and when a landlord claims fair rent in respect of past years for which rent has already accrued due, a suit for determination of fair and equitable rent does not lie. 29 *Cal.* 247 *Foll.* [P 564 C 1.]

K. P. Jayaswal and *B. C. Sinha*—for Appellants.

Khurshaid Hussain and *Hasan Jan*—for Respondents.

Adami, J.—The Plaintiffs, Respondents in this second Appeal, have a seven annas odd share in the two villages of Nathupur and Kazichak Sher Muhammad. Though the two villages have separate tauzi numbers and separate Sadar *jama*, the co-sharer landlords have treated the lands of the two villages as of one village and have kept joint collection papers for both villages. The predecessor-in-interest of the Plaintiffs had 7 bighas 6 kathas *khudkasht* land in the villages and in 1886 she purchased 37 bighas 5 kathas in execution of her decree for arrears of rent against Netlal Mahto, Partap Mahton and Sarju Mahton, who had held that area as their raiyati *kasht* land. The 37 bighas 5 kathas thus became her *khudkasht* land which with the 7 bighas 6 kathas she had held before, now amounted to 44 bighas 11 kathas. In 1889 she gave 9 bighas 6 kathas of this *khudkasht* land to Nasiruddin, one of the co-sharer landlords. According to the plaint these *khudkasht* lands were settled with tenants on *bhaoli* terms, the tenants paying to each co-sharer his share, and in addition to this making a payment of one rupee per bigha to the Plaintiffs ancestor out of the tenants' profit. In 1892 the *bhaoli* rents were commuted to *nakdi* but the payment of rupee one per bigha out of profits was continued.

Sometime before 1896 the Plaintiff No. 1 came into possession of a 4 annas 9 dam odd share in the two villages and Plaintiff No. 2 came into possession of a 2 annas 12 dam share, so that together they hold a 7 annas odd share. In 1896 Plaintiff No. 1 let out her share, including *khudkasht* lands, in *ijara* to Mt. Bechan Kuer, and did not get direct possession again until 1916. In 1897 Plaintiff No. 2 gave his share, including *khudkasht* lands, in *ijara* to Jhari Lal, and he was still in possession as *ijardar* when, in 1903, a fresh settlement of *khudkasht* lands was made. Under the terms of this fresh settlement the tenants were to pay to each of the co-sharer landlords his proportionate share of the annual rental of the *khudkasht* lands at the rate of Rs. 5 as. 13 per bigha, and were to pay in addition to the Plaintiffs one maund of polished rice per bigha out of their profits.

It was the Plaintiffs' case that the father of Defendant No. 1 and the Defendants Nos. 2 and 3 cultivated 10 bighas 19 kathas in the two villages as their *raiyati kasht* land at a rent of Rs. 5 as. 13 per bigha, the total rent amounting to Rs. 63-10-7 and that they had executed two *kabuliyats* in respect of this *raiyati* holding, one in 1894 and another in 1898, the latter enhancing the rent payable under the former. The Plaintiffs alleged that in settlement of *khudkasht* lands made in 1903, the father of Defendant No. 1 obtained settlement of 17 bighas 5 kathas out of the 35 bighas 5 kathas left after the gift of 9 bighas 6 kathas to Nasiruddin, at the rate of Rs. 5-13 per bigha, together with one maund of polished rice per bigha to be paid to the Plaintiffs. At the same

time Nasiruddin settled 5 bighas 4 kathas out of the 9 bighas 6 kathas given to him with the father of Defendant No. 1 at the same rate of rent and the same terms as to delivery of one maund of polished rice per bigha. The 17 bighas 5 kathas were contiguous to the holding of 10 bighas 19 kathas.

In 1903 the father of Defendant No. 1 took a *thica* of the share of another co-sharer landlord, Mt. Halimunnissa, in the name of his grandson for a term of 7 years.

In 1908 the survey and settlement operations started in the villages, and *khewat* and *khatian* were prepared for each of them separately. It is alleged by the Plaintiffs that in the course of the settlement operations, Defendant No. 1 and his nephews, Defendants Nos. 2 and 3 took advantage of the fact that they held a *thica* of Mt. Halimunnissa's share, and managed to get the 17 bighas 5 kathas of *khudkasht*, settled with them by the Plaintiffs as well as the 5 bighas 4 kathas, settled with them by Nasiruddin, amalgamated with 10 bighas 19 kathas which they did hold as raiyati *kasht* under the *kabuliyats*, the whole 33 bighas 8 kathas being described in the record-of-rights as the *kaimi* raiyati *kasht* of the Defendants, at a rental, for the whole, of Rs. 63-10-7 which was really the rental payable for the 10 bighas 19 kathas alone. In the record-of-rights 12.97 acres were recorded against Khata No. 113 of Nathupur with an annual *jama* of Rs. 63-10-7, and 7.57 acres were recorded against Khata No. 121 of Kazichak Sher Muhammed with a remark that the *jama* was included in that of Khata No. 113 of Nathupur. The Plaintiffs alleged that, in order to keep them in ignorance and to prevent them taking any steps to get the record corrected within the time allowed, the Defendants continued to pay rent for the 10 bighas and separate rent for the 22 bighas of *khudkasht* land till 1914 and then from 1915 ceased to pay rent either for the *kasht* land or for the *khudkasht*.

The Plaintiffs in the plaint state that they do not ask for a declaration of their *khudkasht* right or of the want of title in the Defendants : nor do they seek to recover possession of the *khudkasht* lands ; but they do claim that the Defendants are not entitled to hold the 22 bighas 9 kathas of the lands settled with them as *khudkasht* without payment of rent, and that the Plaintiffs are entitled to get their proportionate share of rent for the 22 bighas 9 kathas at the rate of Rs. 5-13 alleged by them to have been agreed on at the time of settlement, and also to get one maund of polished rice per bigha from the tenants' profit.

Thus the claim in the suit from which this appeal arises is for the Plaintiffs' proportionate share of the rents for 1323 F. S. to 1327 F. S. of the 10 bighas 19 kathas at the rate mentioned in the *kabuliyat* of 1898 and also of the 22 bighas 9 kathas at the rate which they allege was agreed on at the settlement of *khudkasht* lands was made. In case the Court is not satisfied as to their allegation of the rate fixed at the time of the settlement of these 22 bighas 9 kathas, the Plaintiffs ask the Court to settle a fair and equitable rent for those lands and to give them a decree for the arrear rent of those lands at the rate so settled. A claim is made for the value of polished rice at the rate of one maund per bigha for the years in suit.

None of the other co-sharers were made parties to the suit either as Plaintiffs or Defendants; the Plaintiffs allege that those co-sharers refused to join them or take any action.

The Defendants resisted the suit on the ground that, being instituted more than six years after the final publication of the record-of-rights, it was barred by limitation and that it was not maintainable since all the co-sharer landlords had not joined in the suit. They denied that the lands were *khudkasht*, or that they were settled with the father of Defendant No. 1 on the terms and rates alleged by the Plaintiffs. They denied also the right of the Plaintiffs to claim the value of any polished rice, as such payment would amount to an *abwab*. They controverted the story put forward by the Plaintiffs and claimed that all the lands were their ancestral *kasht* lands and the rental for all was Rs. 63.

The Munsif found that the *kabuliyats* of 1894 and 1898 were genuine and executed by the father of Defendant No. 1 that, though undue influence was apparent as to some of the terms of the *kabuliyats*, none was used so far as the agreement to pay Rs. 63-9-7 for the 10 bighas 19 kathas was concerned and that *jama* was paid up to the survey. He was satisfied

that the remaining 22 bighas 9 kathas were *khudkasht* as alleged by the Plaintiffs and not ancestral raiyati lands of the Defendants, and that these *khudkasht* lands were settled with Defendant No. 1's father in 1903. He decided, however that the Plaintiffs had knowledge of the survey proceedings, and as the suit was instituted more than six years from the date of the publication of the record-of-rights, the suit was time barred so far as the claim to the additional rent was concerned. As to the alternative prayer of the Plaintiffs for a settlement of fair and equitable rates for the *khudkasht* lands, the learned Munsif held that the Plaintiffs not being sole landlords, and the other co-sharers not having joined, the claim for assessment and for additional rent was barred by the provisions of S. 188 of the Bengal Tenancy Act. As a result of his findings the learned Munsif granted the Plaintiffs a money decree for Rs. 113 only as representing their share for the years 1323 to 1326 F. S. of the rent recorded in the record-of-rights as being payable for all the lands in suit. He disallowed the claim for the value of polished rice, this payment in kind being an addition to the rent and contrary to the provisions of the Bengal Tenancy Act.

On appeal the learned Subordinate Judge has held that the finding of the Munsif to the effect that Rs. 63 is the *jama* for the 10 bighas and not for the entire lands is conclusive because the Defendants did not file a cross-appeal. It is obvious that the Subordinate Judge has expressed the position wrongly, the Defendants had proved successful on the main question in the suit, namely, whether they were liable to pay more than the rent recorded in the record-of-rights for the lands in suit; there was no occasion for them to appeal. The whole case was before the Subordinate Judge on appeal, and what he apparently meant to say was that the finding of the Munsif on this question was not contested before him.

The Subordinate Judge overruled the Munsif on the question of limitation, holding that the suit was within time being a suit for assessment of fair and equitable rent, and having been instituted within 12 years from the date of the publication of the record-of-rights when the Plaintiffs' right to additional rent was challenged.

With regard to the finding of the trial Court that the suit for assessment was barred by the provisions of S. 188 of the Bengal Tenancy Act, the learned Subordinate Judge relied on the case of *Dhananjoy Manjhi* v. *Upendra Nath Deb* (1) and held that S. 188 of the Bengal Tenancy Act had no application, the bringing of a suit for the assessment of rent not being an act which a landlord is authorised or required to do by the provisions of the Bengal Tenancy Act. He found therefore that the suit was maintainable at the instance of the two co-sharer landlords without joining the rest as parties.

The learned Subordinate Judge proceeded to assess the rent for the 22 bighas odd at the rate of Rs. 5-13 a bigha and held that the Defendants, having been in occupation of the lands, were in justice and equity bound to pay rent for the past years in suit, and the settlement with them having been proved, and, on assessment, the rate of rent claimed by the Plaintiffs having been found to be the right rate, the Plaintiffs were entitled to a decree for the past years at that rate. He rejected the claim of one maund of polished rice per bigha, in that this did not form part of the rent. As a result he decreed the appeal except as to this claim for the value of polished rice.

I have stated the facts of the case in some detail because it will be necessary to distinguish them from the facts of the various cases relied on by the parties.

Two points are taken by the learned Counsel for the Appellants, the first is that the Plaintiffs' suit cannot succeed in the absence of the other co-sharers, and S. 188 of the Bengal Tenancy Act is relied on; the second point is that the suit being a suit for assessment of rent no decree could be granted for arrears of past years at the rate newly assessed by the Court. The finding of the lower Appellate Court with regard to limitation has not been assailed in this Court and the suit has been treated as a suit for assessment of a fair and equitable rent of lands for which the record-of-rights omitted to mention a rent. It is to be noticed that the learned Subordinate Judge first assessed a rent and then proceeded to treat the suit as an ordinary suit for arrears of rent because the rate of rent assessed by him

(1) [1918] 22 C.W.N. 685=46 I.C. 428.

coincided with the rate claimed in one of the alternative prayers of the plaint. It is clear that there was a necessity to assess the rent as prayed for in the other alternative prayer, for the Plaintiffs had no document or other reliable evidence to show what rate of rent was agreed upon at the time of the settlement of the *khudkasht* lands with the Defendants.

With regard to the first point taken by the Appellants, namely, the maintainability of a suit for assessment by a co-sharer landlord, in the case of *Dwarka Dhaku* v. *Mathur Lal Mujumdar* (2) a co-sharer landlord brought a suit for arrears of rent and also for additional rent on the basis of a *kabuliyat* in which there was an agreement to pay additional rent for additional area. On measurement of the holding it was found that there was an addition of 10 bighas. The other co-sharers were made parties Defendants. It was held that the suit was a suit under S. 52 to which S. 188 applied, and that the agreement to pay additional rent in the *kabuliyat* did not take it out of that section. That case is to be distinguished from the present one. Here we have no agreement as to additional lands and it is not a case of lands being found on measurement to be in excess of the area stated in the *kabuliyat*. We have here a prayer of assessment of the rent of lands settled under a separate agreement and not forming part of the area settled by the *kabuliyat* of 1894 and 1898. In *Gopal Chander Das* v. *Umesh Narain Chowdhry* (3) the proprietors of an eight annas share claimed from a tenant rent for excess area under S. 52 and for enhanced rent under S. 30 and made the other co-sharers parties Defendants. It was found that the land in excess was held as part of the original holding. This was clearly a case coming under Ss. 52 and 30 of the Tenancy Act and there can be no question that the provisions of S. 188 apply to a suit under either of those sections. In the present case, as I have said before, assessment of rent is asked for with regard to lands not found to be part of the original holding.

Mr. Jayaswal relied on the decision of their Lordships of the Privy Council in *Roy Jotindra Nath Choudhry* v. *Prasanna Kumar Banerji* (4) but that was a case of enhancement of rent and is not relevant, for there is no question of enhancement before us. Their Lordships ruled that in cases to which S. 188 applies it is not sufficient to make the other co-sharers landlords parties Defendants, they must join as Plaintiffs to make the suit maintainable.

On the other hand in the case of *Khondkar Abdul Hamid* v. *Mohini Kant Saha Chaudhuri* (5) the Defendants tenants of the original holding under the Plaintiffs and their co-sharers, took possession of certain lands by gradual encroachment. The Plaintiffs brought a suit for recovery of their share of the encroached lands or in the alternative for assessment of rent and made their co-sharers parties. It was held that the Defendants must be treated as tenants of those lands apart from their tenancy in respect of the holding, and that those lands formed a new holding and the rent assessed upon it would be a new rent in respect of the new holding, and that a suit for the assessment of rent is not an act that is authorised by S. 188 of the Bengal Tenancy Act and S. 52 does not apply. In the present case the co-sharer Plaintiffs are asking for an assessment of the rent of the 22 bighas claimed to be *khudkasht* and not for an assessment of the rent of the 10 bighas. If they had claimed rent, not merely of the Additional 22 bighas in possession of the Defendants over and above the 10 bighas but in respect of the entire quantity of land in possession of the Defendants including the 10 bighas, according to the decision in this last case I have mentioned, Ss. 52 and 188 would have applied. That is to say, Ss. 52 and 188 will apply where the Plaintiffs contend that there has been an addition to the original holding. That is not the contention in the present case.

In *Gobind Chandra Pal* v. *Hamidulla Bhuiya* (6) the Defendant executed a *kabuliyat* in favour of one of the co-sharer landlords with respect to a quantity of land proportionate to that co-sharer's share in the entire holding. The co-sharer landlord sued the Defendant for rent of

(2) [1913] 18 C.W.N. 942=20 I.C. 650.
(3) [1890] 17 Cal. 695.
(4) [1911] 38 Cal. 270=38 I. A. 1=15 C. W. N. 74=9 M.L.T. 1=13 C.L.J. 51=3 A.L.J. 1=13 Bom. L.R. 1=21 M.L.J. 92=8 I.C. 842 =(1911) 2 M.W.N. 149 (P. C.)
(5) [1900] 4 C.W.N. 503.
(6) [1903] 7 C.W.N. 670.

land in excess of the area for which rent had been previously paid. The other co-sharer was not made a party. In the *kabuliyat* the Defendant had agreed to pay additional rent for lands found on measurement to be in excess. Prinsep, J., held that as the Plaintiff did not sue under the general right, declared by S. 52 to be with a landlord to assess rent on excess lands but on the *kabuliyat* under which the right to assess such rent on the specific share was accepted by the Defendant, S. 188 did not apply. The Court was not called on to consider what was the rent payable on the entire holding. The facts in that case are distinguishable from those in the present case inasmuch as we find from the plaint in this case that the agreement at the settlement of the *khudkasht* lands was that the Defendants should pay to each of the co-sharer landlords his proportionate share of the rent, paying in addition the one maund of polished rice to the Plaintiffs, who in making the settlement seem to have acted as agents of all the co-sharers.

The learned Subordinate Judge relied on the case of *Dhananjoy Manjhi* v. *Upendra Nath Deb* (1) and that case has also been cited by the Respondents. There the tenants' lands had been recorded in the record of-rights as liable to be assessed with rent. A co-sharer landlord brought a suit to have the rent assessed, and made his other co-sharers Defendants. The Defendants contended that the land was held rent-free. It was urged that under S. 188 the suit was not maintainable. Richardson, J., after referring to the case of *Khondkar* v. *Mohini Kant* (5), *Berhamdut* v. *Ramji* (7), *Assanullah* v. *Mohini* (8) and *Harihar Pande* v. *Keramat Hossein* (9), held that the right to claim assessment is consistent with and arises out of the general law and land revenue system of the country and that the right to sue for assessment is not limited by the provisions of S. 188.

There cannot be any doubt that the right to sue for assessment is a right given by the general law and that S. 188 will not apply in a case like the present one. It cannot be held that the assessment was made under S. 52 or under S. 158 (*i*) (*d*) of the Bengal Tenancy Act; the former section applies, as shown by the decisions I have cited, to cases where the area of a tenure or holding has increased ; here rent is claimed for lands as forming separate holdings under separate agreements ; the clause of the latter section refers only to a determination of the existing rent, and in the present case there was no existing rent, so the Court was asked to fix one.

The question next arises, whether under the general law a suit by a co-sharer landlord for an assessment of the rent of a tenant's holding is maintainable where the other co sharers have not been made parties either as Plaintiffs or Defendants. It is to be noticed that in the various cases noted above except in the case of *Gobind Chandra Pal* v. *Hamidullah Bhuian* (6) the other co-sharers were made parties Defendants to the suit for assessment ; in the present case the Plaintiffs have not made their co sharers parties to the suit at all and the plaint tells us that the co sharers refused to take any action ; they are apparently satisfied with the rent now paid to them in accordance with the record of rights. Two of the co-sharers come forward and ask for an assessment of the rent of the 22 bighas and for their proportionate share ; the other co-sharers are vitally interested. It may be that it was unnecessary to join the other co-sharers as Plaintiffs as S. 188 does not apply, but surely they should have been made parties Defendants, so that the assessment when made might bind all equally. As pointed out by the learned Munsif, great hardship will be caused to the tenants Defendants if each of the other co-sharer landlords is left free to bring a separate suit for assessment ; not only may there ensue a multiplicity of suits but also the tenant, if different assessments are made in the separate suits, will be uncertain as to what is really the assessed rental. No really effective decree can be made in the absence of the interested co-sharers and there can be no finality as to what is really the fair and equitable rent. As in a partition suit so in a suit for assessment all the interested persons should be made parties.

I am of opinion that as the other co-sharers were not joined as parties in the suit, the suit, so far as it sought for assessment of the lands belonging to the co-sharers jointly, is not maintainable.

(7) [1913] 18 C. W. N. 466=20 I. C. 910.
(8) [1899] 26 Cal. 739.
(9) [1909] 9 C. L. J. 493=4 I. C. 175.

With regard to the second point taken in the appeal, namely, that the Plaintiff was not entitled to claim rent in arrears at the rate to be assessed as fair and equitable in the suit, as pointed out by my learned brother Das, J., in *Gobind Lal Sijar* v. *Ramsaran Lal* (10), a suit for the determination of a fair and equitable rent proceeds on the assumption that no rent has hitherto been paid by the tenant, and when a landlord claims fair rent in respect of past years for which rent has aleady accrued due, a suit for determination of fair and equitable rent does not lie. No doubt it has been held [*Jagannath Manjhi* v. *Jumman Ali Putwari* (11)] that in cases under S. 52 of the Bengal Tenancy Act arrears of rent can be claimed for the additional area, but in those cases the rent of the holding is known and proportionate addition is made for the excess area. In suits for assessment of a fair and equitable rent it is understood that rent has not been settled or paid hitherto and the Court is asked to determine the rent to be paid in future. The learned Subordinate Judge states "The Appellants did allege that the lands were settled with them (the present Appellants) at the rate of Rs. 5-13 per bigha. This contention has been found to be true and correct." As a matter of fact there has been no such finding. The Munsif in fact found that the 22 bighas were settled without any *jama*. The Subordinate Judge made an assessment of what a fair and equitable rent would be and found that a rate of Rs. 5-13 per bigha, the amount claimed by the co-sharer landlord, was fair and equitable. There is no finding that the tenants ever paid rent for the 22 bighas, and there is no real finding that at the time of settlement a rate of Rs. 5-13 a bigha was agreed upon. Under the circumstances it may be taken that it is not found that up to the date of suit any rent had been settled for the 22 bighas, or paid and therefore the assessment now made can only have reference to future years.

The suit for assessment of rent having been found not to be maintainable the appeal must succeed, and the decree of the lower Appellate Court must be modified to this extent, that the Plaintiffs will be declared entitled to a money decree for the sum of Rs. 113 only, in respect of the rent of the lands in suit for the years 1323 to 1326 F. S. The Appellants will get their costs throughout.

The cross-appeal against the decision of both the lower Courts that the alleged stipulation for payment by the tenant of one maund of polished rice per bigha would amount to an illegal imposition under the provision of S. 74 of the Bengal Tenancy Act, must fail. It is clear from the findings of the Courts that this payment would be an addition to the actual rent and would not form an integral part of the same. The cross-appeal is dismissed with costs.

Das, J.—I agree.

Decree modified.

(10) [1921] 2 P. L. T. 642=68 I. C. 433.
(11) [1902] 29 Cal. 247.

1925 PATNA 564

KULWANT SAHAY, J.

(*Bibi*) *Saleha and another*—Plaintiffs—Appellants.

v.

Hulas Mahton and others—Defendants—Respondents.

Appeal No. 1201 of 1921, Decided on 18th July 1924, from Appellate decree of the Dt. J., Gaya, D/- 10th February, 1921.

(*a*) *B. T. Act* (1885) *S.* 148. *A—Suit under—Co-sharer landlords made defendants and not denying plaintiff's share—Tenants not alleging payment of rent to co-sharer landlord in excess of share alleged by plaintiff to belong to such co-sharer—Tenant cannot question plaintiff's share.*

In a suit framed according to the provisions of S. 148 A. where the tenant-defendants do not allege that any co-sharer landlord has been left out from the suit, or that they had paid rent to the co-sharer in excess of the share alleged by the plaintiffs to be held by such co-sharer, it is not open to the tenant-defendants to question the share of the rent payable to the plaintiffs landlords. 1925 *Cal.* 26 *Dist.* [P 563, C 2]

(*b*) *Bengal Land Registration Act* (7 *of* 1876). *S.* 78—*Disqualification in bringing rent suits only applies to estates already entered in General Register.*

The disqualification in bringing suits for rent is one which attaches only to revenue free estates already entered in the General Register if the proprietor or manager or mortgagee fails to register his name. [P 560, C 1]

Sultan Ahmed and *Sultanuddin Hussain*—for Appellants.

Kailaspati and *Shiveswar Dayal*—for Respondents.

Kulwant Sahay, J.—This is a second appeal on behalf of the plaintiffs in a rent suit. The plaintiffs claimed 7 annas 11 pies 3 krants share in a jagir lakheraj land situated in the town of Gaya by virtue of a purchase under a deed of sale dated the 5th September 1919 from the pro forma defendants second party. They alleged that the remaining 8 annas and odd share formed the lakheraj jagir interest of the pro forma defendant first party. The principal defendants were alleged to be the cultivators in respect of 62 acres of land within the jagir interest at a jama of Rs. 41-8-0. The suit was framed according to the provisions of S. 148 A of the Bengal Tenancy Act and the plaintiffs claimed the rent which they alleged to be due on account of their share in the entire rent due for the holding. The suit was for arrears of rent for the years 1323 to 1326 Faslis. The *pro forma* defendants second party who are the vendors of the plaintiffs, filed a written statement admitting the sale and the title of the plaintiffs to claim the arrears of rent and they further stated that the arrears in dispute had not been paid to them and were still due. The principal defendants who are the tenants of the land filed a written statement in which they stated *inter alia* that there was no relationship of landlord and tenant between the plaintiffs and the *pro forma* defendant first party and themselves. They alleged that one Shaikh Jan Muhammad, who is called Khan Muhammad in the judgments of the Courts below, was the tenant of the land in dispute and that these defendants were his under-tenants and that they had regularly paid rent to Khan Muhammad and that they had paid up the rents for the years in suit. They further raised the plea that they did not admit the purchase made by the plaintiffs or their alleged share and they stated that they did not admit that the vendors of the plaintiffs were in possession of the extent of share in the rent claimed land which is alleged to have been sold to the plaintiffs: they further stated that the plaintiffs' names had not been recorded in the Municipality or in the Land Registration Department of Gaya Collectorate, nor were they in possession of the rent claimed lands, and that, therefore, the plaintiffs could not maintain the suit for rent.

The learned Munsif before whom the case came on for trial held that the defendants' allegation that Khan Muhammad was the tenant of the land in dispute and that the principal defendants were his under-tenants had not been made out. He held that it had been satisfactorily proved that there was a relationship of landlord and tenant between the plaintiffs and the tenant defendants and that the suit was maintainable. He, however, was of opinion that the plaintiffs had not proved, that they had ascertained what rent was due to the co-sharer landlord from the tenant defendants, that under S. 148 A of the Bengal Tenancy Act they were bound to prove that they had made that enquiry from their co-sharer but as the tenant-defendants had stated that they had not paid rent either to the plaintiffs or to their co-sharer for the years in suit and the plaintiffs had paid full Court-fee for the sixteen annas rent claimed, therefore, the plaintiffs were entitled to get a joint decree with the *pro forma* defendant first party for the sixteen annas of the rent claimed. He held that the decree that he was going to pass would not be a decree under S. 148 A of the Bengal Tenancy Act. He accordingly made a decree in favour of the plaintiffs and *pro forma* defendant first party for the entire rent of the holding for the years in suit.

Against this decree the tenant-defendants went in appeal before the District Judge and the learned District Judge upheld the finding of the Trial Court as regards the relationship of landlord and tenant between the plaintiffs and the tenant-defendants ; he held that it had not been proved that Khan Muhammad was the tenant of the land in dispute and that the tenant-defendants were his under tenants ; and he accordingly held that the principal defendants were raiyats holding under the jagirdars. He then proceeded to investigate the title of the plaintiffs as jagirdars and he found that the plaintiffs had failed to prove that they had 7 annas 11 pies 13 krants share in the jagir interest. He found that the plaintiffs had only 11 pies 19⅛ krants share in the jagir. He then proceeded to determine for what amout a decree should be passed. The Munsif had ordered that the tenant-defendants do pay to the plaintiffs and the *pro forma* defendant first party the full amount of the recorded rent but he observed that the plaint itself stated that the plaintiffs had brought the

suit believing that their share is the whole of the arrear due and that prayer No. 3 of the plaint was a prayer that decree may be passed for the plaintiffs' share ; and, in the circumstances the learned Judge was of opinion that a decree for more than this share should not be passed. He accordingly modified the decree of the Munsif and made a decree in favour of the plaintiffs for 11 pies 19⅛ *krants* share of the rent and he directed that the decree will be a rent decree under S. 148 A of the Bengal Tenancy Act.

Against this decree the plaintiffs come in second appeal to this Court and the tenant-defendants have filed cross-objections.

On behalf of the appellants it has been contended that having regard to the circumstances of the case it was not open to the tenant-defendants to dispute the share of the plaintiffs as alleged by them in the plaint. Secondly, it has been contended that assuming that it was open to the tenant-defendants to raise this question, the learned District Judge has not considered the entire evidence in the case; and that on a proper consideration of the evidence he ought to have come to the conclusion that the share claimed by the plaintiffs was the share to which they were entitled.

The points taken on behalf of the tenant-defendants in cross-objection are that the findings of the learned District Judge as regards the relationship of landlord and tenant between the *jagirdar* and themselves was erroneous ; and that the plaintiff-appellants or their vendors not having been recorded in the *Batwara* or Register D they were not entitled to maintain the present suit.

As regards the first contention raised on behalf of appellants, I am of opinion that it ought to prevail. As I have already stated, the suit was one as provided by S. 148-A of the Bengal Tenancy Act. In this suit the co-sharer landlord of the plaintiffs was impleaded as a defendant and it was stated that the plaintiffs' share as landlords was 7 annas 11 pies 13 *krants* and that the remaining 8 annas and odd was owned by the *pro forma* defendant first party. The *pro forma* defendant first party did not appear in the suit and raise any objection as regards the share of the plaintiffs. The tenant-defendants in their written statement no doubt alleged that they did not admit the purchase made by the plaintiffs or their alleged share or the share of their vendors ; but during the trial in the Munsif's Court this point does not appear to have been pressed. The only question as regards title that appears to have been raised before the Munsif was as to whether Khan Muhammad was or was not the tenant of the land in suit, and whether the tenant-defendants were or were not his under-tenants. The share of the plaintiff in the *jagir* interest as claimed by them does not appear to have been disputed before the Munsif. Before the learned Judge the plaintiffs' title as *jagirdars* appears to have been questioned and the learned District Judge seems to be of opinion that the plaintiffs have established their title as *jagirdars* ; but he held that they had failed to prove that their share in the *jagir* was as claimed by them and that they had only succeeded in proving their share to the extent of 11 pies 19⅛ *krants*. In a suit framed according to the provisions of S. 148A of the Bengal Tenancy Act, where the tenant-defendants do not allege that any co sharer landlord has been left out from the suit, or that they had paid rent to the co-sharer in excess of the share alleged by the plaintiffs to be held by such co-sharer, I think it is not open to the tenant-defendants to question the share of the rent payable to the plaintiffs landlords. The plaintiffs assert that they have a specific share in the presence of all their co-sharer landlords. These co-sharer landlords do not choose to question the share claimed by the plaintiffs. The tenants do not allege that they paid any rent to the co-sharer landlords in excess of the share alleged to be held by such co-sharer landlords. Under such circumstances I think it is no concern of the tenant-defendant to dispute the share alleged to be held by the plaintiffs landlords if he is not made to pay more than the rent payable for the holding. No doubt in an ordinary suit for rent not framed according to the provisions of S. 148 A of the Bengal Tenancy Act where some of the co-sharer landlords bring a suit for their share of the rent and the other co-sharer landlords are not impleaded as parties to the suit, it would be open to the tenant-defendants to call upon the plaintiff to prove that he is entitled to realize the share of the rent as claimed by him. But, I am of opinion that under

the circumstances of the present case, where the plaintiffs have made their co-sharer a defendant in the suit and have alleged that the entire sixteen annas of the rent is payable to them and the co-sharer defendant, and the tenant-defendants do not allege to have paid any rent to the co-sharer defendant in excess of the share alleged to belong to him, it was not open to the tenant-defendants to question the share of the plaintiffs. Reliance has been placed on behalf of the tenant-respondent upon the case of *Abdul Gafur* v. *Ali Miah* (1) but that case has no application to the facts of the present case. That was a suit in which the plaintiff did not originally bring his co-sharer on the record and claimed a certain amount of rent from the tenant as due to him. The tenant filed a written statement urging, amongst other pleas, that the plaintiff alone was not competent to maintain the suit as he was a fractional landlord. The plaintiff thereupon applied to add his co-sharer as a defendant, and this was done, and the added co-sharer raised the question that the share claimed by the plaintiff was more than he was entitled to and the Courts below proceeded to adjudicate the question as regards the title between the plaintiff and his co-sharer. Their Lordships observed that the effect of the addition of the co-sharer was to transform a simple rent suit into a complex title suit, and that this course had been condemned by the High Courts. Their Lordships, however, proceeded to observe as follows:—"To guard against possible misapprehension, we must state at the outset that it cannot be affirmed as a broad proposition of law that a question of title may not be incidentally investigated in a suit for arrears of rent. Where the tenant-defendant disputes the extent of the title of the plaintiff to the arrears demanded, it is incumbent on the Court to determine the point before the claim is allowed or disallowed." It is upon these observations that the learned Vakil for the respondent lays stress: but it is clear that these observations were made as broad propositions of law, and I agree that in an appropriate case it is open to the tenant to question the title of the plaintiff in a suit for rent. But it is not a general proposition applicable to every case, and, in the present case, I am of opinion, that when the co-sharer landlord does not dispute the title of the plaintiff, when the tenant-defendant does not allege that he has paid rent in excess of the share allotted by the plaintiff to his co-sharer landlord, and where it is nobody's case that there is any other co-sharer landlord who has not been brought on the record, it is not open to the tenant-defendant to question the share of the rent claimed by the plaintiff.

(1) 1925 Cal. 25=28 C. W. N. 805.

In this view of the case it is not necessary to consider the second point taken by the learned Counsel for the appellants. But I may observe that the decision of the learned District Judge on this point does not appear to be satisfactory. The learned Counsel for the appellants has placed before me portions of the documentary evidence which have not been considered at all by the learned Judge and also the documents which have been referred to by the learned Judge and they do certainly go to show that the plaintiffs have more than 11 pies 19⅛ *kraunts* share as held by the learned Judge. However, having regard to the fact that in my opinion the appellants are entitled to succeed on the first point, it is not necessary to discuss the second point, in detail. If the appellant had failed on the first point then it would have been necessary to make a remand to the lower Court for re-hearing of the appeal upon the entire evidence in the case.

As regards the cross-objections of the respondents, the first point taken by them raises a question of fact which has been determined by both the Courts below upon a consideration of the evidence, and it is not open to the respondents to raise this question in second appeal.

As regards the second point I find that this point was not taken either in the Trial Court or before the District Judge. No doubt the plea of non-maintainability of the suit on account non-registration of the names of the plaintiffs in the Land Registration Department of the Collectorate was taken in the written statement: but there is no mention of this point in the decision of either of the Courts below. The land is a lakheraj jagir land within the Municipal limits of the town of Gaya, and in order to raise the bar under S. 78 of the Land Registration Act (VII of 1876 B. C.) it would be necessary to enquire whether the jagir interest is such as is required by the Land Registration Act to be registered in the Collectorate Register.

As was pointed out by the Calcutta High Court in *Pitamber Singh* v. *Sukrim* (2) some revenue free lands in the Districts of Bihar were released after proceedings held under Regulation II of 1819; these were called Estates or Revenue Free Estates and they were entered in the Collectorate in the Register of Revenue Free Estates, but all revenue free estates were not registered and that, therefore, it was not true that every proprietor of revenue free estate is bound to have his name registered. The jagir interest in the present case is a revenue free estate of the nature described in that case and as was observed by the learned Judges in that case the disqualification in bringing suits for rent is one which attaches only to revenue free estates already entered in the General Register if the proprietor or manager or mortgagee fails to register his name. Here it has not been shown that the jagir interest in suit was such as had already been entered in the General Register of the Collectorate. The point raises a question of fact and as it was not raised in the Court below, I think it is not open to the tenant-defendant to raise this question in second appeal.

The result is that the decree of the learned District Judge is modified and a decree will be made in favour of the plaintiffs for 7 annas 11 pies 13 *krants* share of the rent. The decree will be a rent decree under S. 148A as directed by the learned District Judge. The appellants are entitled to the costs of this appeal and to proportionate costs according to the amount decreed in both the Courts below. The order for damages at 25 per cent. will stand. The cross-objection is disallowed but without costs.

Decree modified.

(2) [1903] 35 Cal. 747.

★ 1925 PATNA 568

DAWSON MILLER, C. J. AND
JWALA PRASAD, J.

Kedar Nath Goenka and others—Plaintiffs—Appellants.

v.

Amrit Mandal and others — Defendants—Respondents.

First Appeal No. 6 of 1922, Decided on 6th April 1925, against the decision of the Sub. J., Bhagalpur, D/-30th May, 1921.

★ (*a*) *Adverse possession — Occasional acts of trespass do not amount to adverse possession.*

No title by adverse possession can be presumed from a few acts of trespass committed from time to time.

★ (*b*) *Jalkar —Actual grant need not be proved if plaintiff has been long in possession —Evidence of exercise of right must be clear.*

It is not absolutely essential to prove an express grant after a considerable lapse of time and the plaintiffs can establish their right by proof of an uninterrupted user of fishery prior to their dispossession. The evidence however, must be clear and unambiguous showing the plaintiffs' exercise of the right of fishery over the particular spot in river particularly when the bed of the part of the river in question belonged to the owner of the adjoining village. 42 *Cal.* 439 (*P. C.*) *Foll.*

H. Imam, Niamatullah, N. C. Sinha, S. N. Bose and *N. C. Ghosh*—for Appellants.

S. A. Sami and *S. N. Rai*—for Respondents.

Dawson-Miller, C. J.—The Appellants are the proprietors of Taluka Rasulpur Bhatauni together with a fishery known as *jalkar* Kamri and Dab appurtenant to the Taluka. The respondents are some of the proprietors of mauza Kapsia and certain of their tenants.

The Plaintiff's instituted the suit out of which this appeal arises in April 1920 against the Respondents claiming a declaration that the fishing rights in that part of the river Ghaghri which flows through or adjacent to the Respondents' mauza are included in *jalkar* Kamri and Dab and that the Defendants have no right to fish therein. They also claimed in the alternative a title by adverse possession.

Mauza Kapsia is admittedly outside the Plaintiffs' Taluka and the bed of the river Ghaghri where it flows past Kapsia forming its western and southern boundaries is recorded in the record-of-rights as belonging to the proprietors of that village up to its middle line, the other side being apparently the proprietary interest of the riparian owners on the opposite bank in mauzas Birbas and Paikant which lie to the westward.

The initial difficulty in the way of the Appellants and which to my mind is fatal to their case is that the limits of their *jalkar* have nowhere been clearly defiend in their evidence. The eastern or south-eastern limit of their *jalkar* is claimed to be a place called Simaria *ghat*, but this *ghat* is not shown on the only

map produced by them and for aught that appears to the contrary it may be on a tributary or branch of the Ghaghri river and not on the main stream. It may be assumed that certain *Phauris* or branches of the Ghaghri river and possibly parts of the river itself further to the westward are included in the Appellants' *jalkar* which derives its name from two large *jheels* named Kamri and Dab situate in villages to the westward of Kapsia. It should be mentioned that the river Ghaghri runs generally in a south-easterly direction but follows a winding course. It forms the western boundary of Kapsia and then taking a curve through the east to the north flows back again to the southward and eastward thus forming also the southern boundary and part also of the eastern boundary of that village. The southern part of Kapsia thus lies in a roughly formed horse shoe bounded by the river. The area included within the Appellants' *jalkar* has been defined in certain *kabuliyats* granted by fishermen tenants of the Appellants by reference to the north, south, east and west boundaries. The east boundary has been defined as "up to the boundary limit of Kapsia" and the south boundary as "mauza Katmara from the boundary limit of Chautim to mauza Paikant near *ghat* Simaria" and the north as "mauza Usraha to mauza Kapsia." All the villages named including Paikant lie to the westward of Kapsia and the river where it forms the western boundary of Kapsia divides that village from Paikant which is adjacent to the west or south-west. There is also a branch of the river near the south-west corner of Kapsia which turns away suddenly to the westward leaving the main stream and passing through Paikant and from the evidence as to the locality of Simaria *ghat* it is quite possible that this *ghat* lies on that branch at or near the place where it joins the main stream. If this is so, it would also fit in with the description of the southern limit of the *jalkar* which is from mauza Katmara to mauza Paikant near Simaria *ghat* which implies that Simaria *ghat* is in Paikant to the west or south-west of Kapsia. If this is so, it would seem that the river itself is excluded, for even if Simaria *ghat* be on the Ghaghri river and not on the branch mentioned it is on that bank of the river which lies in Paikant. Moreover if the eastern limit of the *jalkar* is up to the boundary limit of Kapsia this is presumably the western boundary limit of Kapsia for it is not suggested that any of the *jheels* in Kapsia itself lie within the Plaintiffs' *jalkar*. The Appellants could have produced authentic documents to show the boundaries of their *jalkar* but they failed to do so. Apart from the verbal evidence which is too vague to be of any value they rely solely on the *kabuliyats* to which I have referred. Neither the original grant nor their *kabala* by which they purchased from the previous proprietors nor the batwara khisra or batwara maps when the taluk was partitioned some years ago nor the village notes or other survey records relating to the *jalkar* have been produced and the *kabuliyats* are at the best ambiguous. They produced some of their own village papers but these do not show any rents from *jalkar* rights in mauza Kapsia.

The verbal evidence of the exercise of *jalkar* rights in the disputed locality is also very unsatisfactory. The Appellants' muharrir, their first witness, admittedly knows nothing about it. The next witness Nabi Dhobi, said to be a *ticcadar* at one time of the Appellants, does not say difinitely that he ever fished in the disputed part of the river and he produced no papers to prove that he had a lease. The next witness is equally vague and he produced no rent receipts although he said they existed. The next witness says Simaria *ghat* is to the south of Kapsia 10 or 15 *rasis* (500 to 750 yards). If so, it is not on the Ghaghri river. The next witness says the Appellants' *jalkars* are to the west and north of Kapsia. Most of them say the Kapsia *maliks* do not fish in the river but one of them admits they do. Most of them have no direct concern with the fishery. Even the Plaintiffs' *patwari* cannot give the boundaries of the *jalkar*. He said they were in the *batwara* papers but these were not produced.

The learned Subordinate Judge considered this evidence too vague and inconclusive to act on and I see no reason after listening to the Appellants' argument to take a different view.

It is not shown that the Appellants were ever in exclusive possession of these disputed waters and their claim to title by adverse possession also fails. Even if their *mustajirs* committed a few acts of trespass from time to time no title by adverse possession can be presumed from such conduct.

It is unnecessary to consider the question of non-joinder of parties which was raised. It is at least clear that any declaration the Appellants might be entitled to would not bind those who are not represented in the suit, but in the view taken on the main question this point is of secondary importance. It may be added that the evidence adduced by the Defendants shows that the *maliks* of Kapsia through their lessees have exercised fishing rights on the disputed waters for a long time, some of the older witnesses speaking to the exercise of such rights for the last 23 to 25 years. In my opinion no reason has been shown why we should disturb the judgment of the trial Court and I would dismiss this appeal with costs.

Jwala Prasad, J.—This is an appeal from a decision of the Subordinate Judge of Bhagalpur, dated the 30th May 1921, dismissing the Plaintiffs' suit. The subject-matter of the litigation is a *jalkar* or right of fishery. The Plaintiffs have indicated the disputed *jalkar* in yellow colour on the survey map fil.d with the plaint, The *jalkar* is claimed in respect of that part of *Nadi* Ghaghri which flows between two villages Kapsia and Birbas, the bed of which belongs to the proprietors of those two villages as part of their permanently settled estates.

The Plaintiffs are proprietors of a permanently settled Taluka called Rasulpur Bhatauni bearing Tauzi Nos. 530 and 5715 and *adar sama* Rs. 916. The Taluka includes several mauzas and the *jalkar* mahals of Kamri and Dab together with all *Phauris* and branches thereof. The Plaintiffs as proprietors of the Taluka are in possession of the aforesaid *jalkars* Kamri and Dab including the branches thereof and their names stand registered in the Collectorate with respect to the aforesaid Taluka and the *jalkar* mahals of Kamri and Dab.

Briefly speaking the Plaintiffs' case is that of the *Phauris* and branches of *jalkars* Kamri and Dab there is a *jalkar* known as *jalkar Nadi* Ghaghri which passes through mauza Thuthum and other villages in the District of Monghyr and towards east passing by the boundary of mauza Kapsia Touzi No. 3052, Pargana Chhai, District Bhagalpur, extends up to Simaria *ghat* and the Plaintiffs have been in possession thereof as proprietors of Taluka Rasulpur Bhatauni from a long time. During the survey and settlement proceeding which began in 1902 and the record of which was finally published in December 1904, half the bed of river Ghaghri in the vicinity of mauza Kapsia, bearing Khisra No. 494, was measured within Kapsia village. In 1324 the *jalkar* of the said river Ghaghri was settled by the Plaintiffs with the Defendants Nos. 1 to 3, second party, but about the fishing season the first party Defendants, *maliks* of mauza Kapsia, set up Defendants second party as their settlement-holders and caused a proceeding to be instituted in March 1917 in the Criminal Court under S. 145 of the Code of Criminal Procedure in respect of the *jalkar* in question. The proceedings ended with the decision, dated the 18th April 1917. in favour of the Defendants, proprietors of mauza Kapsia. A motion to the High Court on behalf of the Plaintiffs' *mustajirs* was rejected on the 24th of July 1917. As a result of the criminal proceedings the Plaintiffs were dispossessed of the *jalkar* from the 18th April 1917, and the Defendants first party have been in possession since then. After the decision of the case under S. 145 the Defendants third party, who were the lessees of the Plaintiffs, surrendered their lease and have gone over to the side of the Defendants first party, The Plaintiffs' case as summed up in para. 6 of the plaint is that although they have nothing to do with the land situate in the bed of the river Ghaghri, bearing survey No. 494, yet the *jalkar* of the said river Ghaghri is a branch of the Plaintiff's *jalkar* Kamri and Dab which was settled with them along with the Taluka Rasulpur Bhatauni and that they have all along been in possession of the disputed *jalkar* before they were dispossessed as aforesaid in 1917, and that even if they do not possess any right or title to the said *jalkar*, yet owing to adverse possession for more than 12 years before dispossession they have acquired absolute right to the said *jalkar* and the Defendants first and second parties had no right to oust them from the possession of the *jalkar*. The plaintiffs further say that although the proceedings under S. 145 of the Code of Criminal Procedure related only to half the *jalkar* of river Ghaghri, the bed of which was measured within Kapsia in Khisra No. 494, yet the Defendants first party being emboldened by the decision of the Criminal Court dispossessed the Plaintiffs of the

entire *jalkar* of river Ghaghri including *Khisra* No. 861 situate in mauza Birbas, Pargana Phirkia, District Monghyr, opposite Kapsia. Upon these allegations the Plaintiffs claim a declaration of their right to the *jalkar* in dispute and recovery of possession thereof with mesne profits from the date of institution of the suit till recovery of possession.

The Defendants Nos. 8, 9 and 12 to 14 are the chief contesting Defendants.

They filed a joint written statement denying the plaintiffs' right, title and possession over the *jalkar* in question and asserting that the *jalkar Nadi* Ghaghri bearing survey *Khisra* No. 494 appertains to their mauza Kapsia and not to the Plaintiffs' *jalkar* Kamri and Dab, and that the Defendants and not the Plaintiffs have been in possession of the *jalkar* in question. They further state that the circuitous portion of the river Ghaghri towards the west of village Kapsia had entirely separated from *Nadi* Ghaghri in Asin 1324 and from that the *Nadi* Ghaghir has left that course which has become Maro Ghaghri having no longer any connection with the river Ghaghri except during rains, so that even if the Plaintiffs have any concern with the river Ghaghri, which the Defendants deny, still the Plaintiffs have no right to fish in Maro Ghaghri. They also impugn the suit as being bad on account of having left out necessary parties and having impleaded some imaginary persons, such as Defendants Nos. 2 3 and 11. The Defendants Nos. 1, 3 to 7 and 10 have filed one written statement and Rikhi Mahto, Defendant second party, filed another written statement. They denied the Plaintiffs' claim but did not contest at the trial.

Upon the pleadings the trial Court framed the following issues :—

"1. Has the suit been over-valued?"

"2. Have the Plaintiffs any cause of action against the Defendants?"

"3. Is the suit bad for non-joinder and mis-joinder of parties as alleged by Defendants?"

"4. Is the suit barred by limitation?"

"5. Have the Plaintiffs any title in the disputed *jalkar*?"

"6. Have the Plaintiffs acquired title to the *jalkar* in the dispute by adverse possession?"

"7. Is the Piaintiffs' allegation of possession and dispossession true?"

"8. Are the Plaintiffs entitled to recover possession of the *jalkar* in dispute?"

"9. Are the Plaintiffs entitled to mesne profits?" If so, to what extent?"

"10. To what relief, if any, are the Plaintiffs entitled?"

Issue No. 1 does not arise not having been pressed in the Court below or in this Court. The remaining issues have been decided against the Plaintiffs, with the result that their suit has been dismissed. The Plaintiffs have come to this Court in appeal and impugn the decision of the Subordinate Judge on all the points decided against them.

The contest however, principally centres round Issue No. 5: "Have the Plaintiffs any title in the disputed *jalkar*?" and in fact the decision of the appeal rests entirely upon the decision of this issue.

The undisputed facts are that Taluka Rasulpur Bhatauni formerly belonged to two brothers Maharaj Singh and Sheo Sahay Singh. They partitioned that Mahal among themselves and subsequently by transfer and arrangement among themselves Maharaj Singh become the 16 annas proprietor of the Taluka which included *jalkar* Kamri and Dab. The Plaintiffs purchased the said Taluka with the said *jalkar* from the heirs and representatives of Maharaj Singh and thus they are now the proprietors of the said Taluka including *jalkar* Kamri and Dab and their names are recorded in respect thereof in the Collectorate registers. The Plaintiffs are thus the proprietors of *jalkar* Kamri and Dab. The question is whether the disputed *jalkar* appertains to and is included in the Plaintiffs' *jalkar* Kamri and Dab. It is undisputed and in fact the Plaintiffs admit in para. 6 of the plaint, that the land situate in the bed of the river Ghaghri opposite mauza Kapsia, bearing *Khisra* No. 494, belongs to the Defendants, proprietors of mauza Kapsia. It is conceded in the argument on behalf of the Plaintiff that there is no document showing the grant of the disputed *jalkar* to the Plaintiffs or their predecessor-in-interest, or that the disputed *jalkar* is a part of the Plaintiffs' *jalkar* Kamri and Dab included in their Taluka Rasulpur Bhatauni. No record of the settlement showing the disputed *jalkar* as having been settled with the predecessor in interest of the Plaintiffs

as part of their *jalkar* Kamri and Dab has been produced.

The Plaintiffs have filed some papers relating to the partition of Taluka Rasulpur Bhatauni among the then proprietors thereof (Exbts. 7, 8, 9 and 10 from 1838 to 1854). These papers do not carry the case further than that Taluka Rasulpur Rhatauni embraces two *jheels* or lakse called *jalkar* Kumri and Dab.

Certain judgments and *Rubakari* of the revenue authorities of 1869 and 1870 (Exbts. 17, 18 and 11) filed by the Plaintiffs only show that the claim of the Government as owner of *khas mahal* as to the right of fishery in certain pools within the Government estate of Gowas and Moorassee was disallowed in favour of the Zamindar of Rasulpur Bhatauni who claimed the right of fishery in those pools. These documents are of no assistance in the present case. There is therefore a total absence of any documentary evidence to prove that the Plaintiffs' *jalkar* Kamri and Dab included the fishery rights in the part of river Ghaghri adjoining village Kapsia, the bed of which belongs to the *maliks* of Kapsia as a part and parcel of their permanently settled estate In fact there is no definite evidence to show the extent of the Plaintiffs' *jalkar* Kamri and Dab.

The Plaintiffs, therefore, in support of their claim to the *jalkar* in the particular spot in dispute in the river Ghaghri, rely solely upon their having in the past exercised the right of fishery therein. It is now well settled that it is not absolutely essential to prove an express grant after a considerable lapse of time and the Plaintiffs can establish their right by proof of an uninterrupted user of fishery prior to their dispossession; *vide Srinath Roy* v. *Dinabandhu Sen* (1). The evidence, however, must be clear and unambiguous, showing the Plaintiffs' exercise of the right of fishery over the particular spot in river Ghaghri particularly when the bed of the part of the river in question belongs to the *maliks* of Kapsia as part of that village. The recent survey has admittedly included the bed of the river, half in village Kapsia and has allotted a *Khisra* number to it, namely, No. 494, and half in village Birbas, *Khisra* No. 861. The bed of the river having been settled with the owners of villages Kapsia and Birbas, it has ceased to be the Government property or a public domain, and ordinarily the owners of the bed of the river, namely, the Kapsia and Birbas *maliks* will have the right of fishery unless the Plaintiffs established that they have been using the waters of the river in question for the purpose of catching the fish and have been exercising their right of fishery to the exclusion of the owners of the bed of the river. The Plaintiffs have tried to prove the exercise of their right of fishery in the disputed spot by means of certain *kabuliyats* in respect of *jalkar* rights executed by lease-holders. These *kabuliyats* do not very much assist the Plaintiffs in establishing that their *jalkar* right extended to the spot in question. The *kabuliyats* 3 (*d*) of 1871, 3 (*c*) of 1873, 3 (*b*) of 1875, 3 (*f*) of 1880 and 4 of 1903 do not give any description or boundary of the *jalkar* taken settlement of by the *mustajirs*. They do not expressly mention *jalkar* in the *Nadi* situate in mauza Kapsia and have not been seriously relied upon by the Appellants in course of their arguments.

The *kabuliyats* 3 (*e*) of 1875, 3 (*a*) of 1870, 3 (*h*) of 1882, 3 (*i*) of 1888, 2 of 1902 and 4 (*a*) of 1915 attempt to describe the *jalkars* leased out, but it is not possible from the description of the boundaries given therein to say for certain that the *jalkar* in dispute was included in the settlement.

The Plaintiffs rely upon two notes (Exbts. 12 and 13) dated the 16th March 1903 and 10th May 1903 respectively, made by the Assistant Settlement Officer and a list of *jalkars* (Exbt. 14) appertaining to the Plaintiffs' Taluka Rasulpur Bhatauni. Witness No. 12 for the Plaintiffs, Ram Chandra Prasad, who was appointed to look after the survey affairs of the Plaintiffs, has been examined to prove that the aforesaid notes and the list were written and signed by Babu Kandhji Sahay, Assistant Settlement Officer. Babu Kandhji Sahay who made inquiries and prepared the notes and the list has not been examined. The witness says: "I had seen the village

(1) [1914] 42 Cal. 489=41 I. A. 221=18 C. W. N. 1217=(1914) M. W. N. 654=1 L. W. 733=16 M. L. T. 319=12 A. L. J. 1193 =20 C. L. J. 385=25 I. C. 467=16 Bom. L. R. 901 (P. C.)

notes of all the villages where *jalkars* are. I did not see the village note of Kapsia as it did not belong to the Plaintiffs. I saw the village notes of the villages which were in Plaintiffs' possession." Further on he says: "I went with Babu Kandhji Sahay in his inquiry.....I cannot say about which *jalkar* there was dispute before Kandhji Sahay. I do not remember in which village Kandhji Sahay had gone to hold inquiry." The witness does not prove that the disputed *jalkar* has been either the subject of inquiry by the Assistant Settlement Officer or the aforesaid notes and list related to the *jalkar* in question. Strictly speaking, these notes and list have not been properly proved and are not admissible in evidence. It is not known on what basis and upon what evidence they were prepared. The Defendants were not parties to the dispute which led to the preparation of the notes and the list They were prepared at the instance of the Plaintiffs and as pointed out by them. They have not been incorporated into the finally published record-of-rights. Therefore they have no evidentiary value against the Defendants.

Assuming that the list is admissible in evidence, from the description and the boundaries given therein as in the case of those given in the *kabuliyats* one cannot with certainty say that the disputed *jalkar* between Kapsia and Birbas appertains to the Plaintiffs' *jalkar* called Kamri and Dab. The eastern boundary is said to be Kapsia, and the northern boundary Usraha. The southern boundary is said to extend from Kathmara to Paikant near *ghat* Simaria. *Ghat* Simaria has not been traced on the map, and the plaintiffs have failed to show where this would be. Paikant is to the south-west of Kapsia, according to the evidence, at some distance. River Ghaghri surrounds village Kapsia on three sides. It enters the village on the west and turns towards the south and then goes upwards towards north, and then turns towards the east. Following the course of the *jalkar* as described in the aforesaid documents it would seem that the disputed portion of the western side of Kapsia is excluded from the Plaintiffs' *jalkar* appertaining to the Taluka Rasulpur Bhatauni. The plaintiffs' *jalkars* are called Kamri and Dab. According to their witness No. 8 Kamri is 1 or 1½ *koses* away from Dab. Kamri is in village Birbas, and Dab in village Usraha. P. W. No. 9, Plaintiffs' *patwari*, says that Kamri is a village, and the river opposite it is called Kamri. Dab is near Kathmara and is a big *nadi*. It is not a *Kund*. Although these witnesses contradict each other as to which of them is a *nadi* and which is a *Kund* they agree that both Kamri and Dab are distinct *jalkars*. Witness No. 10 says, "*Jalkars* Kamri and Dab are branches of Ghaghri." He says that the principal *jalkar* is *nadi Ghaghri*. All the *jalkars* are its off-shoots and they take water from Ghaghri. Thus Kamri and Dab are themselves branches of river Ghaghri. The portion of river *nadi* Ghaghri which passes between Kapsia and Birbas is geographically outside the limit of Kamri and Dab. The *jalkars* in Kamri and Dab belong to the Plaintiffs as part of their Taluka Rasulpur Bhatauni. They have to show that their *jalkar* right in Kamri and Dab extended beyond its geographical limit to the portion of river Ghaghri in dispute.

The Plaintiffs' witnesses divide the *jalkar* into two parts Puchwari (western) and Purwari (eastern). The disputed *jalkar* is said to be situate in the Purwari *patti* and Ex. 2 is the *kabuliyat* with respect thereto. Witness No. 2 says that the Purwari *patti* extends from Chautham on the west to Itmadi, and the Purwari *patti* from Itmadi to Kapsia. He was the *thiccadar* of Purwari *patti*. This witness states in his evidence: "There was no *Phauri* (branch) in village Kapsia which was, under my settlement." His evidence will therefore exclude the disputed *jalkar* in Kapsia from the Plaintiffs' *jalkars* Kamri and Dab, as being its branch or *Phauri*. It is noteworthy that in the *kabuliyat* (Ex. 4-a) of 1915 the Plaintiffs' *jalkar* with the aforesaid description and boundaries is said to bear survey *Khisra* No. 144, where as the *Khisra* number of the disputed *jalkar* is 494. Therefore the disputed *jalkar* has nothing to do with the *jalkar* described in the Plaintiffs' *kabuliyats* or in the list prepared by the survey authorities (Ex. 14) Again, the Plaintiffs have not filed the village note nor have they filed the finally published survey record to show that the *jalkar* in dispute has been recorded in their names. The Court below has found that the village notes produced

by the Defendants show that they are entitled to get rents of village Kapsia. The Plaintiffs do not challenge this finding and in fact have not even printed the village notes produced by the Defendants, in order to show that the finding is incorrect. The Plaintiffs have not also printed their village papers to dispute the finding of the Court below that those papers do not show that rents were ever realised by them in respect of the *jalkar* in question. As a matter of fact, the Plaintiffs' witness No. 10 admits that the village papers do not show that they relate to the *jalkar* in suit.

The note of the Assistant Settlement Officer, dated the 16th March 1903 (Ex. 12), shows that on behalf of Baijnath Goenka, father of Plaintiff No. 1, a map and khisra of *jalkar* Kamri and Dab were filed before him showing the villages to which their *jalkars* extended. On the basis of those papers he decided the dispute with regard to *jalkar* right in several villages. The cases in which the *Khisra* showed the names of the villages in dispute as appertaining to the *jalkars* Kamri and Dab, were decided in favour of Baijnath Goenka. The plaintiffs are, therefore, in possession of the aforesaid documents. Their failure to produce them in this case raises the presumption against them that the disputed *jalkar* in Kapsia is not shown in the *Khisra* as appertaining to the Plaintiffs' *jalkar* Kamri and Dab. The Plaintiffs' have also omitted to produce the Batwara khisra of 1854 whereby the *jalkars* of Kamri and Dab were partitioned among the co-proprietors. The *Khisra* would have shown to whom the disputed *jalkar*, if at all it appertained to Kamri and Dab, was allotted.

[The evidence on behalf of plffs. & defts. was then discussed in short and the Judgment then continued :—]

We have carefully perused the evidence and we are convinced that the learned Subordinate Judge has taken a right view of the evidence in the case. The learned Subordinate Judge has accepted the *kabuliyats*, the rent receipts and the village papers filed on behalf of the Defendants as showing their possession for a considerable period over the *jalkar* in question. The Plaintiffs have not challenged the finding of the Subordinate Judge upon this point, inasmuch as they have not even printed the aforesaid papers proved on behalf of the Defendants and have made no comment in this Court. The finding of the Subordinate Judge must, therefore, be accepted as correct. We must accept the conclusion to which the learned Subordinate Judge has arrived, namely, the plaintiffs have failed to show that they are the owners of the *jalkar* in question as part of their *jalkars* Kamri and Dab, or that they ever exercised the right of fishery over the *jalkar* in question.

Issues Nos. 2, 4, 6 and 7 must also be decided against the Plaintiffs. They have failed to show that they have ever been in possession of the disputed land or that they acquired any right of adverse possession.

Dealing with issue No. 8 the learned Subordinate Judge has held "the *jalkar* in dispute has become Maro Ghaghri and both its ends have been closed and the Ghaghri water joins the Maro Ghaghri during floods and rains and it has changed its course." The finding is in accordance with the evidence in the case. The Plaintiffs' witnesses have admitted that the river has changed its course and that the disputed portion is disconnected now. Both its ends remain closed for a considerable part of the year and is connected with it only for four months in the year, that is, during the flood season. Upon this finding the learned Subordinate Judge has held that the old dry course of the river must be taken to have become the private property of the Defendants, the owners of the bed of the river. In support of his view the learned Subordinate Judge has referred to the case of *Raja Sasi Kanta Acharjee Bahadur* v. *Kunja Mohan Moitra* (2). Against this view the learned Counsel on behalf of the Plaintiffs has cited the case of *Ahmadi Begum* v. *Taraknath Ghosh* (3). The point does not call for any decision in view of the Plaintiffs having lost upon issue No. 5 as to their title or possession over the disputed *jalkar*. The same remark applies to issue No. 3 under which the learned Subordinate Judge has held that the Plaintiffs have not made the *maliks* of Birbas or all the 16 annas *maliks* of village Kapsia parties to the suit, although the Defendants took this objection at the earliest stage. The Defendants claim

(2) [1917] 22 C.W.N. 63=41 I.C. 425.
(3) [1913] 17 C.W.N. 1173=21 I.C. 233=18 C. L.J. 399.

only half the bed of the disputed *jalkar* which lies in their village Kapsia, *Khisra* No. 494. They do not claim the western half which lies in village Birbas, being *Khisra* No. 861. Plaintiffs say that on account of the decision in the case under S. 145 of the Code of Criminal Procedure. the Defendants dispossessed them of the entire 16 annas *jalkar*. The Birbas *maliks* being not parties to the suit are not bound by the decision in the present case, nor are the *maliks* of Kapsia who have not been impleaded as Defendants in the present case. Upon this view the learned Subordinate Judge holds that the Plaintiffs' suit is bad for mis-joinder and non-joinder of parties. Under O. 1, R. 9, C. P. C., the suit could not be defeated on account of defect of parties. The issue, however, does not deserve any serious consideration.

The result is that agreeing with the view taken by the learned Subordinate Judge, we dismiss the appeal with costs.

Appeal dismissed.

1925 PATNA 575

DAS AND ROSS, JJ.

Mahabir Prasad and others—Plaintiffs—Appellants.

v.

Basudeo Narayan — Defendant—Respondent.

Second Appeal No. 661 of 1922, Decided on 25th May 1925, against a decision of the Sub. J., Gaya, D/- 5th June, 1922.

Co-operative Societies Act (2 *of* 1912), *S.* 43 (2) *(l)—Registrar can pass award against sons of deceased mem er as representing his estate, but not personally.*

The Co-operative Society has complete power to refer any matter in dispute between them and the estate of a deceased member to the arbitration of the Registrar. But there is no power in the Registrar of Co-operative Societies to compel strangers to appear before him unless they are sued as representing the estate of a deceased member. So, if the Registrar passes an award against the sons of a deceased member personally, the Civil Court has complete jurisdiction to set aside the award. [P 575 C 2 ; P 576 C 1]

Shiveshwar Dayal—for Appellants.

S. P. Varma and *Devaki Prasad Sinha*—for Respondent.

Das, J.—Munshi Nath Sahay was a member of the Kamalpur Barawan Co-operative Society and, as such, he borrowed certain money from the Society on which he was liable to the Society. He died on the 30th of Poos 1323 Fs. The Society having a claim against Munshi Nath Sahay took proceedings under the Co-operative Societies Act, and the matter was referred to the arbitration of the Registrar of the Society. The Registrar made an award against the present plaintiffs, who are the sons of Munshi Nath Sahay. The plaintiffs now bring the suit out of which this appeal arises for a determination of the question whether the Co-operative Society is entitled to a personal decree against them. The Courts below have differed in opinion, the lower appellate Court holding that the Society is entitled to such a decree.

The Act gives power to the Local Government to frame rules providing, *inter alia*, that

"Any dispute touching the business of a Society between members or past members of the Society or persons claiming through a member or past member or between a member or past member or persons so claming and the commitee or any officer, shall be referred to the Registrar for decision or, if he so directs, to arbitration, and prescribe the mode of appointing an arbitrator or arbitrators and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators and the enforcement of the decisions of the Registrar of the awards of arbitrators."

See S. 43, sub-section 2 (*l*) of the Co-operative Societies Act. At first sight it would seem unlikely that power should be given to the arbitrator to decide disputes between the Society and strangers to the Society. There is no doubt that the Co-operative Society has complete power to refer any matter in dispute between them and the estate of a deceased member to the arbitration of the Registrar. But there is no power in the Registrar of Co-operative Societies to compel strangers to appear before him unless they are sued as representing the estate of a deceased member. The award of the Registrar is in form an award against the present plaintiffs personally, but in substance it is an award against them as representing the estate of their deceased father. This is conceded by the learned Counsel appearing on behalf of the Society. Now if that be so, clearly there is nothing to object in

the award and the Civil Court has no jurisdiction to interfere wlth the decision of an independent tribunal.

But the decision of the learned Judge in the Court below assumes that the award was against the present plaintiffs personally. If that be the construction of the award, then clearly the arbitrator acted in excess of his authority and the Civil Court has complete jurisdiction to set aside the award. It is now agreed between the parties that whatever the Registrar may have done, the award will be treated as an award against the present plaintiffs as representing the estate of Munshi Nath Sahay and that it will be enforceable as against the estate of Munshi Nath Sahay in the hands of the present plaintiffs.

By consent of parties, therefore, the decree passed by the Court below is thus modified, There will be no order for costs.

Ross, J.—I agree.

Decree modified

1925 PATNA 576

ADAMI AND KULWANT SAHAY, JJ.

Babu Ram Chander Tewary — Petitioner.

v.

Gudar Potedar and others — Opposite Party.

Civil Rev. No. 45 of 1925, Decided on 21st May 1925, from an order of the Sub-J, of Purnea, D/- 16th January 1925.

Civil P. C., O. 26, R. 11—Profits arising out of mortgaged property—Commissioner can investigate but he cannot enquire as to possession.

Court cannot delegate all its judicial powers to the Commissioner. In a suit relating to mortgage, the most that the Commissioner can do would be to investigate and report on the profits arising from the mortgaged lands during the years in suit, but he cannot be asked to take evidence as to the possession of any party or the extent of that possession. [P 576 C 2]

Janak Kishore—for Petitioner.

B. N. Mitter and *K. L. Moitra*—for Opposite Party.

Adami, J.—The petitioner instituted a suit against the opposite party on the basis of a mortgage bond dated the 21st August 1917. The reply of the defence to the plaint was that the petitioner had been in possession of a portion of the mortgaged property and had satisfied the mortgage debt out of the usufruct of the property. The opposite party defendants asked that a Commissioner should be appointed. It is not clear for what purpose the Commissioner was to be appointed, for the writ of commission is not on the record.

The learned Subordinate Judge ordered a commission to issue and appointed a Commissioner. Thereafter the present petitioner objected to the issue of the commission before the Subordinate Judge who succeeded the Subordinate Judge who had directed the commission to issue. The Subordinate Judge rejected the petition of the petitioner and held that the Commissioner should proceed to carry out the commission.

Before us it is objected that the questions to be decided were whether the bond was a usufructuary mortgage bond and whether the petitioner had in fact been in possession of the property, and it would seem that the work the Commissioner was to do was to inquire as to the possession of the petitioner. As I have said before, we have not the writ before us and we do not know what instructions were issued to the Commissioner but Mr. Janak Kishore agrees that if the Commissioner merely inquires into the amount of the profits from the mortgaged lands there will no objection to the Commissioner proceeding, otherwise the Commissioner would not be empowered to take evidence as to the plaintiff's possession or the extent of that possession.

It is clear that the lower Court could not delegate all its judicial powers to the Commissioner and that the most that the Commissioner could do would be to investigate and report on the profits arising from the mortgaged lands during the years in suit.

With a direction, therefore, that the Commissioners's inquiry should be confined to this investigation as to the profits from the lands, the order of the lower Court will be upheld and the Commissioner will be directed to continue his investigation in the direction which I have stated.

There will be no order for costs.

Kulwant Sahay J.—I agree.

Order varied.

★ 1925 PATNA 577

JWALA PRASAD, J.

Sital Prasad Singh and others—Appellants.

v,

Jagdeo Singh—Respondent.

Decided on 18th December, 1924.

★ (a) *Civil P. C. Ss.47 and 144—Question under Civil P. C., S. 144 is also one under S. 47—Court Fees Act* (1882), *S. 35 and Local Government of B & O. Notification No. 2576 L.A. 25 of* 1921.

Determination of a question arising under S. 144 will naturally relate to the execution, discharge or satisfaction of the decree either of the First Court or of the Appellate Court. If the First Court's decree has been discharged by the Appellate Court, the question arising under S. 144 will naturally be a question as to the discharge of the decree coming under S. 47 of the Civil P. C. [P 580 C 2]

In an appeal under S. 47, of the Civil P. C. "A" was declared (reversing the lower Court's order) entitled to a certain share in the sale proceeds realised by the decree-holder, which were lying in Court. Subsequently the lower Court allowed also the claim of "A" for interest and damages from the date on which the decree-holder removed from the Court, the entire sale proceeds realised by him.

Held: that the order came under S. 47, that therefore the B. and O. Government Notification No.2576 LA-25 of 1921 directing under S. 35 of the Court Fees Act that the fee chargeable on appeals from orders under Civil P. C. S. 47, shall be limitted to the amounts chargeable under Sch. 2 Art. 11 of the Court Fees Act applied and therefere that an appeal from the Court's order in the present instance need not be stamped *ad valorem* but that a stamp of Rs. 4 was enough.

Rai Gur Saran Prasad, Raghunandan Prasad and *Anand Prasad* for—Appellants.

Government Pleader—for Respondent.

Judgment.—This is a reference by the Taxing Officer about the court fee to be paid upon the memorandum of appeal. The facts appear to be as follows.

The appellants obtained a mortgage decree against Gopi Nath Singh, Bodh Narayan, the *Mahanth* of Bodh Gaya and others. Bodh Narayan was a prior mortgagee, and the *Mahanth* was made a defendant as a subsequent purchaser. In execution of that decree some of the mortgaged properties were sold for Rs. 71,198/- on 21st October 1918. Bodh Narayan also obtained a decree on his prior bonds making Harbans Narayan a defendant. He claimed Rs. 36,907-7-7 out of the sum realised by the auction sale in the decree of Harbans Narayan. This was disallowed by the Subordinate Judge. Bodh Narayan then came up to this court in appeal. That appeal was treated as one under S. 47 of the Code of Civil Procedure. The order of the Subordinate Judge was set aside by this Court and Bodh Narayan was declared entitled to receive Rs. 36,907-7-7 out of the sale proceeds. Against the order of this Court there is an appeal pending before the Privy Council. During the pendency of the appeal in this Court the decree-holder Harbans Narayan had withdrawn the entire sale proceeds of Rs. 71,198 on furnishing security. Bodh Narayan is dead, and his representative Har Ballabh Narayan Singh assigned the decree to Jagdeo Singh and he applied to the Subordinate Judge for an order that Sital Prasad, representative in interest of Harbans Narayan, who is dead, should deposit Rs. 36,907-7-7 in Court as ordered by the High Court. Sital Prasad opposed this petition and the matter came to this Court again. Upon the final order passed by this Court Sital Prasad deposited Rs. 36,907-7-7 in the Court on the 6th February 1922. Jagdeo Singh applicant claimed besides the aforesaid amount deposited by the decree-holder interest and damages from 4th April 1919 the date on which the sum had been taken out of the Court by Harbans Narayan and others. His claim has been allowed by the Court below and the respondent has been asked to deposit Rs. 11736 as interest. Against the order of the Subordinate Judge, Sital Prasad and others have preferred an appeal to this Court, with a Court-fee of Rs. 4/-only. The Stamp Reporter reported that *ad valorem* court-fee should have been paid upon the aforesaid amount of Rs. 11,736/. This view has been accepted by the Taxing Officer. The appellant claims that he is liable to pay only the court fee already affixed by him on the memorandum of appeal. On account of this difference the matter has come to me as a Taxing Judge.

The point appears to be somewhat difficult, and the views of the High Courts have been divergent thereupon. The relevant Sections in the Code of Civil Procedure upon this point are Ss. 47 and 144. S. 144 corresponds with S. 583 of the Civil Procedure Code of 1882. That Section ran as follows:

"When a party entitled to any benefit (by way of restitution or otherwise) under

a decree passed in an appeal under this Chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred : and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits."

Section 244 of the old Code ran as follows :—" The following questions shall be determined by order of the Court executing a decree and not by separate suit (namely) :—

" (a) Questions regarding the amount of any mesne profits as to which the decree directed enquiry ;

(b) Questions regarding the amount of any mesne profits,or interest which the decree has made payable in respect of the subject-matter of a suit, between the date of its institution and the execution of decree or the expiration of three years from the date of decree" :

" (c) any other questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay or execution thereof.

Section 583 which under the old Code occurred in Chapter XLI relating to appeals has now been replaced by Section 144 of the Code of Civil Procedure under Part XI, headed ' Miscellaneous". That section runs as follows :

" (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution, or otherwise, cause such restitution to be made as will so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed : and for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages compensation and mesne profits which are properly consequential on such variation or reversal."

S. 47, clause (1) which corresponds to S. 244, clause (c) of the old Code of Civil Procedure runs as follows :—

"(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

" (2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this Section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional Court fees."

" (3) Where a question arises as to whether any person is or is not representative of a party, such questions shall for the purposes of this Section, be determined by the Court."

Clauses (a) and (b) of S. 244 do not now find place in S. 47.

S. 35 of the Court Fees Act empowers the Government to reduce or remit the fees mentioned in the first and second Schedules of the Act. Under this Section the Governor General in Council issued Notification No. 4650 dated the 10th September 1889. Clause (6) of that Notification directed that the fees chargeable on appeals from orders under S. 244 of the Code of Civil Procedure (Act XIV of 1882), shall be limited to the amounts chargeable under Article 2 of the second Schedule.

By Notification No. 4344 S. R., dated the 6th October 1893, this was amended by direction that the fee chargeable on appeals from orders under clause (c) of S. 244 shall be the amounts chargeable under Article 2 of the Second Schedule to the Court Fees Act, 1817.

The present Section 35 (Act XIV of 1882), of the Court Fees Act empowers the Local Government to reduce or remit the fees mentioned in the First and Second Schedules of the Court Fees Act. Under this power the Local Government issued Notification No. 2576/LA-25, dated the 5th December 1921, directing that the fee chargeable on appeals from orders under S. 47 of the Code of Civil Procedure (Act V of 1908), shall be limited to the amounts chargeable under Article 11 of the Second Schedule. Article 11 of the Second Schedule provides that on a memorandum of appeal, when the appeal is not from a decree or an order having the force of a decree and is presented to a High Court, the Court fee chargeable is Rs. 4.

S 2 of the Code of Civil Procedure (Act XIV of 1882), defined "decree" to include an order determining any question mentioned or referred to in S. 244 of that

Code. Similarly, S. 2 of the present Code of Civil Procedure (Act V of 1908), defines "decree" as including orders determining any question within S. 47 of the Code. Prior to the present Code of Civil Procedure the relief by way of restitution was to be given by execution of the appellate decree under S. 583 of the old Code. Now under the present Code the relief by way of restitution is to be given by an application in the Court of first instance under S. 144 of the Code. Orders under S. 583 relating to restitution under the old Code of 1882 used to be appealable as if they were orders passed under S. 244 of the Code of Civil Procedure. Therefore there was no necessity of making orders under S. 583 as being included in the definition of "decree". The present arrangement of the Code has taken out S. 583 of the old Code from the Chapter relating to appeals and has made a distinct provision in S. 144 under the heading "Miscellaneous". In order to remove any doubt as to whether orders under S. 144 would be appealable or not, such orders have been included in the definition of "decree" along with S. 47 of the Code.

In the case of *Gangadhar Marwari* v. *Lachman Singh* (1), Brett and Sharfuddin, JJ. held that an application for mesne profits made not by the plaintiffs but by the defendants against whom the suit had been dismissed, by way of restitution under S. 583 Civil Procedure Code, comes under S. 244 (c) of the Code, and that such application would be chargeable with Court fees under Article 11, Schedule II of the Act and not *ad valorem*.

In the unreported case of *Babu Shyamnandan Kishore Singh* v. *Rai Radha Krishna* (2), (Sharfuddin and Chapman, JJ.) this view was upheld and it was held that an order passed under S. 144 of the Code of Civil Procedure came under the Notification, inasmuch as such order under S. 144 of the present Code amounts to an order under S. 244 (c) of the old Code. They further held that the reference in the Notification to S. 244 (c) of the old Code must relate to S. 144 by virtue of S. 8 of the General Clauses Act. This was the view taken under the present Code of Civil Procedure.

The matter was fully dealt with by Chatterjea, J. in the case of *Madan Mohan Dey* v. *Nogendra Nath Day* (3). The learned Judge referring to the Notification referred to above puts the question to himself as to whether an order under S. 144 is an order which decides a question falling under S. 47 (1) of the present Code, and he replies that under S. 583 of the old Code an application for restitution was treated as an application for execution of the appellate decree, and it was expressly provided that the Court shall proceed to execute the decree passed on appeal according to the rules for execution of decrees in suits. It was accordingly held that an order under S. 583 fell within the provisions of S. 244 (c). and therefore clause (6) of the Notification applied. Continuing the learned Judge observes:

"It is true S. 144 of the present Code omits the provision that the Court is to proceed according to the rules prescribed for the execution of decrees in suits, but it expressly lays down that no suit shall be instituted for the purpose of claiming any restitution which can be obtained by application under the Section. The Court in making restitution has to execute the decree of reversal (which necessarily carries with it the right to restitution even though the decree may be silent as to such restitution) in order to give effect to the reversal of the decree. That being so, an order under S. 144 comes under S. 47 (1) and clause 6 of the Notification applies to such an order."

On the 26th March 1917 the matter was agitated in this Court upon the report of the Stamp Reporter and ultimately came up for the decision of the Taxing Judge (Roe, J.). The learned Judge expressed the view taken in the case of *Madan Mohan Dey* v. *Nogendra Nath Dey* (3) and directed that the Court fee of Rs. 2 as was payable under the old Court Fees Act was sufficient (vide the unreported case of *Sheikh Kamaruddin Mandal* v. *Raja Thakur Barham* (4).

The Allahabad High Court has taken a contrary view: vide *Jagdip Narain Singh* v. *Mahant Keshogir and another*. (5) That was an authority under the old Code.

(1) [1910] 11 C. L. J. 541=6 I. C. 125.
(2) M. A. No. 370 of 1913, decided on 20th December 1915.
(3) [1917] 21 C. W. N. 544=39 I. C. 640.
(4) M. A. No. 142 of 1917.
(5) [1901] A. W. N. 189.

Under the present Code and under the Notification of the Government of the United Provinces, Daniels, J. took the same view in the case of *Baijnath Das* v. *Balmukand* (6) and the reason given by him is as follows:—

"An application under S. 144 is no doubt one which carries out the intention of the appellate Court's decree, but it does not directly execute that decree. What it does is to undo an execution wrongly granted by the Court below. In this case the High Court's decree was declaratory and could only have been executed in respect of costs. The appellant must, therefore, stamp his appeal *ad volorem*."

The learned Judge felt the inequity of levying *ad valorem* fee upon a miscellaneous application of this kind, and he observed as follows:—

"It is unlikely that the omission of orders under S 144 from the Notification referred to above was due to deliberate intention. The exemption of appeals under S. 47 from an *ad valorem* fee dates back to a time when the Code of 1882 was in force. Under that Code, S. 583, an application by way of restitution was treated as a proceeding in execution and there was no need for separate notification under the section corresponding to the present S. 144. It is probable that if the matter is brought to the notice of Government, Government will not consider it desirable to impose an *ad valorem* fee on a party who is merely asking the Court to set right a wrong unintentionally done by the Court itself. I direct that a copy of this judgment be forwarded to Government with the suggestion that the provisions of paragraph (4) of the Notification should be extended to appeals from orders under S. 144."

The Notification of the Government of the United Provinces referred to by Daniels, J., exactly corresponds with the Notification of the Government of Bihar and Orissa already referred to, which makes fee payable on appeals from orders under S. 47 of the present Code of Civil Procedure of 1908, one under Article 11 of Schedule II. I am inclined to think that the Notification did not consider it necessary to include orders under S. 144. Whereas S. 583 of the old Code of 1882 has been removed from the category of the Chapter headed "Appeals" which gave relief by way of restitution to a party when the decree under which injury has been done to him has been set aside by the appellate Court by executing the decree of the appellate Court, the present S. 144 gives the same relief and prescribes the same *forum*, namely, the Court which passes the decree from which the relief is sought. Determination of a question arising under S. 144 will naturally relate to the execution, discharge or satisfaction of the decree either of the First Court or of the appellate Court. If the First Court's decree has been discharged by the appellate Court, the question arising under S. 144 will naturally be a question as to the discharge of the decree coming under S. 47 of the Code of Civil Procedure. This view has been accepted by the Calcutta High Court under the present Code and the view is in consonance with reason, equity and justice so much so that even the learned Judge of the Allahabad High Court, Daniels, J. felt that if the interpretation was correct it requires to be set right by Legislature. This province used to be governed formerly by the rules and practice obtaining in the Calcutta High Court, and the practice has been followed by this Court ever since in the matter with which we are at present concerned. The Taxing Judge (Roe, J) in 1917 gave effect to the Calcutta view and held that the fee chargeable was one under Article 11 of Schedule II of the Court-Fees Act. I as a Taxing Judge am not prepared to go against the view of my predecessor in office. Whatever trouble there might have arisen in the interpretation due to S. 144 not being expressly included in the Government Notification, it is, I think, amply obviated by the reason given by me above.

In a matter of this kind the decision of a Taxing Judge such as that of Roe, J., should be the rule of the Court and it should not be disturbed by his successor in office.

I, therefore, hold that the Court-fee paid is sufficient.

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(6) 1925 All. 137=47 All. 98=22 A.L J. 881=5 L. R. A. Civ. 773.

★ 1925 PATNA 581

DAWSON-MILLER, C. J. AND MACPHERSON, J.

In the matter of Rajendra Narayan Bhanja Deo of Kanika—Assessee.

Miscellaneous Judicial Case No. 30 of 1925, Decided on 8th June 1925.

★ *Income Tax Act* (1922), *S.* 29—*Notice after fourteen months is not necessarily too late—Form prescribed for notice does not fix limitation—Notice must be issued within reasonable time.*

No period within which a notice demanding income-tax is to be issued is prescribed in the Act and therefore *prima facie* a notice issued about 14 months after the expiration of the year of assessment would not necessarily be too late. [P 582 C 1]

It was not intended by prescribing a form of notice to create a limitation period within which such notice must be given. Although no time is prescribed for issuing the notice it may be said that such a notice must be issued within a reasonable time. What would be a reasonable time might vary according to circumstances. [P 582 C 1 2]

K. P. Jayaswal and *S. Saran*—for the Assessee.

Sultan Ahmed, Government Advocate—for the Crown.

Dawson-Miller, C. J.—The only question in this case is whether the assessee can escape payment of income-tax and super-tax assessed at Rs. 3,898 for the financial year 1922-23 on the ground that the demand notice issued to him claiming payment of the tax was not issued during the financial year for which the tax was payable. What happened was that for the previous year (1921-1922) he had been assessed for income-tax and super-tax to a sum of over R. 18,000. That was under the Act of 1918 Under the provisions then in force the assessment was in all cases a provisional one based on the previous year's income but liable to adjustment wher the actual income for the year in question came to be known. It so happened that the income for the year 1921-1922 had been provisionally assessed at a sum very much larger than the actual income turned out. In fact the actual income for 1921-1922 produced a tax and super tax amounting together to only Rs. 3,898. There was there-fore a balance due to the assessee on adjustment of over Rs. 14,000. That balance was ascertained after taking into consideration the return made by the assessee of his actual income for the year 1921-1922. The return was made for the purpose of ascertaining the income for the next succeeding year, that is to say, the year which began in April 1922. That year came under the new Act of 1922 by which the provisional adjustments were abandoned and a different method of adjustment was adopted, namely, the income for any financial year was based once and for all upon the actual income of the previous year. Accordingly on the 1st November 1922 the assessee whose return was accepted was served with a notice intimating that in respect of the income of the previous year he was entitled to a refund of Rs. 14,277. That sum was the surplus which he had paid for the previous year over and above that which as it turned out, he was liable to pay upon the actual income earned. When that notice was issued it was perfectly clear from the form of it that the income for the year 1922-1923 which was based upon exactly the same assessment would also be taxed and super-taxed to the extent of Rs. 3,898, but for some reason or other no actual demand for payment of that sum for 1922-1923 was made at that time. This appears to have been discovered sometime before January 1924 and on the 26th of that month the Income-tax Officer, finding that no income-tax had been paid by the assessee in respect of the year 1922-1923, treated the case as one under S. 34 of the Income Tax Act 1922, which provides for cases where no assessment has been made or where certain items of income have not been taken into account in making the previous assessment. The section provides in effect that in such a case where income has escaped assessment or has been assessed at too low a rate for any year the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax a notice containing the requirement which may be included in a notice under sub-Sec. (2) of S. 22 and may proceed to assess or re-assess such income. If that were the real state of affairs and no assessment had in fact been made for the year 1922 1923 then no doubt S. 34 would apply and the notice which was issued under that section, on the 26th January 1924, would be a notice issued within the time prescribed for that purpose under that section.

Here again it was obvious to the assessee that he had been assessed for a tax to the amount of Rs. 3,898 for the year in question, so that although no demand in the prescribed form for the income-tax for that year was served, there was in fact an intimation to the assessee on two occasions, namely, on the 1st November 1922 and the 26th January 1924 of what the amount of the income-tax payable by him was.

The Income-tax Commissioner before whom the case came eventually and who stated a case for the High Court, considered that this was not a case to which S. 34 applied, that is to say, he did not think it was a case where no assessment had been made for the year in question or where any part of the income, profits or gains had escaped assessment, for an assessment had actually been made. Therefore upon the case stated we must take it that the facts do not disclose a case coming within S. 34. Then on the 9th June 1924 the assessee having taken exception to the demand under S. 34 a fresh notice was issued in the ordinary form prescribed under the Act demanding the income-tax for the year 1922—1923. It will be seen that this notice was issued something more than a year after the expiration of the year of assessment and the assessee contends that that is too late to make any demand under the provisions of S. 29 of the Act. S. 29 of the Act provides that: "When the Income-tax Officer has determined a sum to be payable by an assessee under S. 23, or when an order has been passed under sub-Sec. (2) of S. 25 or S. 28 for the payment of a penalty, the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum so payable." The first thing to be observed is that no period within which such a notice demanding income-tax is to be issued is prescribed in the Act and therefore *prima facie* a notice issued about 14 months after the expiration of the year of assessment would not necessarily be too late. The assessee, however, relies upon the form under which the demand referred to under S. 29 is to be made. That form is headed "Notice of demand under S. 29 of the Income Tax Act, 1922." It begins thus:—"You have been assessed for the current year to income-tax amounting to Rs. ....." and so on. The learned Counsel for the assessee contends that the form clearly indicates that the demand can only be made during the current year that is to say the year in respect of which the income-tax is payable. No doubt in the ordinary course the form prescribed would be quite applicable because assessments are generally made as soon as possible after the commencement of the financial year and the demand notices are sent out in the ordinary course soon after ths assessment is made. I cannot believe, however, that it was intended by prescribing a form of notice of this sort to create a limitation period within which such notice must be given. If it had been the intention of the Legislature to prescribe a period of limitation for such notices I think that such an important provision would have found place in the body of the Act itself indicating that intention. In other Sections of the Act we do find that where certain notices have to be given the period within which they have to be given is prescribed. But so far as S. 29 is concerned no period at all is prescribed in the Act. Again it is quite possible that in certain cases no demand could be made within the actual year for which the tax is payable. Provision is made for disputes which may arise as to the acceptance or rejection of the assessee's return. If his return is not accepted then an enquiry takes place, evidence may be demanded of him and much time may be expended in carrying on the enquiry, and it is quite possible that such enquiry would not terminate until after the year of assessment and I do not think it can be suggested that because the ordinary form prescrieed for such a demand contemplates that it will be issued during the current year of assessment, it is tantamount to an enactment that it cannot be issued afterwards. If any part of the form should not be applicable to the particular facts of the case then I presume it can be altered in the ordinary course before the form is sent out, but the mere fact that forms are prescribed under the Act does not seem to me to carry with it the result that unless everything is done exactly as provided by the form it is of no force and effect. Although no time is prescribed for issuing the notice in question I suppose it may be said that such a notice must be issued within a reasonable time. What would be a reasonable time might vary according to circumstances.

In the present case it was, as I have already said. about 14 months after the expiry of the year of assessment but from November of the year of assessment the assessee had in fact had notice, although no formal demand was made upon him, of the amount for which he had been assessed to income-tax for that year, and again he had notice in the following January showing that a demand was being made upon him for payment of the same sum on the ground that no previous assessment had been made. In these circumstances it seems to me that the notice was issued within a reasonable time. There is no period of limitation in the Act and I do not think in the circumstances the assessee should be allowed to escape payment of that which is justly due from him. I think that in this case the costs should be paid by the assessee who asked for a case to be stated. Having regard to the small amount in dispute we assess the hearing fee at Rs. 150.

Macpherson, J.—I agree.

Order accordingly.

★ 1925 PATNA 583

MACPHERSON, J.

Nehal Ahmad Khan—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 147 of 1925, Decided on 8th May 1925, from an order of the Sub-Div. Magistrate Sasaram, D/- 16th March 1925.

★ *Criminal P. C., S. 345 (2)—Offence relating to Public trust property—Matters more suitable for civil suit—Compromise refused by trial Court—High Court allowed the same.*

Where the trial Court declined to grant permission of a compromise in a case under S. 417 I. P. C. on the ground that the offence related to Public trust property but it was found that matter would not be suitably dealt with in a criminal case and the compromise was sought at an early stage, the High Court allowed the case to be compounded. [P. 583, C. 2 ; P. 584, C. 1]

K. P. Jayaswal and *D. N. Varma*—for Petitioner.

Assistant Government Advocate — for Opposite Party.

Facts.—On the 17th February the complainant, a former tahsildar under the sajjadanashin of the Sasaram Khankah, lodged a complaint before the Sub-Divisional Magistrate against the petitioner who is a Circle Officer under the sajjadanashin setting out that the petitioner had cheated him of sums of Rs. 375 and Rs. 1,200 which he had obtained on hand-notes by stating that the money was wanted for the sajjadanashin who had directed him to execute the hand-notes; that in the hand-notes he stated that he took the first sum for the necessity of the Khankah and the second sum for the sajjadanashin; that the sajjadanashin denied either having received the money or having asked the petitioner to borrow it on his behalf; that the petitioner on demand refused to repay the money to the lender and that the lender would never have lent the money to the petitioner who is in debt, except on the assurance that the sajjadanashin wanted it.

The Magistrate issued process under S. 417 for the 3rd March and when three witnesses including the sajjadanashin did not appear, he issued warrants for their arrest. On the 16th March a petition of compromise was filed between the complainant and the accused on which the Magistrate ordered as follows, "As the offence relates to a public trust I do not see any justification for permitting a compromise. The case will therefore proceed". and he re-issued warrants against the witnesses who had not appeared one of whom was the sajjadanashin. Against this order the revision was sought.

Judgment.—[After stating facts as set out above, the judgment proceeded:—]

The only question is whether the Magistrate exercised sound judicial discretion in refusing to let the case be compromised. His ground is that the Khankah is a public trust. But it does not appear that the funds of the Khankah are or ever were in jeopardy. The pretence of the petitioner was that the money was required for the Khankah or for the sajjadanashin but the handnotes which he executed seem to make the petitioner himself personally liable. The affairs of the Khankah appear to be in some confusion and the position as between the petitioner and the Knankah or the sajjadanashin in respect of these loans generally is involved in considerable obscurity. Such matters cannot suitably be unravelled in a criminal case of this kind, especially where the evidence of the sajjadanashin, who appears from the order sheet to have been already involved in

some trouble as a witness, is necessary for a conviction. Having regard to these considerations and to the fact that the compromise was arrived at an early stage before the evidence was gone into, I am of opinion that the Magistrate would have exercised a wise discretion in assenting to the compromise. Accordingly his order of the 16th March refusing to permit the compromise is vacated and this Court under S. 345 (2) permits the offence to be compounded and acquits the accused. The ruie is made absolute.

Rule made absolute.

1925 PATNA 584

MACPHERSON, J.

Tikaldhari Singh—Petitioner.

v.

Misri Singh—Opposite Party.

Criminal Revision No. 83 of 1925, Decided on 28th April 1925, from a decision of the S. J., Monghyr, D/- 21st January 1925.

Criminal P. C., S. 202—Record of statments before police put before the Magistrate—Witnesses deposing in like manner before him—Magistrate's not recording their evidence is not illegal.

Where the Magistrate, in an enquiry under S. 202 did not record the statments of witnesses but he had before him the final report of the police a detailed account of the statements of the witnesses before the police and the witnesses repeated the same statements before him,

Held; that it cannot be asserted that there has been an error of law since the Code makes no provision with regard to the manner in which the evidence in an inquiry under S. 202 should be recorded. The case would be different had the deposition of any witness deviated from the record of the previous statements. [P. 584, C. 2]

S. N. Sahay and *Gopal Prasad*—for Petitioner.

Janak Kishore—for Opposite Party.

Macpherson, J.—This rule is concerned with a dismissal under S. 203 of a complaint of the petitioner against the opposite party; an application against which dismissal was rejected by the Sessions Judge of Monghyr.

The petitioner had lodged an information with police on 12th October that the opposite party had rioted armed with deadly weapons and committed theft, grievous hurt also being caused to complainant and one Bida Singh. The occasion of the riot was alleged to be that on the previous day the petitioner had remonstrated with Misri Singh for blocking the pnblic road by building on it and had threatend to bring a suit against Misri Singh who counter-threatened as to what he would do on the following morning.

The police declined to send up the case holding the occurrence to be an affray under S. 160 of the Indian Penal Code which is non-cognizable. The petitioner impugned the police report before the Sub-divisional Magistrate and his petition was treated as a complaint. The Magistrate directed him to summon his witnesses and the petitioner produced seven witnesses whose evidence the Magistrate heard. In his order the Magistrate pointed out that the witnesses had practically repeated the statements which they had made before the Police and which were before him, that none of them were disinterested, that the complainant had no right to interfere in connection with the alleged encroachment and had given the provocation. He added that witnesses had undoubtedly exaggerated the case very much and that it was impossible to base a conviction on such evidence as they gave.

On behalf of the petitioner it is now urged that the Magistrate did not take down the depositions of the witnesses and that his failure to do so was a material error. But in the first place, the Magistrate had before him the final report of the police, detailed account of the statements of the witnesses before the police and the witnesses repeated the same statements before him We therefore know what the witnesses deposed and though ordinarily a summary of the statements should be made for further reference, there is no practical difficulty in the present instance.

In the second place it cannot be asserted that there has been an error of law since the Code makes no provision with regard to the manner in which the evidence in an enquiry under S. 202 should be recorded.

I am not prepared to hold that the Magistrate in this case acted unreasonably. Had the deposition of any witness deviated from the record of the previous statements which was before him he would certainly have made a note to that effect.

The only point therefore is whether on the materials before him the dismissal of the complaint was unreasonable. I have carefully examined the papers in this case and the conclusion at which I have arrived is that it was not, and that, as the Sessions Judge had remarked, further inquiry would not serve any useful purpose. The complainant apparently gave the provocation and owing to the factions in the village it is impossible to secure any disinterested evidence. There are serious contradictions on material points and it is very unlikely that any Court would convict upon tne evidence adduced.

I consider therefore that no gronnd has been made out for interference with the dismissal of the petitioner's complaint.

The rule is accordingly discharged.

Rule discharged.

1925 PATNA 586

DAS AND ROSS, JJ.

Hia Lal Kumar and others—Decree-holders—Appellants.

v.

Ganu Mahto and others—Judgment-debtors—Respondents.

Appeal No. 249 of 1924, Decided on 2nd June 1925, against an order of Sub. J., Bhagulpore, in original order D/- 25th August 1924.

Lim. Act, Art. 182 (2)—*Appeal by some—Appellate decree is the final decree for all.*

Where some of the parties to a decree appealed against it, the decree in appeal is the final decree for the purpose of the execution with respect to all the parties. Where the appeal by the judgment-debtor abated against some decree-holders, even those decree-holders are entitled to treat the appellate decree as the final decree. 5 *P. L. J.* 731 *not Foll.* 33 *Bom.* 39 *Foll.*

[P 587 C 1]

S. N. Palit and *S. M. Mullick*—for Appellants.

K. B. Dutt and *J. P. Sinha*—for Respondents.

Ross, J.—On the 10th of September 1919 a decree was passed in a suit instituted by Nasib Kumar and his sons and grandson Hia Lal Kumar, Thakur Prasad Kumar and Thitar Kumar and by Kare Prasad Kumar against the defendants Nos. 1 to 7 and 8 who are represented by the Respondents to this appeal. That decree ordered that the Plaintiffs do get Rs. 3,735-8-6 and proportionate costs from Defendants Nos. 1 to 7 and Rs. 1,678-12-0 and proportionate costs from Defendant No. 8, the amount of the decree to carry interest at six per cent. per annum from the date of the decree until realization. The Defendants appealed on the 5th of January 1920 to the High Court against that decree. During the pendency of the appeal, on the 22nd of February 1921, Kare Prasad Kumar died. No substitution of his legal representatives was made and the appeal against him abated. It should be mentioned that the decree was a decree in favour of the Plaintiffs jointly. When the appeal came to be heard a sworn petition was filed in the High Court by the Appellants stating that they had settled out of Court the dispute with the heirs of Kare Prasad Kumar whose share in the decree had already been paid by means of a registered bond, dated the 18th of January 1922. In the judgment of the High Court it was stated that two questions arose in the case, first, whether the abatement of the appeal as against the Respondent No. 4 (that is, Kare Prasad Kumar) had caused the abatement of the entire appeal by reason of the decree being a joint one, and secondly, what was the effect of the payment out of Court of a portion of the decree said to represent the share of Kare Prasad Kumar which had not been certified in the Court below. Their Lordships held that, assuming that these two points were decided against the Appellants the Respondents Nos. 1 to 3 would be entitled to execute the entire decree which amounted to Rs. 6,433 against both sets of Appellants and complications would certainly arise in the course of execution as to the effect of the payment made to one of the joint decree holders. In order to avoid these complications the parties have settled their difference and a consent decree was passed to the effect that the decree of the Court below be reduced to Rs. 3,550 payable by the Appellants to the Respondents Nos. 1 to 3 for principal and costs out of which Appellants Nos. 1 to 9 would be liable for Rs. 2,415 and the Appellant No. 10 for Rs. 1,135. These sums were to carry interest at the rate of six per cent. per annum. This decree was dated the 3rd of January 1923. On the 3rd of January 1924, an application was made by Hia Lal Kumar, Thakur Prasad Kumar and Thitar Kumar and by

the sons of Kare Prasad Kumar for execution. The application stated the date of the decree passed by the Court of first instance to be the 10th of September 1919, to be and the 3rd of January 1923 the date of the decree of the Appellate Court. The amount claimed was Rs. 8,584-5-0. The account stated in the application contained first an item of Rs. 3,735-8-6 with costs and interest amounting in all to Rs. 5,305-0 9. From this was deducted Rs. 2,415 as payable to the Plaintiffs Nos. 3, 4 and 5. On the balance interest was calculated from the date of the High Court decree giving a total of Rs. 3,063-6-3 as the share of the sons of Kare Prasad Kumar. The share of the representatives of Nasib Kumar was stated as in the High Court decree to be Rs. 2,415 and on this sum interest was calculated. These were the amounts due by the Defendants Nos. 1 to 9. The amounts due by the Defendant No. 10 to the sons of Kare Prasad Kumar and to the representatives of Nasib Kumar were similarly calculated and the total already stated was arrived at.

Two objections were taken by the judgment-debtors to this application for execution, first, that the application was not maintainable in its present form, and secondly that as regards the representatives of Kare Prasad Kumar it was barred by time. The learned Subordinate Judge gave effect to both of these objections and dismissed the petition. The decree-holders have appealed and on behalf of the Respondents the same points have been urged.

With regard to the maintainability of the application it seems to me that if the contention of the Appellants on the question of limitation is sound, there can be no objection to the form of the application. If time runs against the representatives of Kare Prasad Kumar from the date of the appellate decree then, as the appeal had abated against them, the only decree which they can execute is the decree of the original Court, while it is evident that the representatives of Nasib Kumar are bound by the consent order passed by the High Court and the only decree that they can execute is the decree of the High Court.

It should be stated that the settlement out of Court which was alleged at the hearing of the appeal in the High Court was untrue and has been disbelieved by the Subordinate Judge. If that misrepresentation had not been made, it is quite clear that the appeal to the High Court must have been dismissed because the decree was a joint decree and as the appeal had abated against one of the decree-holders it had abated against all. It was in view of that misrepresentation, which was accepted as a true statement of fact, that the High Court passed the decree by consent. The rights of the parties having been adjusted in that way, it seems to me that the account stated in the application for execution has been stated in the only possible way and the application is maintainable.

The principal question in the appeal, however, is the question of limitation. The learned Advocate for the Appellants relies on the language of Art. 182 of the first schedule to Limitation Act which lays down the period of limitation as three years, where there has been an appeal "from the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal." The contention is simply that the present case falls within these words because there has been a final decree of the Appellate Court, and that the present application, though beyond three years from the date of the decree of the original Court, is within three years from the date of the final decree of the Appellate Court. So far as the representatives of Nasib Kumar who were parties to the appeal are concerned, there can be no question of limitation as against them, and the only question is as to the representatives of Kare Prasad Kumar who seek to execute the decree of the original Court, but claim the benefit of the date of the decree of the Court of appeal. The contention on behalf of the Respondents is that as the appeal had abated so far as Kare Prasad Kumar was concerned, there was no final decree or order of the Appellate Court and therfore the decree of the Appellate Court is not material in the case of his representatives. Reliance is placed on the decision of this Court in *Tikait Krishna Prasad Singh* v. *Raja Wazir Narain Singh* (1) where it was held that Art. 182 (2) does not apply where a decree has abated by operation of law. On the other hand in *Shivaram Dhondu*

(1) [1920] 5 P. L. J. 731=58 I. C. 977=[1920] P. H. C. C. 342.

Pujara v. *Sakharam Krishna Kulkarni* (2) it was held that where some of the parties to a decree appealed against it the decree in appeal is the final decree for the purpose of the execution with respect to all the parties. In that case it was argued for those who opposed the application for execution that the words of cl. (2) in the third column of Art. 182 should not be taken literally and that as the opponents did not appeal against the original decree although the other Defendants did the date of the final decree of the Appellate Court which was passed within three years from the initiation of the proceedings was a date which did not concern the opponents, as the original decree, which was final so far as they were concerned was passed more than three years before. Their Lordships overruled this contention holding that they could not disregard the plain words of cl. (2): "There was an appeal and the final decree of the Appellate Court was passed less than three years before the Plaintiffs' application and that application was therefore within time." I do not myself see how the fact that the Respondents allowed their appeal against Kare Prasad Kumar to abate can prevent the representatives of Kare Prasad Kumar from taking the benefit of the date of the Appellate Court decree. The facts in *Tikait Krishna Prasad Singh* v. *Raja Wazir Narain Singh*, (1) were very peculiar. Wazir Narain Singh who was seeking to execute the decree had been a party neither to the original nor to the appellate decree and his position was therefore different from that of the representatives of Kare Prasad Kumar in the present case. It was held that Wazir Narain Sirgh could not execute the original decree, and as he had not been a party to the appellate decree, he could not execute that either. The observations of their Lordships on the effect of abatement must therefore be treated as unnecessary to the decision of the case and in view of the plain words of cl. (2) of Art. 182 and of the decision above referred to in *Shivaram Dhondu Pujara* v. *Sakharam Krishna Kulkarni* (2) I am of opinion that time runs against the representatives of Kare Prasad Kumar from the date of the decree of the Court of appeal and their application is therefore not barred by time. That the decisions of the Privy Council in *Abdul Majid* v. *Jawahir Ali* (3) and *Batuk Nath* v. *Munni Dei* (4) have no application to the present question is clear from the discussion of these decisicns in *Raghu Prasad Singh* v. *Jadunandan Prasad Singh* (5). The decision in the last-mentioned case does not apply precisely to the present question because there the appeal had been dismissed for non-payment of printing costs and there had been an order of dismissal passed by the High Court, whereas in a case of abatement no order is made. But on principle the decision does apply where their Lordships observed: "It would be a strange thing if the period of limitation were to be revived where the Appellant withdraws his appeal and yet it were not to be revived in cases where the Appellant instead of withdrawing his appeal allowed the appeal to be dismissed by default." The same anomaly would arise if the period of limitation were not revived where the Appellant instead of withdrawing the appeal allowed it to abate. There is no distinction in principle and there ought to be no difference in the result In the present case the judgment-debtors got a consent decree in appeal against some of the decree-holders on the allegation of a settlement out of Court by the other decree-holders against whom the appeal had abated. The whole case was essentially a single case and the consent decree rested on this allegation. It seems to me impossible to deprive the representatives of Kare Prasad Kumar of the benefit of the date of this decree in calculating the period of limitation as against them.

I would therefore allow this appeal with costs, set aside the order of the Subordinate Judge and direct that the execution do proceed.

Das, J.—I agree.

Appeal allowed.

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(2) [1908] 33 Bom. 39=1 I. C. 459=10 Bom. L. R. 939.

(3) [1914] 36 All. 350=1 L. W. 483=12 A. L. J. 624=16 Bom. L. R. 395=18 C. W. N. 963=19 C. L. J. 626=27 M. L. J. 17=23 I. C. 649=(1914) M.W.N. 485=16 M.L.T. 44 (P.C.)

(4) [1914] 36 All. 284=41 I A. 104=1 L. W. 729=18 C. W. N. 740=12 A. L. J. 596=19 C. L. J. 574=16 Bom. L. R. 360=27 M. L. J. 1=16 M. L. T. 1=23 I. C. 614=(1914) M. W. N. 437 (P. C.)

(5) [1921] 6 P. L. J. 27=2 Pat. L. T. 28=59 I. C. 696=(1921) P. H. C. C. 34.

★ 1925 PATNA 588

MULLICK AND ROSS, JJ.

Tikait Gayan Nath Sahi and another—Judgment-debtors—Appellants.

v.

Pandit Malhjyi Vaidija and others—Decree-holders—Respondents.

Appeal No. 75 of 1924, Decided on 6th April, 1925, from Original Order of the Dy. Mag. Sub. J., Daltonganj, D/-24th March, 1924.

★(a) *Hindu Law—Alienation—Mortgage decree against father—Execution—Ancestral property of sons and grandsons is liable.*

A mortgage decree can be enforced against the ancestral property in the hands of the sons and grandsons of the mortgagor unless they can show that the mortgage debt was illegal or immoral. It is not sufficient to show that the transaction was extravagant or reckless or that the money might have been got at a cheaper rate of interest. The sons are liable not only for the original mortgage amount but also for the interest.

Semble: The son might perhaps take an objection that the stipulation for interest was in the nature of a penalty. [P 589, C 2]

(b) *Civil P. C., S. 11 Exp. 4—Execution case dismissed for default—Objection not taken that the objector was not liable for the debt—Objection is not precluded in subsequent execution case.*

Where the former execution case was dismissed for default,

Held: that the contention, that as in the previous execution case the Appellant did not take the point that he was not liable for the debt, he could not take it in the present execution, could not be maintained. In the previous execution case, there was no adjudication which could even by implication be held to constitute a decision adverse to the Appellant. The principle which was applicable to suits upon a party's failure to raise an issue, which he might have raised, was not applicable to execution cases, but even if it were, the final order in the last execution case was made not in consequence of the conduct of the Appellant but in spite of it. The doctrine of *res judicata* did not apply. [P 590, C 2]

R. C. Bhaduri and *C. S. Banerjee*—for Appellants.

S. Saran—for Respondents.

Mullick, J.—The facts out of which this appeal arises seem to be as follows. In or about 1314 F. Tikait Koshalesh Nath Sahi Deo, the father of the Appellants Tikait Gayan Nath Sahi and Pertap Nath Sahi, became liable for a sum of Rs. 15,000 to one Heramba Nath Banerji of Benares under a decree with the result that his ancestral properties were brought to sale in execution. The debtor thereupon on the 8th November 1913 borrowed Rs. 20,000 from the Respondent Pandit Malhjiji Vaidya by a mortgage of the ancestral joint family property and got the sale set aside. The Appellants, who were born after the mortgage, were not parties to the transaction, although it appears that they were at that time members of the joint family. Whether the debtor's brother Dina Nath Sahi was also a member of the joint family is not clear.

Thereafter the debtor borrowed more money from the Respondent and having defaulted in the payment of the same as well as the interest for two years upon the mortgage, a suit was brought against him by the mortgagee in 1915 and on the 29th January 1917 a decree was obtained for a sum of Rs. 9,162-4-0. Neither the brother Dina Nath Sahi nor the two sons of the debtor were parties to this decree. Execution was taken out against the debtor in the Court of the Subordinate Judge of Daltonganj; but the case, which was registered as No. 45 of 1917, was struck off on the 8th March 1918 without any realisation being made. The second execution case was registered as case No. 7 of 1919 and the debtor having died Dina Nath Sahi, Partap Nath Sahi and Gayan Nath Sahi were impleaded in it as his representatives. That case was dismissed on the 30th March 1920.

An appeal was taken against the order to the High Court and on the 28th May 1923 it was ordered by that Court that the name of Dina Nath Sahi should be struck off the record as a party to the execution and that the execution should proceed against the mortgagor's two sons who had raised no objection to the execution proceedings.

The present execution case, which has been registered as No. 106 of 1923, was filed on the 4th August 1923 against the two minor sons, who preferred an objection on the 22nd December 1923 denying their liability for the decretal amount and objecting to the valuation put upon the properties. That objection was disposed of on the 24th March 1924, it being held by the Deputy Magistrate Subordinate Judge that as the debts were neither illegal nor immoral the objectors were under a pious obligation to pay them.

Against this decision the present appeal was filed on the 24th April 1924.

In the meantime the execution proceedings continued. On the 24th March 1924 an order was made for the issue of sale proclamations fixing the 15th May 1924. On the 14th May 1924 an objection was filed contesting the valuation of the properties. The Court held that the objection was made too late and on the 21st May the sale was completed and the decree holder with the permission of the Court was declared to be the purchaser for a total sum of Rs. 7,610. In consequence of the present appeal it does not appear that the sale has yet been confirmed.

It is to be noticed at the outset that Dina Nath Sahi is not a party to the present execution proceeding and we are not concerned to inquire what will be the rights of the auction-purchaser against him. All that we are concerned with in the present appeal is to see whether the Appellants by reason of their not having been parties to the mortgage decree of the 29th January 1917, are entitled in the execution proceedings to deny liability.

If their father was sued in a representative capacity, then they are certainly bound. If he was not sued in a representative capacity, then by reason of the doctrine of picus obligation they are bound to satisfy the decree provided it was not for an illegal or immoral debt. The creditor might have brought a fresh suit for the enforcement of his charge against their interest in the property or he might have, as he has done in the present case, left it to them to take whatever objections they chose in the execution proceedings. This has been settled by a long series of cases of which it is necessary only to cite the following : *Suraj Bansi Koer* v. *Sheo Prasad Singh* (1), *Luchman Das* v. *Giridhur Chowdhry* (2), *Hira Lal Sahu* v. *Parmeshar Rai* (3), *Lal Singh* v. *Pulandar Singh* (4), *Chander Prashad* v. *Sham Koer* (5), *Ran Singh* v. *Sobha Ram* (6), *Amar Chandra Kundu* v. *Sebak Chand Chowdhury* (7), *Kishun Pershad Chowdhury* v. *Tipan Pershad Singh* (8), *Indar Pal* v. *The Imperial Bank* (9) and *Kuldip Sahay* v. *Rambhujhawan Mahto* (10). This last-named authority which is a recent judgment of this Court clearly lays down that if the sons and the grandsons of the mortgagor cannot show the debt to be illegal or immoral, they are bound to satisfy the claim out of the ancestral properties in their hands. It further decides that it is not sufficient to show that the transaction was extravagant or reckless or that the money might have been got at a cheaper rate of interest. Indeed as the doctrine of antecedent debt is a compromise between the rule that the father cannot alienate ancestral property for his own purposes and the rule that the son is under a pious obligation to discharge his father's debts it is difficult to see how any objection could be taken by the son on the ground that the interest was excessive. He might perhaps take an objection that the stipulation for interest was in the nature of a penalty but that is not the case before us here.

It is contended before us now that the Appellant should have been permitted to show that there was no necessity for the debt covered by the decree of 1917. It appears that this debt was composed of a sum of Rs. 5,348 on account of interest for two years and Rs. 3,204-10-7 for a loan taken to pay *mukarrari* rent on certain properties and the interest thereupon. How a mortgage decree was passed with regard to the latter loan is not known, but we have to take the decree under execution as it stands and it is clearly a mortgage decree and as no appeal was made against it, the decree must be executed as a mortgage decree.

It is open to the Appellants to show that Heramba Nath's debt was for an immoral consideration but this they did not do. They have confined their attack to the sum of Rs. 5,000 left over out of the Rs. 20,000 borrowed from the respondent after Heramba had been paid off.

Secondly, it is open to the appellants to take the ground that the sum of Rs. 3,000 odd borrowed for paying *mukarrari* rent was not in fact borrowed but it is

(1) [1880] 5 Cal. 148=6 I.A. 88=4 C.L.R. 226=4 Sar. 1 (P.C.)
(2) [1880] 5 Cal. 855=6 C.L.R. 473 (F.B.)
(3) [1899] 21 All. 356=(1899) A.W.N. 100.
(4) [1905] 28 All. 182=2 A. L. J. 647=(1905) A.W.N. 248.
(5) [1906] 33 Cal. 676=3 C.L.J. 131.
(6) [1907] 29 All. 544=(1907) A.W.N. 159=4 A.L.J. 424.
(7) [1907] 34 Cal. 642=11 C.W.N. 593=5 C.L. J. 491=2 M.L.T. 207 (F.B.)
(8) [1907] 34 Cal. 735=11 C.W.N. 613=5 C.L. J. 569.
(9) [1910] 37 All. 214=28 I.C. 593=13 A.L.J. 211.
(10) 1924 Patna 454=3 Pat. 425=5 P.L.T. 115.

not open to them to show that there was no necessity for the borrowing.

Thirdly, it is open to them to contend that the sum of Rs. 5,348 on account of interest on the Respondents' bond was not in fact due, but it is not open to them to contend that the rate of interest was too high and that it was not necessary to borrow at this rate from the Respondents in order to pay off Heramba Nath Banerji's decretal amount.

The Appellants have failed to give any evidence in support of the last two grounds. But it is contended before us that the sons are liable to pay the father's debt upon the mortgage but not the interest thereupon. This position cannot be maintained in view of the Full Bench decision in the Allahabad High Court in *Lachman Das* v. *Khunnu Lal* (11).

Turning now to the evidence adduced in the case, I can find nothing to indicate that the debt incurred to Heramba Nath Banerji was illegal or immoral: therefore in regard to the Respondents' mortgage the sum of Rs. 15,000 which went to pay off Heramba Nath Banerji, cannot be challenged. There remains a sum of Rs. 5,000 which is said to have been spent by Koshalesh Nath Sahi, on liquor and women. Three witnesses were called to prove this, but I agree with the Subordinate Judge that their evidence cannot be accepted because they are all interested persons and their statements are of the vaguest kind. They cannot give any details showing what particular sums were spent by Koshalesh Nath Sahi on dancing girls, nor can they fix the times and the places for this expenditure,

The result, therefore, is that the objection that the Appellants are not liable for the judgment-debt has been rightly dismissed.

With regard to the objection made on the day before the sale repeating in part the objection taken on the 22nd December 1923 as regards the valuation of the properties, no appeal lies against the order of the Subordinate Judge declining to reopen the valuation. If the appellants have any grievance, it may be open to them to have the sale set aside on the ground of material irregularity in publishing the sale notifications and consequent inadequacy of price.

A point has been taken as to *res judicata*. It was argued that as in the last execution the Appellants did not take the point that they were not liable for the debt they cannot take it in the present execution. The answer to this is that the former execution was dismissed for default. There was no adjudication which could even by implication be held to constitute a decision adverse to the Appellants. In my opinion the principle, which is applicable to suits upon a party's failure to raise an issue, which he might have raised, is not applicable to execution cases, but even if it were, the final order in the last execution case was made not in consequence of the conduct of the Appellants but inspite of it. The doctrine of *res judicata* does not apply.

The result therefore is that the appeal is dismissed with costs.

Ross, J.—I agree.

Appeal dismissed.

(11) [1896] 19 All. 26=(1896) A.W.N 183 (F.B.)

1925 PATNA 590

DAWSON MILLER, C. J. AND MACPHERSON, J.

Daroga Singh and others—Defendants—Appellants.

v.

Raghunandan Singh and others—Plaintiffs—Respondents.

Second Appeal No. 333 of 1922, Decided on 20th May 1925, against a decision of the Sub. J. Muzafferpur, D/. 21st December 1921.

Civil P.C., O. 22, Rr. 4 and 11—Mortgage decree obtained by members of Mitakshara joint family—Appeal—Failure to substitute legal representatives of deceased respondent causes whole appeal to abate.

An appeal from a mortgage decree in which the plaintiffs are all jointly interested, wholly abates where the legal representatives of any of the deceased respondents are not brought on record. A mortgage decree obtained by the members of a Mitakshara joint family is a decree in which all the plaintiffs are jointly interested.

[P. 591 C. 1]

T. N. Sahay—for Appellants.

A. B. Mukherji—for Respondents.

Dawson Miller, C. J.—In this case the plaintiffs, who are members of a joint family obtained a decree in a mortgage suit against the defendants before the Subordinate Judge of Muzafferpur. The defendant Daroga Singh has instituted the present appeal and some of the respondents who were the plaintiffs in the

suit have died pending the appeal. Raghunandan Singh, who was apparently the *karta* of the family and the respondent No. 1, died on the 28th September, 1923. Nothing turns upon that because his interest would devolve upon the other members of the family by survivorship. Jagdeo Singh, his son, died on the 28th July, 1923, leaving two minor sons Kalika Prasad Singh and Chandrika Prasad Singh. Although Jagdeo died on the 28th July 1923, no steps were taken to bring his sons on the record, who certainly were interested in the decree obtained on behalf of their father as one of the members of the joint family. No application even has been made for setting aside the abatement although it must have been known long ago that Jagdeo Singh was in fact dead and had two sons surviving him. As this is a mortgage suit and the plaintiffs are all jointly interested in the decree it seems to us that it is a case in which the whole appeal abates as all the parties are not brought upon the record. No authority has been called to our attention by the learned Vakil for the appellants and it seems to us that this appeal abates and ought to be dismissed. The respondents are entitled to their costs against the appellant.

Macpherson, J.—I agree.

Appeal dismissed.

1925 PATNA 591

ADAMI AND KULWANT SAHAY, JJ.

Chaudhury M. Yazirul Hassan—Judgment-debtor—Appellant.

v.

Abdul Wahab Khan and others—Decree-holders—Respondents.

Appeal No. 138 of 1924, Decided on 27th May 1925, against an order of the Sub. J., Monghyr, in Original Order D/- 10th May 1924.

(a) *Succession Certificate Act, S. 4—S. 4 does not apply to assignment from a co-decree-holder.*

S. 4 has no application to the case of an assignment or conveyance from one of the deceased decree-holders.

(b) *Civil P. C., O. 21, R. 15—Court need not determine who are the other decree-holders before making order under R. 15—Order safeguarding interests of heirs of deceased decree-holder—Notice to heirs not necessary.*

Before making an order under O. 21, R. 15 it is not necessary for the Court to enquire as to who the other decree-holders are for whose benefit the execution is to proceed. Where the Court directs the execution to proceed under O. 21, R. 15 and safeguards the interests of the other decree-holders, whoever they might be, the question whether the execution could proceed without notice to the heirs of the deceased decree-holders does not arise. [P 592 C 2]

Khurshed Hussain—for Appellant.

S. M. Mullick and *Syed Ali Khan*—for Respondents.

Kulwant Sahay, J.—This is an appeal on behalf of the judgment-debtor against an order of the Subordinate Judge of Monghyr rejecting his objection to the execution of a decree and directing the execution to proceed.

It appears that there were four decree-holders who obtained a decree on the 12th January 1921 on account of mesne profits. They were Abdul Wahab Khan, *Mt.* Noorjahan Begum, Bibi Bashiran and Gulab Khan. Bibi Bashiran is dead and the decree-holder Abdul Wahab Khan claims her share under a deed of *ekrarnama* dated the 28th June 1915. Gulab Khan is also dead. One *Mt.* Habiban claims to be the widow of Gulab Khan and the present application for execution has been filed by Abdul Wahab Khan who claims to execute the decree as the representative of Bibi Bashiran as well as in his own individual capacity by Noorjahan Begum and by *Mt.* Habiban as the widow and heiress of Gulab Khan.

The objection of the judgment-debtor was that Bibi Bashiran being dead, Abdul Wahab had no right to execute the decree for her share of the money without obtaining a succession certificate. Secondly, the *ekrarnama* of the 28th June 1915 was not admitted and it was contended that execution could not proceed so long as the legal heirs of Bibi Bashiran were not brought on the record. Next it is contended that Bibi Habiban was not the wife of Gulab Khan but that one Khizar Khan was his heir and that this Khizar Khan had transferred his interest to one Ram Sahai Lal and Abdul Ghani, and that therefore Bibi Habiban had no right to execute the decree.

In their application for execution the three persons named above, stated that although there was no specification in the decree itself as regards the shares of the different decree-holders yet the two applicants Abdul Wahab and Noorjahan Begum were entitled to 11 annas share on

account of their own interests as well as the interest of Bibi Bashiran and that Bibi Habiban was entitled to the remaining 5 annas share on account of the share of Gulab Khan deceased. The judgment-debtor objected that the share of Gulab Khan was one half and not 5 annas out of 16 annas in the decree. In the application for execution it was prayed that the Petitioner Abdul Wahab Khan might be declared to be the representative of *Mt.* Bibi Bashiran and the Petitioner Bibi Habiban might be declared to be the representative of Gulab Khan, deceased, and the execution proceedings may be taken on behalf of the applicants for realisation of the entire 16 annas of the decree. It was further stated that if for any reason it be found irregular on the part of the applicant *Mt.* Bibi Habiban to have joined in the application for execution, then only Abdul Wahab Khan, one of the decree-holders, may be treated as an applicant for execution of the decree and the entire decretal amount together with interests and costs might be realised under the provisions of O. 21, R 15 of the Code of Civil Procedure.

The learned Subordinate Judge did not decide the question as to whether Abdul Wahab Khan was the representative of Bibi Bashiran and as to whether *Mt.* Habiban was the representative of Gulab Khan. He was of opinion that as there was no dispute as regards Abdul Wahab Khan being the decree-holder and as under the law he could execute the whole decree for himself as well as for the other decree-holders, it was proper to execute the whole decree at the instance of Abdul Wahab Khan one of the decree-holders and to take proper steps for safe-guarding the interests of the other decree-holders. He accordingly ordered the execution to proceed, but he directed that Abdul Wahab Khan will not receive any payment from the judgment-debtor towards the decree out of Court nor was the judgment-debtor to make any payment or any settlement either with Abdul Wahab Khan or with any of the persons who claimed to be the heirs of Gulab Khan. He directed that all payments towards the decree must be made in Court.

Against this order of the Subordinate Judge the judgment-debtor has come up in appeal to this Court: and it is contended on his behalf that the Subordinate Judge was bound to enquire as to who were the heirs of Gulab Khan; that the learned Subordinate Judge was wrong in directing the decree to be executed under the provisions of O. 21, R. 15; that he ought not to have allowed the execution to proceed without the production of a succession certificate by Abdul Wahab Khan as the heir of Bibi Bashiran; that if Abdul Wahab Khan claimed to execute the decree as an assignee of Bibi Bashiran under the *ekrarnama* of the 28th of June 1915 then the learned Subordinate Judge was wrong in directing the execution without notice upon the heirs of Bibi Bashiran under the provisions of O. 21, R. 16 of the Code.

In support of the first contention, namely, as regards the necessity to make an equiry as to who were the heirs of Gulab Khan, the learned Advocate for the Appellants refers to O. 22, R. 5, of the Code which prescribes that where the question arises as to whether any person is or is not the legal representative of a deceased Plaintiff or a deceased Defendant such questions shall be determined by the Court, and to R. 12 of the same order which says that nothing in Rr. 3, 4 and 8 shall apply to proceedings in execution of a decree or order, and does not limit the provisions of R. 5 in the same way. On the other hand it has been contended by the learned Advocate for the Respondent that R. 5 has no application to execution proceedings because R. 5 is based on R. 3 and 4, and if Rr. 3 and 4 do not apply to proceedings in execution, R. 5 too has no such application.

In my opinion, having regard to the view taken by the Subordinate Judge it was not necessary for him to determine as to who were the legal representatives of Gulab Khan. He directed the execution to proceed under the provisions of O. 21, R. 15, and he gave proper directions to safeguard the interests of the other decree-holders whoever they might be. The argument of the learned Advocate for the Appellant that he could not make the order under O. 21, R. 15, without determining as to who the representatives of Gulab Khan were does not appear to be sound. He contends that before making an order under O. 21, R. 15, it was necessary for the Subordinate Judge to enquire as to who the other decree-holders were for whose benefit the execution was to proceed In my opinion it was not necessary for the Subordinate Judge to do so

before he could make an order under O. 21, R. 15.

As regards the second contention, namely, that as no execution was prayed for the benefit of the other decree-holders the Subordinate Judge was not justified in making the order under O. 21, R. 15, I need only observe that it was expressly stated in the application that if for any reason it was found irregular on the part of *Mt.* Bibi Habiban to join in the application for execution then only Abdul Wahab Khan, one of the decree-holders, might be treated as an applicant for execution and the entire decretal amount might be realised under the provisions of O. 21, R. 15. It is contended that it is not stated in the application that execution of the whole decree was to proceed for the benefit of the decree-holders or for the benefit of the surviving decree-holders and the legal representatives of the deceased decree-holders. No doubt these words are not used in the application, but the reference to O. 21, R. 15 in the application clearly indicates that this is what was intended.

As regards the third objection, namely, that the execution could not proceed without the production of a Succession Certificate, and the fourth objection that it could not proceed without notice on the heirs of Bibi Bashiran, I may observe that having regard to the order to proceed with the execution under O. 21, R. 15 these questions do not really arise in the case It may, however, be noticed that Abdul Wahab Khan did not claim to execute the decree as the heir of Bibi Bashiran but under an assignment or conveyance from her and S. 4 of the Succession Certificate Act had no application to such a case.

In my opinion none of the grounds taken on behalf of the Appellant is sound and can be sustained. The appeal must be dismissed with costs.

Adami, J.—I agree.

Appeal dismissed.

1925 PATNA 593

JWALA PRASAD, J.

Abdul Shakur—First Party.

v.

Abu Sayeed alias *Abdul Mian*—Second Party.

Criminal Reference No. 117 of 1924, Decided on 13th January 1925, made by the S. J. Patna, on 9th December 1924.

(a) Criminal P. C., S. 145—Object is to stop breach of the peace.

The object of S. 145 is to finally terminate the dispute between the parties so far as the Criminal Court is concerned so as to effectively put a stop to any breach of the peace. It is with this object that the decision of the Magistrate under S. 145 is declared to be final and conclusive until it is set aside by a competent Civil Court and the rights of the parties are determined by a competent Court. [P 594 C 2]

(b) Criminal P. C., S. 145 (5)—Incidental decision by any Court does not cause cessation of dispute.

The existence of a decision incidentally arrived at by a Criminal Court, or for the matter of that, even by a Civil Court, does not *per se* cause a cessation of the dispute between the parties as to possession. [P 595 C 1]

M. N. Ray and *B. P. Singh* — for 1st Party.

W. H. Akbari—for Second Party.

Judgment.—This is a Reference by the Sessions Judge of Patna under S. 438 of the Cr. P. C. recommending that the order of the Sub Divisional Magistrate of Barh dated the 25th October 1924, staying proceedings under S. 145 and cancelling the same under cl. 5 of that section be set aside. The lands in dispute are claimed by both the parties as having acquired the same from the tenants recorded in the Survey Record of Rights. The first party claimed the lands as having been acquired by means of purchases made prior to the acquisition thereof by the second party. The dispute between the parties led to a criminal case instituted by the first party against the members of the second party under Ss. 143 and 379 of the Indian Penal Code, with respect to the crops on lands said to have been forcibly removed by the second party. The Magistrate who tried the case acquitted the accused, that is, the members of the second party, holding that they were in possession of the lands and directed the complainant to pay compensation to the accused under S. 250 of the Cr. P. C. The order directing compensation to be paid by complainant was set aside by the Additional District Magistrate of Patna. He did not entirely agree with the Magistrate, who acquitted the accused, in his finding as regards the prosecution case of possession over the lands in dispute. The complainant then put in a petition before the Sub-Divisional Magistrate of Barh stating that emboldened by the acquittal in the theft case the members of the second party are prepared to commit

serious breach of the peace and invoked the help of the Magistrate by asking him to institute proceedings under S. 145 of the Cr. P. C. The Sub-Divisional Magistrate after considering the judgment of the Trial Court in the theft case and of the Additional District Magistrate who set aside the order as to compensation being paid by the complainant, and the allegations made in the petition of the complainant, held that there was a dispute between the parties regarding the actual possession of the lands in question and that the dispute is likely to cause breach of the peace. Accordingly he directed proceedings to be initiated under S. 145, Cr. P. C., and drew up the necessary proceedings. The case was eventually transferred to the file of the Deputy Magistrate of Barh. The second party filed a petition before him in the shape of a written statement stating that by reason of the decision of the Magistrate in the theft case their possession over the properties in dispute was upheld and consequently there did not exist any dispute as to possession with respect to the lands in question and hence the proceedings started under cl. 1 of S. 145 be stayed and cancelled. The Deputy Magistrate upheld this contention and directed further proceedings under S. 145 to be stayed. Against this order the first party moved the Sessions Judge of Patna who has referred the case to this Court recommending that the order of the Deputy Magistrate be set aside and the proceedings started under S. 145 by the Sub-Divisional Magistrate on the 1st October 1924 be continued until the question is determined by a decision under cl. 4 of that section. Mr. Akbari on behalf of the second party opposes this Reference and contends that this Court should not revive the proceedings under S. 145 which have been cancelled by the Deputy Magistrate under cl. 5 of that section. It appears to me that the Deputy Magistrate is wrong in construing the decision of the Magistrate in the theft case as putting an end to the dispute between the parties tending to a breach of the peace. That decision no doubt shows that in the opinion of the Magistrate the second party was in possession of the lands in dispute. The decision is not of a competent Civil Court and is not capable of enforcement by execution of the same so as to prevent a breach of the peace. The first party has not accepted and is not bound to accept the decision of the Magistrate as to possession passed in the theft case. The first party has no right to challenge in appeal or otherwise the finding of the Magistrate as to possession given in the theft case, for against an acquittal there is no appeal by a private party. As a matter of fact he disputed the correctness of the finding in an appeal against the order of the Magistrate directing compensation to be paid and succeeded in obtaining from the Additional District Magistrate an expression of opinion which at least threw doubt as to the correctness of the finding of the Magistrate. Such a decision is not conclusive as to possession and can in no sense be said to have settled the dispute between the parties, so as to put a stop to the trouble and consequent breach of the peace. The object of S. 145 is to finally terminate the dispute between the parties so far as the Criminal Court is concerned so as to effectively put a stop to any breach of the peace. It is with this object that the decision of the Magistrate under S. 145 is declared to be final and conclusive until it is set aside by a competent Civil Court and the rights of the parties are determined by a competent Court. It the Deputy Magistrate thought that finding of the Magistrate in the theft case was a pertinent finding as to possession, the best course for him was to make the enquiry as to possession upon the proceedings started by the Sub Divisional Magistrate and to treat that decision as a piece of evidence of possession *quantum valebat* in the case. The important words in cl. 5 of S. 145 which would entitle a Magistrate to stay proceedings already started under S. 145 are that "no such dispute as aforesaid exists"; that dispute is as to the possession of the subject matter in question. A party may disclaim the lands in dispute and thus show that there is no cause for any dispute and consequently no necessity for continuing an enquiry under S. 145. No such thing has happened in the present case. One of the parties may show that the title of the parties to the lands in dispute is already under investigation by a competent Civil Court and consequently there is no necessity for putting the parties to trouble and expenses in continuing an enquiry under S.145. Such a contingency has not arisen in this case. This

and similar other circumstances are contemplated in cl. 5 of S. 145 so as to entitle a Magistrate to stop the proceedings already started. The existence of a decision incidentally arrived at by a Criminal Court, or for matter of that, even by a Civil Court, does not *per se* cause a cessation of the dispute between the parties as to possession. Therefore, the Deputy Magistrate in the present case stopping the proceedings under cl. 5 of S. 145 acted under a misapprehension of the effect of the decision of the Magistrate in the theft case as to the possession of the parties with respect to the lands in dispute. Numerous authorities have been cited on both sides. *Palani Goundan* v. *Kulandavelu Goundan* (1), *Kedar Nath Chaubey* v. *Jaleswar Ram Tewari* (2), *Rambarai Rai* v. *Sagina Rai* (3), *Parmessar Singh* v. *Kailaspati* (4), *Khubi Singh* v. *Darbari Mahton* (5), and *Deonandan Singh* v. *Ramajodhya Singh* (6). I have considered those decisions and I am a party to some of them. The view that I have taken in this case is supported by the principles enunciated in those decisions and is not in conflict with any of them.

The result is this I accept the Reference as recommended by the learned Sessions Judge and set aside the order of the Deputy Magistrate of Barh dated the 25th October 1924, the result of which will be that proceedings started under S. 145, Cr. P. C., will continue and will be disposed of in accordance with law.

As Mr. Mathur has already expressed his opinion in the case it is desirable that the case should either be tried by the Sub-Divisional Magistrate himself or by by some other competent Magistrate than Mr. Mathur.

Reference accepted.

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(1) 1922 Mad. 437=43 M. L. J. 716=(1922) M.W.N. 484.
(2) 1923 Pat. 364=4 P.L.T. 248=1 Pat.L.R. Cr. 166=24 Cr. L.J. 467.
(3) 1923 Patna. 437=4 P.L.T. 333=24 Cr.L. J. 939.
(4) [1917] 1 P.L.J. 336=1 P.L.W. 95=17 Cr. L.J. 369=35 I.C. 801=(1917) P.H.C.C. 1 (F. B.)
(5) [1921] 2 P.L.T. 237=(1921) P.H.C.C. 167= 62 I.C. 177=22 Cr. I.J. 481.
(6) [1917] 2 P.L.W. 25=41 I.C. 139=18 Cr. L.J. 763.

1925 PATNA 595

BUCKNILL AND ROSS, JJ.

Sariman Ahir—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 648 of 1924, Decided on 15th December 1924, from a decision of the Sessions J., Arrah, D/- 30th June 1924.

Criminal P. C., 300—*Jury allowed to disperse after charge—Trial is illegal.*

There can be no doubt that S. 300 does not contemplate that the Jury, after the Judge has summed up a case to the Jury, will leave the precincts of the Court or be at large. The section clearly contemplates that after the Judge had delivered his charge the Jury must then retire to the Jury room and then and there consider its verdict. Where after the Judge's charge to the Jury the latter were, owing to exceptional circumstances, allowed to disperse for several hours and then returned to the Court and considered and delivered their verdict.

Held; that the trial was vitiated. [P. 596, C. 2]

Hyder Imam—for Petitioner.

Asstt. Govt. Advocate—for the Crown.

Bucknill, J.—This was an application in criminal revisional jurisdiction made by four applicants who were convicted of offences in connection with a dacoity by the Assistant Sessions Judge of Shahabad. They were tried before a Jury who by a majority found them guilty. The first two applicants were sentenced to four years' rigorous imprisonment and the third and fourth applicants were sentenced to three years' rigorous imprisonment.

The only point upon which this application is made to this Court to interfere with the convictions and sentences is that there has been in the procedure of this case a very gross irregularity which is of such a character that the applicants ought to be entitled to a re-trial. The circumstances surrounding this irregular procedure were certainly very unusual. It would appear that after the case had been concluded the Judge summed up the case to the Jury and after having delivered his charge it was contemplated that the Jury should retire to consider their verdict. The foreman of the Jury, however, became indisposed and began to vomit and according to the learned Assistant Session Judge's order-sheet, he (the Assistant Sessions Judge) observed that the foreman was unable to take part in the discussion which was apparently going on between the members of the Jury. It was then about 1 P. M. in the height of the hot weather in May and the Judge

seems then to have stated to the Jury that they could rest for two or three hours and come back at 4-30 P. M. There seems no doubt that the members of the Jury then dispersed, left the precincts of the Court and went home. At 4-30 P. M. they returned and after having retired for about twenty minutes gave the verdict to which I have already drawn attention. It would seem that the Pleader who appeared for the defence pointed out at that time to the Assistant Sessions Judge that the proceeding had been in fact irregular and that three hours had elapsed between the time when the Judge had concluded his charge to the Jury and the time when the Jury had returned its verdict and that the bulk of that period had been spent by the Jury away from the precincts of the Court. The Judge, however, in his order-sheet whilst drawing attention to the Pleader's objection, states that no definite information had been given to him which would show that any member of the Jury had an opportunity of speaking or holding communication with anybody at all and in consequence he thought that there was no material substance in the objection. The question was raised in appeal before the Sessions Judge and the Sessions Judge whilst recognizing that there had been an irregularity came to the conclusion that it was an irregularity which did not in any way vitiate the trial. He thought that although the provisions of S. 300 of Cr. P. C. had been clearly disregarded, it was necessary for the applicants to show that, as a matter of fact, some communication had been made to some member of the Jury during the Jury's absence from the Court after the Judge had concluded his charge. He also indicates that to his mind the circumstances under which the foreman of the Jury was indisposed were so peculiar that the Assistant Sessions Judge had practically no alternative except to do what he did do. Now, there can be no doubt that S. 300 does not contemplate that the Jury after the Judge has summed up a case to the Jury, will leave the precincts of the Court or be at large. The Section clearly contemplates that after the Judge had delivered his charge the Jury must then retire to the Jury room and then and there consider its verdict; and emphasis is placed upon this construction of the Section by the second portion of the Section itself, which states that except with the leave of the Court no person other than a juror, should speak or hold any communication with any member or such a Jury. This means in particular that the Jury shall have no chance of communicating with any outside person while they are, in fact, considering their verdict. Now the learned Counsel for the applicants had aptly pointed out that there seems every probability that during the two or three hours when these jurors had dispersed to their homes they did in fact enter into some sort of communication with the outside public. I am bound to say that I have come to the same conclusion. I think that it is hardly possible to imagine that during these hours some if not all of the Jury did not speak to some person or persons about the case. It is true we do not know in fact that they or any of the Jury did so speak to any one but I think that one may properly infer that they did so. What, if any effect such conversation may have had it is, of course, quite impossible to contemplate. But I do not think that, in the circumstances of this case, this irregularity of procedure can be passed over. I think it is important to impress upon those who have to try cases with a Jury that after a charge is made to the Jury, the Jury should not be allowed to disperse but should strictly follow the procedure laid down in the Code and there and then retire and consider in private their verdict. The obvious disadvantage which might appertain to any other form of procedure such as to allow the Jury to disperse after the charge has been concluded seems to open the door to all kinds of possible abuses. At any rate it gives a chance of improper communication being made to the Jury by persons or by the Jury to persons interested in the subject-matter of the trial and when one is really in doubt as to what has taken place when there has been after a charge dispersal of the Jury. I think that it may not be altogether safe to conclude that that irregular procedure had had no effect upon the Jury's verdict.

In this case, therefore, I have with some reluctance come to the conclusion that the convictions must be set aside and that the applicants must be tried *de novo*.

Ross, J.—I agree.

Retrial ordered.

1925 PATNA 597

MULLICK AND ROSS, JJ.

Garbhu Mahton—Defendant—Appellant.

v.

Bibi Khudai Jatunnissa and others—Plaintiffs—Respondents.

Appeal No. 361 of 1922, Decided on 1st May 1925, from Appellate decree of the Sub-Judge, Patna, D/- 6th February 1922.

B. T. Act (1885), *S.* 26—*Tenant of transferable occupancy holding dying intestate without heirs—Occupancy right is extinguished—Holding reverts to landlord subject to encumbrance created by tenant.*

S. 26 seems to mean that although the other property of an occupancy *raiyat* dying intestate and without leaving any heirs, escheates to the Crown, his occupancy right does not escheat to the Crown but is extinguished. This does not mean that the holding ceases to exist but only that the occupancy right is terminated as in the case of transfer of an occupancy right to a person jointly interested in the land as proprietor. 32 *Cal.* 386 (*F. B.*) *Foll.* The holding is then a holding without a tenant and must revert to the landlord. 1 *Cal.* 391, 1925 *Patna* 57 *Foll.*, 13 *C. W. N.* 12 *Diss.* [P. 598, C. 2.]

Where a tenant can legally alienate or encumber his holding, and that holding reverts to the landlord on the death of the tenant intestate without heirs, what reverts is the estate that was in the tenant as encumbered by him, diminished by virtue of S. 26 by the loss of the occupancy right. 8 *M. I. A.* 500 and 11 *M. I. A.* 619 *Foll.* [P. 599, C. 1.]

A. B. Mukerjee—for Appellant.

Khurshed Hussain and *Muhammad Yusuf*—for Respondents.

ROSS, J.—This is an appeal by Defendant No. 1 against a decree of the learned Subordinate Judge of Patna in a suit brought by the Plaintiff-Respondent for recovery of possession of 51 acres of land in the following circumstances.

The Plaintiff claims to be the proprietor of 16 annas of Mauza Simli Morarpur, *tauzi* No. Samelat in which the land in suit is situated. The land was formerly the occupancy holding of two brothers Nokha Mahto and Una Mahto. Nokha Mahto died leaving a widow Mt. Bhatni. On his death the holding went by survivorship to his brother Una who mortgaged it to Defendant No. 1 on the 18th of November 1912. According to the allegation in the plaint, which is not traversed in the written statement, Una Mahto died in the month of Pous 1326, that is January 1919. On the 12th of January 1919 Mt. Bhatni, who had entered into possession of the holding on Una's death, executed a deed of sale of the holding in favour of Defendant No. 1, in consideration of the dues under the earliar mortgage and of a sum of Rs. 50 advanced for the *sradh* of Una Mahto. The Defendant No. 1 entered into possession of the property. The Plaintiff claiming the property by right of reversion on the death of the last tenant without heirs, settled it with Defendant No. 2. Criminal proceedings between Defendant No. 1 and Defendant No. 2 having terminated unfavourably to the latter, the Plaintiff brought this suit.

The Defendant pleaded that Mt. Bhatni lawfully entered into possession on the death of Una and conveyed the holding to him for legal necessity and that he was recognized by the landlord as tenant and therefore could not be ejected.

The learned Munsif held that Mt. Bhatni, being a brother's widow, was no heir under the Hindu law. He found, however, that she was entitled to maintenance out of the entire property left by Una and that the landlord had no right to take possession of the land. He further found that she was in possession and that subsequently to the conveyance the Defendant No. 1 was in possession and was recognized as tenant by one of the *maliks* Kannoo Lal. He also found that the sale was for legal necessity and was valid and consequently he dismissed the suit.

On appeal the learned Subordinate Judge agreed with the finding of the Munsif that Mt. Bhatni was not an heir of Una Mahto. Differing from the Munsif he held that she had no right to convey the land and the conveyance conferred no title on the purchaser. He further held on the authority of *Muktakeshi Dassi* v. *Pulin Behari Singh* (1) that on the death of the last tenant without heirs the security of the mortgage created by him was extinguished. He was also of opinion that the fact that Mt. Bhatni sold the holding to Defendant No. 1 showed that she had no intention to charge it with her maintenance, and there was in fact no charge upon the property for her maintenance; and in the result, he decreed the suit.

(1) [1908] 13 C. W. N. 12=1 I. C. 155=8 C. L. J. 324.

In second appeal it is contended that as the Plaintiff is only a co-sharer landlord, the most he is entitled to is joint possession with the Defendant and that as he has framed his suit in ejectment, even this relief should not be given. It is further contended that the case of *Muktakeshi Dassi* v. *Pulin Behary Singh* (1) was wrongly decided and that if the landlord is entitled to the property, he must take it subject to the mortgage.

With regard to the first point the learned Counsel for the Respondents has shown that in the grounds of appeal in the Court below it was stated that the learned Munsif was wrong in considering that the Plaintiff was only a co-sharer landlord and ought to have considered that he was the 16 annas landlord ; and consequently the receipts granted by Kannoo Lal did not relate to the land in suit. He contended that this point was clear and was not disputed and that the decision of the learned Subordinate Judge was on the basis that the Plaintiff was the sole landlord. Now in the written statement, although it is pleaded that the landlord recognized the Defendant No. 1 as tenant and recorded his name and granted him receipts; yet the statement in the plaint that the Plaintiff is the 16 annas landlord is not expressly denied. In the judgment of the learned Subordinate Judge there is no reference to the finding of the Munsif that the Plaintiff was a co-sharer landlord and there is no discussion of this point, In view of the fact that the suit was decreed in full, it must be taken that the judgment proceeded on the basis that the Plaintiff was the sole landlord and the inference to be drawn is that the case was argued on that footing. This view finds support in the fact that the learned Subordinate Judge has not referred to or discussed the effect of the receipts granted by Kannoo Lal. I shall therefore deal with the case on the footing that the Plaintiff is the sole landlord of the village in which the land in suit is situated.

The question then is what situation arose in law on the death of Una Mahto without heirs, because it was not contended for the Appellant that Mt. Bhatni was an heir. S 26 of the Bengal Tenancy Act occurs in Chap. V, which deals with occupancy rights and lays down the law for the devolution of the occupancy right as follows : "If a raiyat dies intestate in respect of a right of occupancy it shall, subject to any custom to the contrary, descend in the same manner as other immovable property : Provided that in any case in which under the law of inheritance to which the raiyat is subject his other property goes to the Crown, his right of occupancy shall be extinguished." This seems to mean that although the other property of an occupancy raiyat dying intestate escheats to the Crown, his occupancy right does not escheat to the Crown but is extinguised. This does not mean that the holding ceases to exist but only that the occupency right is terminated as in the case of transfer of an occupancy right to a person jointly interested in the land as proprietor, *Rammohan Pal* v. *Sheikh Kachu* (2). The holding is then a holding without a tenant and must revert to the landlord. This right of the landlord to the reversion where there are no heirs is clear on principle and is recognized by implication in *Sonat Kooer* v. *Himmut Bahadur* (3) and is expressly recognized by the Court in *Srikanta Prasad* v. *Jag Sah* (4). So far as the decision in *Muktakeshi Dassi* v. *Pulin Behari Singh* (1) is to the contrary effect, I would respectfully differ from it.

The question then is, what reverted to the landlord ? In *The Collector of Maulipatam* v. *Cavaly Vencata Narrainapa* (5) and in *Cavaly Vencata Narrainapah* v. *The Collector of Masulipatam* (6) it was held in dealing with the escheat of a zamindari to the Crown that a mortgagee by a mortgage created by the last holder was entitled as against the Crown, who took the estate by escheat on the death of the widow for want of heirs, to possession of the estate under the mortgage as security for the amount advanced and interest, subject to the equity of redemption by the Crown. If property escheats to the Crown subject to equities there can be no reason why it should not revert to the landlord on the same terms. The question whether the holding in the present case reverts subject to the mortgage created by the last holder depends on

(2) [1905] 32 Cal. 386=9 C. W. N. 249,=1 C. C. L. J. 1 (F. B.)
(3) [1876] 1 Cal. 391=3 I. A. 92=25 W. R. 239=3 Sar. 608 (P. C.)
(4) 1925 Patna 57=3 Pat. 818=6 P. L. T. 237.
(5) [1859-61] 8 M. I. A. 500=2 W. R. 59= 1 Suther. 417=1 Sar. 572 (P. C.)
(6) [1867] 11 M. I. A. 619=10 W. R. 47=2 Suther 103=2 Sar. 338 (P. C.)

whether the holding was transferable or not. Now in this case the transferability of the holding has never been questioned, but has been assumed. The transfer to Defendant No. 1 is referred to in the plaint but it is not questioned on the ground of non-transferability. If the last holder had sold the holding the landlord would have got nothing ; as he has transferred it by way of mortgage, the landlord gets only the right to redeem. It seems clear that where a tenant can legally alienate or encumber his holding as in the present case and that holding reverts to the landlord on the death of the tenant intestate without heirs, what reverts is the estate that was in the tenant as encumbered by him diminished, of course, by virtue of S. 26 by the loss of the occupancy right. Now Una Mahto mortgaged this holding to the Defendant No. 1. The conveyance from Mt. Bhatni may be, and, in my opinion, is, without legal effect. But the position of the Defendant No. 1 is at least that of a mortgagee in possession and he is entitled to retain possession until he is redeemed by the landlord or until his tenancy is otherwise lawfully determined. It is unnecessary to consider the decision of *Muktakeshi Dassi* v. *Pulin Behari Singh* (1) in this connection as that was a case of a non-transferable holding.

In *Cavaly Vencata Narrainapah* v. *The Collector of Masulipatam* (6) the Judicial Committee observed as follows at p. 636 (11 I. A.): "This declaration is fatal to the Respondent's claim to immediate possession of the zemindari, but it will leave the equity of redemption in the Crown. In strictness the present suit should stand dismissed, leaving the Crown to assert that equity, if it shall be so minded, in a suit properly framed for the purpose. It has, however, been suggested at the Bar that provision for redemption might be made in this suit. If the parties can agree as to the terms of redemption, their Lordships would not be unwilling to have them embodied in the order to be made on this appeal. But if they do not so agree, the order which their Lordships must recommend to Her Majesty as a consequence of the before-mentioned declaration is that the Respondent's suit should stand dismissed without prejudice to the right of the Crown to redeem." In my opinion, the order to be made in the present case ought to follow the terms of that decision of the Privy Council.

The result is that the appeal must succeed and there will be a declaration that the Plaintiff has a right to redeem the holding in suit and that if the parties can agree within fifteen days as to the terms of redemption, these terms will be embodied in the decree of this Court ; and, in that case, each party will bear his own costs throughout. But if they do not so agree then the appeal will stand decreed and the Plaintiff's suit will be dismissed with costs throughout, without prejudice to his right to redeem.

Mullick, J.—I agree,

1925 PATNA 599

DAS, J.

Ritbhanjan Rai and others — Petitioners.

v.

King Emperor—Respondent.

Criminal Revision No. 583 of 1924, Decided on 26th November 1924, from an order of S. J. of Shahabad, D/- the 22nd September 1924.

Criminal P. C., S. 437—Discharge cannot be set aside unless it is perverse and not merely wrong.

The Sessions Judge has to consider whether it was open to the Magistrate to come to the conclusion to which he did come on the materials before him. That a different view could be taken on the evidence would not justify the Sessions Judge in ordering commitment ; he must come to the conclusion that the finding of the Magistrate is not only wrong but perverse.
P. 601, C. 1]

Ali Imam and *Hyder Imam* — for Petitioners.

Government Advocate—for the Crown.

Das, J.—This application is directed against the order of the learned Sessions Judge of Shahabad, dated the 22nd September 1924, by which he has directed the petitioners to be committed to the Court of Sessions by the discharging Magistrate, or if he is transferred by his successor.

The petitioners were tried by a Magistrate of Sassaram in respect of an occurrence which took place on the afternoon of the 14th of April last.

By his order dated the 26th June 1924, the learned Magistrate discharged the petitioners under S. 253 of the Code.

The complainant thereupon moved the Sessions Judge of Shahabad with the result that the petitioners have now been directed to be committed to the Court of Sessions.

It is not open to doubt that in the course of the occurrence which took place, Sumiran and Balgobind received certain injuries which were more or less slight. It is the case of the prosecution that serious injuries were inflicted on Sheodahin, the brother of Sumiran and Balgobind, which caused his death. Sheodahin undoubtedly died in the afternoon of the 15th April, and the medical evidence shows that there were two contusions on both sides of his head which were the cause of his death.

The defence theory is that he received these wounds by a fall from a tree. The medical Officer stated in his evidence that a contusion on one side of the head could have been caused by a fall from a tree. On being pressed further, he stated that contusions on both sides of the head could be caused by a fall from a tree but that the idea was far fetched. I understand his evidence to be that it is possible but highly improbable that the injuries on both sides of the head could have been caused by a fall from a tree.

Now in respect of the occurrence, Sumiran is alleged to have lodged an information before the Writer Head Constable at 7 P. M. that evening. He is alleged to have reported that the petitioners were taking his cattle to the pound from a purti land when he went and remonstrated. On that there was an altercation and he was assaulted. As the offence disclosed in the information was of a non-cognizable nature, the constable refused to take any action. It is to be noted that there was no suggestion in the Sanha that serious injuries were inflicted on Sheodahin, or that the Complainant and his brother were taking the cattle to the pound.

The case made by the prosecution at the trial was, however, a different one. That case is as follows :

"Twenty or twenty two heads of cattle of village Baluahi were eating the crops stored in the khalihan of Sumiran Singh, Sheodahin and Balgobind, and Sumiran, Sheodahin and Balgobind started driving the cattle to the pound." Thereupon the petitioners came and rescued the cattle and began to assault them in the course of which they all received injuries from the effect of which Sheodahin died the next day.

It will be noticed that the case presented in Court was radically different from the one alleged to have been stated to the Writer Head Constable, and it was impossible for the Court to convict the petitioners if it found that the information was correctly recorded by the Writer Head Constable.

The Sanha was proved by the Head Constable who was very properly called as a witness on behalf of the prosecution. Sumiran in his evidence admitted that he went to the Wirter Head Constable to have his information recorded ; but he states that the constable refused to take down his statement. In this he was contradicted by the Writer Head Constable and the Court had to consider which of the rival versions was true. On a consideration of the evidence, the Magistrate came to the conclusion that the evidence of Sumiran on this point was untrue, and I have no doubt whatever that this is the only conclusion at which he could have arrived.

Now if the prosecution case be true, a serious offence had been committed by the petitioners. It is the evidence of Sumiran that he went to the Writer Head Constable to have his information recorded but that the refused to record his statement. No attempt was made to have Sheodahin conveyed to the hospital and the complaint was not filed in Court till the 16th of April, the occurrence having taken place on the 14th of April. The internal evidence furnished by the complainant, however shows that it was drawn up on the afternoon of the 15th of April.

Now I cannot believe that, if the police refused to help Sumiran in the matter, Sumiran would not have rushed to the Court at the earliest possible opportunity and laid his case before the Court; but he waited till the 16th of April and when he did file his complaint in Court, he made no allegation whatever against the police and suppressed the fact that he had gone to the Head Constable to have his information recorded. The facts speak for themselves and it is not necessary for me to pursue the subject.

These being the circumstances, the Magistrate had to consider whether there was a case to go to the Jury, or whether he was not competent to try the case

himself. He examined the evidence and came to the conclusion that "there is nothing to show that the injuries were inflicted with intent to cause death or knowing it likely that they will cause death". Although the point is disputed by the learned Government Advocate, I take the view that the finding of the Magistrate amounted to a finding to the effect that there was no case of culpable homicide to be tried by the Court. That being his finding, he tried the case himself to see whether any of the petitioners could be convicted of an offence under S. 325 I. P. C. On this his finding is that "the injuries were received in the heat of the fight and proved fatal afterwards". Having accepted that the Sanha correctly represented the information given by Sumiram, the Magistrate rejected the whole of the prosecution evidence and discharged the petitioner under Section 253 of the Code.

When the matter went up to the learned Sessions Judge at the instance not of the Crown but of Sumiram, the learned Sessions Judge thought that there was much to be said on behalf of the complainant that the entry in the Station diary was not a correct entry.

Now it seems to me that this was a vital point in the case: was the entry in the station diary a true entry or a false entry. In dealing with this point, the learned Magistrate referred to two circumstances which in his view were important: first that there was no allegation by Sumiran either in his petition of complaint or in his statement on solemn affirmation that the Writer Head Constable refused to take down his statement; and secondly that Sheodahin was not taken to the *thana*.

Now these are matters not discussed in the Judgment of the learned Sessions Judge. I apprehend that, in considering whether the petitioners should be directed to be committed to the Court of Sessions notwithstanding they had been discharged by the Magistrate, the Sessions Judge had to consider whether it was open to the Magistrate to come to the conclusion to which he did come on the materials before him That a different view could be taken on the evidence would not justify the learned Sessions Judge to take the course which he has taken; he must come to the conclusion that the finding of the Magistrate is not only wrong but perverse. In my opinion, on the materials in the record, the learned Sessions Judge could not have come to the conclusion that the finding of the Magistrate on this point was a perverse finding nor do I think that the learned Sessions Judge has come to that conclusion. The finding of the learned Sessions Judge on this point is somewhat halting; but as I read the Judgment, he does not even say that the finding of the Magistrate is wrong although he does throw some doubt on that finding. In my opinion there is no case to be tried either under S. 304 read with S. 149, or under S. 147 of the Indian Penal Code.

But the learned Government Advocate contended before me that at any rate there is a case under S 325 to be tried.

There is no doubt that Sheodahin has died from injuries inflicted on him. I have read the evidence myself and I altogether reject the theory that Sheodahin could have received these injuries by a fall from a tree. But still the prosecution has to establish a case under S. 325 against the petitioners or some of them. The learned Magistrate examined the prosecution evidence and rejected it as unworthy of credit. His finding on this point is as follows :—

"It is clear that true circumstances of the occurrence have been suppressed and false and fictitious circumstances have been set forth in order to get up a case. All the eleven accused persons are given their respective parts, three assault one man, three assault another and five assault another. None are left to stand idle. But I do not understand how in the heat of fight persons injured can see things so minutely and in detail and why when so many persons used their lathis so few injuries were received. This shows that much less number of men were engaged in the occurrence than what is alleged by the prosecution and this is another proof that the circumstances of the occurrence have been changed."

It was, in my opinion, open to the learned Magistrate, on the materials before him, to reject the evidence, having regard to the fact that the prosecution had undoubtedly made a false case on many points.

It is, however, contended by the learned Government Advocate that Sheodahin having died from the injuries admittedly inflicted on him by the petitioners,

there would be a gross miscarriage of justice if the petitioners are not directed to be committed to the Court of Sessions to be charged for an offence under S. 325, or at any rate if further inquiry into the matter be not ordered.

Now in dealing with this point, it has to be remembered that charges under S. 304 read with S. 149 and S. 147 have wholly failed. I have myself read all the evidence in the case and there is no doubt whatever that there is no case under S. 304 to be tried. That being so the only question is, is there any evidence on the record to connect the petitioners or any of them with the serious injuries inflicted on Sheodahin? As I have said I have read all the evidence in the case and in my opinion there is no evidence whatever to connect the petitioners or any of them with those injuries. That being so, obviously none of the petitioners could be convicted of an offence under S. 325 I. P. C.

The application must be allowed and the order of the learned Sessions Judge must be set aside.

Reference answered.

★ 1925 PATNA 602

DAWSON-MILLER, C. J., AND MACPHERSON, J.

Debi Prasad Dhandhania and others—Plaintiffs—Appellants.

v.

Mahesh Lal and others—Defendants—Respondents.

Appeal No. 35 of 1922, Decided on 22nd May 1925, from Appellate decree of the Dt. J. of Bhagulpur, D/-22nd August 1921.

★ *Receiver—Receiver is personally liable except when liability is made a charge on assets only, by Court's order — Even when personally liable, Receiver can create liability on estate for whose benefit loan was made.*

A receiver put in charge of property for the purpose of managing it, is ordinarily personally responsible to any persons with whom he may contract liabilities for the purposes of managing the property, looking to be reimbursed from the estate itself. There are, however, certain cases in which the principle does not operate so as to render the receiver personally liable in respect of sums which have been advanced to him. Those cases are where the sums have been advanced pursuant to an express order from the Court and where payment has been made a charge upon the assets only. As the acts of the receiver are the acts of the Court, the estate cannot be permitted to enjoy he benefit to those acts without being held responsible for the obligations arising out of them. [P 604, C 1,2]

The purchaser of an equity of redemption instituted a suit against the mortgagee for the specific performance of a contract for assignment of the mortgagee's interest. The suit was decreed by the Trial Court. The plaintiff deposited the consideration amount in Court. But the mortgagee preferred an appeal to the High Court. Pending the appeal he was appointed receiver to sue upon the mortgage bond as it was going to be time-barred. As receiver he borrowed money by sub-mortgaging the mortgage bond for the purpose of bringing the suit on the mortgage bond. He brought the suit, but on the dismissal of his appeal in the specific performance case, he withdrew the suit. The sub-mortgagee thereafter instituted a suit for recovery of his loan and as his claim for mortgage decree was time-barred he prayed for a personal decree against the receiver.

Held: that the money was borrowed entirely in the mortgagee's interest to put him in a position to prosecute the mortgage suit and that his liability to repay that sum undoubtedly arose as the person for whose benefit he borrowed the money, namely himself. Assuming that he could not be sued as a receiver because the transaction was made under the express directions of the Court, still the principles of justice and equity required that he should repay that which he borrowed as a receiver and used for his own benefit and covenanted to repay.

[P 605, C 1,2]

N. C. Sinha, S. N. Palit, Rai Guru Saran Prasad and *Jadubans Sahay*—for Appellants.

A. K. Ray, S. M. Mullick, S. N. Bose Bindhesri Prasad and *Janaki Kishore*—for Respondents.

Dawson-Miller, C. J.—The suit out of which this appeal arises was instituted on the 19th September 1919, by Debi Prasad Dhandhania and other members of his family against a number of Defendants, for the purpose of enforcing a bond, dated the 5th July 1912, executed in favour of Debi Prasad Dhandhania by Sakhi Chand, to secure the repayment of a loan of Rs. 2,000 carrying compoud interest at the rate of 9 per cent. per annum. The money was borrowed by Sakhi Chand under circumstances somewhat peculiar and which I must refer to shortly in order to explain the nature of the questions which arise for decision in the case.

At the time when the loan was taken, litigation was pending between Sakhi Chand, deceased, who is represented in this suit by the Defendants fourth party, and Darbari Lal who is now represented by the Defendants first party. I may add that the other Defendants in the suit, the second and third party Defend-

ants, are the *farzidars* of Darbari Lal and persons who are interested in the property which was the subject of the suit I am about to mention.

It appears that in the year 1897, a mortgage bond was executed by one Bulaki Lal in favour of Bishun Chand, the predecessor-in-interest of Sakhi Chand and the Defendants fourth party. On the 23rd July 1909, Bishun Chand entered into an agreement with Darbari Lal to assign to him his interest under the mortgage bond of 1897. On the 29th March 1910, Bishun Chand having died, a suit was instituted by Darbari Lal against Sakhi Chand, Bishun's brother and legal representative, for specific performance of the contract of the 23rd July 1909. Sakhi Chand was contending that no binding agreement had been entered into. The trial Court, however, in that suit delivered its judgment on the 20th February 1911 in favour of Darbari Lal and ordered an assignment of the mortgage to be executed by Sakhi Chand in favour of Darbari Lal upon the latter depositing the agreed purchase price. The money was deposited in Court but was not taken out of Court by Sakhi Chand, for he entered an appeal to the High Court from the decision of the Subordinate Judge. Whilst that appeal was pending, an application was made to the Court by Sakhi Chand to appoint a receiver of the mortgage interest in order that a suit might be brought upon the mortgage against the mortgagors, because at that time the suit was about to become time-barred and unless action was taken by either Sakhi Chand who claimed to be the real owner of the mortgage bond or by Darbari Lal in whose favour a decree had been passed ordering a conveyance to be executed in his favour, then the bond would become time-barred and nobody would receive the benefit of it.

It appears quite clear from the evidence in the case which has been referred to in the judgments of the Subordinate Judge and of the District Judge, whose judgment is now under appeal, that Darbari Lal, as might well be expected, was not prepared to take part in bringing a suit against the mortgagor, for although he was assignee of the mortgage he had in fact in the year 1909 himself purchased from the mortgagor the equity of redemption in the mortgaged property. The result, therefore, would be, so far as he was concerned, that he would be a party if he assented, to a suit brought against himself. His case was that he being a purchaser of the equity of redemption and also the purchaser of the mortgage bond, the whole property was his and there was no object in bringing a suit to enforce the mortgage. He was however at all times apparently perfectly willing to pay the price arranged for the assignment of the mortgage interest and in fact that money had been paid into Court.

On the 11th March 1912, the application of Sakhi Chand to appoint a receiver was granted and he himself was appointed receiver of the interest in the mortgage bond in order that he might on behalf of the person interested bring a suit for its enforcement In order to carry on the suit he applied to the High Court for power to raise a loan of Rs. 2,000 to provide funds to prosecute the suit. Having obtained the leave of the Court, he accordingly borrowed the money from the Plaintiff, a banker of Bhagalpur, and instituted a suit on the 5th July 1912 as receiver to enforce the mortgage bond. At some time which has not been definitely stated but after the suit on the mortgage bond was instituted, the appeal by Sakhi Chand against Darbari Lal in the suit brought to enforce specific performance of the contract of the 23rd July 1909, was decided in favour of Darbari Lal. Thereupon, as there was no further appeal from that decision, there was no object in Sakhi Chand as receiver proceeding any further with the mortgage suit, and accordingly he made up his mind to make the best of matters and to take out of Court the money which had been deposited to his credit as consideration for the assignment of the mortgage bond, and the suit which he had brought on that bond on the 5th July 1912 was dismissed on the 10th February 1914 without prejudice to the rights of Debi Prasad, the Plaintiff in the present suit.

The question that now arises is whether the Plaintiff is entitled to recover either from Darbari Lal or from any of the other Defendants the amount borrowed under the bond in suit. Both the Subordinate Judge and the District Judge on appeal considered that the Plaintiff had no remedy against either of the Defendants. The bond hypothecates the

interest in the mortgege bond of 1897 as security for repayment of the loan, but even if a decree were passed in favour of the Plaintiff upon the bond in suit as against the interest hypothecated, that would be a barren decree because the mortgage bond of 1897 which was hypothecated has long since become time-barred and no suit could now be brought to enforce it.

There remains, however, the question of the personal liability of the Defendants. In the bond in suit Sakhi Chand recites that he is a receiver appointed by the High Court at Calcutta He then refers to the making of the mortgage bond of 1897 and to the litigation which was pending with regard to the agreement to assign that bond to Darbari Lal and states that in the capacity of receiver he has borrowed Rs. 2,000 from Debi Prasad at 9 per cent. per annum interest agreeing to pay back the principal within a period of two years. Then it goes on to state that for security of the aforesaid amount borrowed with interest, "the amount due under the mortgage bond" (that is, the bond of 1912) "will be an incumbrance over the aforesaid mortgage bond, dated 9th April 1897, that is to say, from the amount realised under the aforesaid mortgage bond, dated 9th April 1897, amount principal with interest and compound interest due under the aforesaid present mortgage bond will be first paid up."

It will be seen that in addition to the charge upon the mortgage bond itself, there is a personal covenant to repay the loan, and the question is, whether Sakhi Chand or Darbari Lal or any other of the Defendants is liable upon that contract. Sakhi Chand entered into the contract, as a receiver, and it is contended that in the circumstances of this case he is under no personal liability as receiver. The ordinary rule is that a receiver put in charge of property for the purpose of managing it is ordinarily personally responsible to any persons with whom he may contract liabilities for the purposes of managing the property, looking to be reimbursed from the estate itself. There are, however, certain cases in which the principle does not operate so as to render the receiver personally liable in respect of sums which have been advanced to him. Those cases are where the sums have been advanced pursuant to an express order from the Court and where repayment has been made a charge upon the assets only. It was laid down by Mr. Justice. Sale in the case of *Mohari Bibi* v. *Shyama Bibi* (1) that the receiver even if personally liable may create a liability upon the estate of the person for whose benefit the loan was made. In that case Sale, J., after pointing out the difference between the position of trustees and receivers in acting on behalf of an estate, says in his judgment: "In the latter case creditors deal with the Court through its receiver and the Court imposes obligations on the estate through the receiver for protection of creditors dealing with the receiver. It doubtless is the law, as appears from the case already cited, that in carryiny on a business under directions of the Court a receiver must necessarily incur personal obligations, but in incurring these personal obligations it seems to me that he necessarily and under the authority of the Court imposes obligations on the estate for the benefit of those creditors with whom he has dealt, and which obligations the Court ought and does give effect to and it is in this respect that a receiver occupies a position towards an estate in his hands different from that of an executor or trustees," And in a later part of the judgment he points out that the right to maintain such a suit is founded on the just and equitable principle that as the acts of the receiver are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them. It seems to me, therefore, that a receiver appointed in the circumstances in which the receiver in this case was appointed is entitled to, and does, in incurring obligations of this sort, create a liability upon the estate of the person for whose benefit the obligations were incurred.

What are the circumstances here? Sakhi Chand was suing to enforce a mortgage, a mortgage which in fact he had assigned to Darbari Lal. He was disputing that assignment; he had failed in the trial Court and he had been ordered to execute a conveyance in favour of Darbari Lal. The purchase price had been deposited in Court but he refused to take it out and he was bringing an appeal to the High Court from that decision. If he

(1) [1903] 30 Cal. 937=7 C. W. N. 799.

succeeded in that appeal then obviously he would be entitled to prosecute the mortgage suit and would probably recover more than the consideration for the assignment deposited in Court. Darbari Lal on the other hand was the proprietor of the equity of redemption and was contending that he was the assignee of the mortgage interest, a matter still *sub judice*. It was therefore obviously not in his interest or for his benefit that any suit should be brought on the mortgage bond. In the circumstances Sakhi Chand himself was appointed a receiver of the interest in the mortgage bond in order to prosecute the suit, and I may add, to prosecute the suit entirely for his own benefit. In these circumstances the appeal which he had taken to the High Court failed and therefore it was quite obvious after that, that he had ceased to have any interest in the mortgage bond beyond the amount deposited and that the assignment to Darbari Lal was good and valid. Had he succeeded in his appeal against Darbari Lal and gone on with the suit on the mortgage bond, he would presumably have recovered the amount due thereunder. It became however, no longer practicable for him to prosecute the suit as receiver of the mortgage interest for that had then passed to Darbari Lal who also held the equity of redemption. The result was that instead of getting into his hands the proceeds of the mortgage suit which would have been charged with repayment of the loan he was eventually content, and in fact bound to accept instead the consideration for the assignment which had been paid into Court. It is true that that money was not the proceeds of the mortgage suit and it is contended that it was not charged with the payment of the loan under the bond now sued on, but in the circumstances it represented Sakhi Chand's interest in the mortgage bond which was the interest charged and I think he was bound to pay thereout the loan taken from the Plaintiff. Moreover the money was borrowed entirely in his own interest to put him in a position to prosecute the mortgage suit, and if that is so, it seems to me that his liability to repay that sum undoubtedly arises as the person for whose benefit he borrowed the money, namely himself. Assuming that he could not be sued as a receiver because the transaction was made under the express directions of the Court, still I think, the principles of justice and equity require that he should repay that which he borrowed as receiver and used for his own benefit and covenanted to repay and that the Defendants fourth party, as representatives of Sakhi Chand, the person for whose benefit the money was in fact borrowed, are liable to the extent of his assets coming into their hands.

The result will be that the decree of the District Judge will be set aside and a decree in lieu thereof will be entered in favour of the Plaintiffs for the sum of Rs. 2,000 together with interest at the bond rate from the date of the bond upto the date of this decree and further interest at 6 per cent. per annum until realisation.

The Plaintiffs are entitled to their costs in this appeal and in both the lower Courts from the defendants fourth party. The appeal as against the other Defendants in the suit will be dismissed. The Defendants first and third party are entitled to one set of costs in each Court to be divided between them. The Defendant second party did not appear and is not entitled to costs. The decree of this Court will be subject to the provisions of Ss. 52 and 53 of the Code of Civil Procedure.

Macpherson, J.—I agree.

Decree varied.

1925 PATNA 605

DAS AND ADAMI, JJ.

Gauri Shankar and another—Plaintiffs—Appellants.

v.

Bahadur Singh and others — Defendants—Respondents.

First Appeal No. 44 of 1922, Decided on 21st April 1925, against the decision of Sub. J., 1st Class, Patna, D/- 28th November 1921.

T. P. Act, S. 101—Question whether subrogation takes place is one of intention—Party should be presumed to intend what is manifestly for his benefit.

The question whether a mortgage which is paid off is to be considered as extinguished or kept alive for the benefit of the person who makes the payment, is a question of intention; but,

every one is presumed to intend that which is manifestly for his benefit. [P. 607, C. 1]

(*b*) *Mortgage — Decree on second mortgage— Decree on prior mortgage declaring puisne mortgagee to be entitled to redeem—Property not redeemed—Purchaser in execution of decree on second mortgage with notice of prior mortgage cannot claim higher position than second mortgagee.*

Where a purchaser in execution of a decree passed on a second mortgage purchased the property with full notice of the previous mortgage and subsequentley, decree was passed on the first mortgage which expressly declared the puisne mortgagee to be entitled to redeem the property and where this was not done and the property was ultimately sold in execution,

Held: that the pruchaser in execution of the decree on the second mortgage could not claim a higher position than the subsequent mortgagee.

N. C. Sinha, *N. C. Ghosh*, *G. P. Das* and *Miss. S. B. Hazra*—for Appellants.

Sultan Ahmad, *Kailaspati*, *S. Dayal* and *Sarjoo Prasad*—for Respondents.

Das, J.—It is somewhat difficult to understand the nature of the suit which has given rise to this appeal; but the object seems to be to obtain a declaration that the second mortgagee or the person who now represents the interest of the second mortgagee is entitled to priority over the first mortgagee.

In order to understand the point which has been argued before us by the plaintiffs who are the appellants in this Court, it is necessary to remember the following transactions.

On the 9th June, 1902, defendants 11-16 who will henceforth be referred to as the mortgagaors, mortgaged an 8 annas share of a certain *mokarrari* property to Harbans Narain Singh represented in this action by defendants 7-10. On the 29th September, 1902, the mortgagors mortgaged 16 annas of the same property to Rai Bahadur Harihar Prasad Singh, cited as defendant No. 5 in this action.

On the 23rd December, 1907, the mortgagors borrowed Rs. 71,000 from Ram Narain Singh, represented in this action by defendants 2-4 and gave a usufructuary mortgage of the entire 16 annas of the *mokarrari* property as well as other property to him. This usufructuary mortgage was executed in order to enable the mortgagee to pay off, amongst others, Harbans Narain Singh. A large portion of the consideration money was left with Ram Narain Singh to enable him to pay off Harbans Narain. It appears that Harbans Narain was not paid by Ram Narain and on the 11th June, 1909 Harbans Narain instituted a suit being suit No. 27 of 1909 against the mortgagors, to enforce the security of the 9th June, 1902 as against them. He took the precaution of joining Rai Bahadur Harihar Prasad Singh as a party defendant in this action. This suit as I have said, was instituted on the 11th June 1909; but it appears that Rai Bahadur Harihar Prasad Singh himself instituted a suit to enforce his security of the 29th September, 1902 sometime in 1904 and on the 4th February, 1905 he obtained the usual mortgage decree subject to the prior mortgage of Harbans Narain Singh. He took out execution proceedings and in due course the property was put up for sale and on the 17th September, 1917, the plaintiffs purchased the property at that sale. Meanwhile, as I have said, Harbans Narain instituted his suit to enforce the security of the 9th June, 1902, and, as I have said, he cited Rai Bahadur Harihar Prasad Singh as a party defendant in his suit. On the 2nd July, 1912 the heirs of Harbans Narain Singh, cited as defendants 7-10 in this action, assigned the security of the 9th June, 1902 to Bahadur Singh for valuable consideratian. Bahadur Singh is the first defendant in this action and is contesting the claim of the plaintiffs. Bahadur Singh applied for substitution and in due course was substituted in the record of suit No. 27 of 1909 as plaintiff in the place of Harbans Narain Singh. On the 7th June, 1909, Bahadur Singh obtained a preliminary decree which gave Rai Bahadur Harihar Prasad Singh the right to redeem his mortgage. It will be remembered that, although the Rai Bahadur had obtained his decree on the 4th February, 1905 the property had not passed to the plaintiffs until the 17th September, 1917. The Rai Bahadur's decree was subject to the prior security created in favour of Harbans Narain Singh, and it may be pointed out that he did not choose to exercise his right of redemption in suit No. 27 of 1909. The final decree in suit No. 27 of 1909 was passed on the 8th November, 1918. Execution proceedings followed, and in due course the mortgaged properties were put up for sale and were purchased by Bahadur Singh on the 21st August, 1920.

The case of the plaintiffs is that Bahadur Singh is the *benamidar* of Ram Narain Singh and that the deed of assignment was a fraud upon Rai Bahadur Harihar Prasad Singh and that it operated as an extinguishment of the prior mortgage of the 9th June, 1902. The learned Subordinate Judge has come to the conclusion that Bahadur Singh is the *benamidar* of Ram Narain Singh. I will assume, though I do not decide, that the finding of the learned Subordinate Judge on this point is right; but even then, I do not see how it is possible for the plaintiffs to succeed in the action. The decree of Rai Bahadur Harihar Prasad Singh expressly provided that the sale to be held in his suit should be subject to the mortgage lien of defendants 6-14, the prior mortgagees. The plaintiffs purchased the mortgaged property at the sale held in execution of the decree obtained by the Rai Bahadur and the sale proclamation itself recited Harbans Narain Singh's mortgage, and it stated that having regard to the prior incumbrances, the decree-holder fixed Re. 1 to be the value of the property. There is no doubt whatever that the plaintiffs purchased the property with complete notice of the prior mortgage in favour of Harbans Narain Singh and it is difficult to understand on what principle they should claim to have priority over the principal defendant.

Mr. Naresh Chandra Sinha contends that the effect of Ram Narain Singh taking an assignment of the mortgage on the 2nd July, 1912 was that an additional burden was placed on him. His first contention is that, had Ram Narain Singh carried out his bargain with the mortgagors and discharged the mortgage of the 9th June, 1902, Rai Bahadur Harihar Prasad would naturally have stepped into the position of the first mortgagee. With this contention I am unable to agree. Ram Narain Singh would undoubtedly have been entitled to be subrogated to the securities held by Harbans Narain Singh had he paid off Harbans Narain Singh out of the money advanced by him on the 23rd December, 1907 to the mortgagors. It is quite true that the question whether the mortgage which is paid off is to be considered as extinguished or kept alive for the benefit of the person who makes the payment, is a question of intention; but, as has been pointed out, every one is presumed to intend that which is manifestly for his benefit. Now, what are the surrounding circumstances? On the 23rd December, 1907, when Ram Narain Singh took a mortgage of the property, there were two outstanding mortgages, one of the 9th June, 1902, the, other of the 29th September, 1902. It cannot for a moment be contended that Ram Narain Singh was not aware of the mortgage of the 29th September and 1902, for his mortgage bond gave him an opportunity to pay off Rai Bahadur Harihar Prasad Singh for his own protection. Now, if that be so, clearly it was to his manifest advantage to keep on foot the security of the 9th June, 1902 and not to extinguish it. I quite agree that, if it could be shown that Ram Narain Singh was not aware of any other mortgage except that of the 9th June, 1902, it could be argued with some show of reasoning that there would be no object in Ram Narain keeping alive the security of the 9th June, 1902, since there was no other intermediate security to imperil his security; but obviously that is not the position in this case. It was for him to discharge the mortgage bond of the 9th June, 1902 Having discharged that mortgage bond, clearly he would have been entitled to keep alive the security of the 9th June, 1902 for his own benefit. And a perusal of the mortgage bond executed by the mortgagors in favour of Ram Narain Singh supports this conclusion. That mortgage bond provides that Ram Narain Singh should discharge the security of the 9th June, 1902 and

"on taking back the bonds they should keep them with themselves and should make them over to us along with this deed."

Now, there was no object in preserving the mortgage bond of the 9th June, 1902 if the intention was to extinguish the security of that date Clearly the intention of the parties was that on discharging the mortgage bond of Harbans Narain and others, Ram Narain Singh should step into the shoes of Harbans Narain and hold the mortgage of the 9th June, 1902 as a shield against the mortgage bonds that might have been executed by the mortgagors subsequent to the 9th June, 1902. In my opinion there is no doubt whatever that, had Ram Narain Singh carried out his undertaking the

plaintiffs would have been in no better position than that which they occupy to-day.

It is next contended that Ram Narain Singh should have paid off Harbans Narain Singh on or about the 23rd of December 1907 and that the effect of not paying off Harbans Narain Singh has been to throw an additional burden upon the plaintiffs. I do not see how this question arises. The argument is founded upon the fact that on the 23rd December 1907 Harbans Narain was entitled to receive Rs. 16,064-15-6 from the mortgagors and that the amount swelled to a very large sum of money when Bahadur Singh ultimately obtained his final decree as against the mortgagors. The question that arises from the failure of Ram Narain Singh to pay off the mortgage on or about the 23rd December, 1907, is a question between Ram Narain Singh and the mortgagors It may be that Harihar Prasad, if he had claimed the right to redeem, might have asked the Court to open the accounts as between the mortgagors and Harbans Narain Singh in order to enable the Court to determine the terms upon which he should be allowed to redeem the mortgage. The question is put in this form by Mr. Naresh Chandra Sinha, had Ram Narain Singh paid off Harbans Narain Singh, the burden upon Harihar Prasad Singh would not have exceeded the sum of Rs. 16,064-15-6. Ram Narain Singh did not pay off Harbans Narain Singh, but, in fraud both of the mortgagors and of Harihar Prasad Singh, took an assignment of security from the heirs of Harbans on the 2nd July, 1912. No doubt the usufructuary mortgage bond of the 23rd December, 1907 provided that Harbans Narain Singh should be paid off at once. As I have said, the delay in paying off Harbans Narain Singh is a question as between Ram Narain Singh and the mortgagors; but I am quite willing to concede that had Rai Bahadur Harihar Prasad Singh claimed the right to redeem the property he might have asked the Court to place him in the position which he would have occupied had Ram Narain Singh carried out his bargain; but Rai Bahadur Harihar Prasad Singh never claimed the right to redeem the mortgage In my opinion the question does not fall to be considered since Harihar Prasad Singh never claimed the right to redeem and since his right to redeem is, by virtue of the decree in suit No. 27 of 1909, gone for ever.

The position is a very simple one and may be re stated. The plaintiffs cannot claim to be in a better position than that which they would have occupied had Ram Narain Singh carried out his bargain If Ram Narain Singh had carried out his bargain, he would have been entitled to enforce the security of the 9th June, 1902. It makes no difference to the plaintiffs whether that security is enforced by Harbans Narain Singh or by Ram Narain Singh. Harihar Prasad Singh had an opportunity to redeem the prior mortgage at any time he chose and it can make no difference either to him or to the plaintiffs who have purchased the property at the execution sale held pursuant to the decree obtained by Harihar Prasad Narain Singh whether the security of the 9th June, 1902, is enforced by Harbans Narain Singh or by Ram Narain Singh. In my opinion the question whether Bahadur Singh is the *benamidar* of Ram Narain Singh has nothing whatever to do with the question.

In the next place, it seems to me that the assignment taken by Ram Narain Singh in the name of Bahadur Singh on the 2nd June 1912 was a mode of performing his obligation under the mortgage bond of the 23rd December 1907. There is of course the question of delay in performing his obligation. As I have said that question could have been raised either by the mortgagors or by Harihar Prasad Singh had he claimed the right to redeem; but the question no longer arises. In my opinion the decree passed by the learned Subordinate Judge is right and must be affirmed I would dismiss this appeal with costs payable to the respondents 1 to 4.

Adami, J.—I agree.

Appeal dismissed.

1925 PATNA 609

ROSS AND KULWANT SAHAY, JJ.

Brij Nath Prashad — Defendant—Appellant.

v.

Bindeshwari Prasad Singh and another —Plaintiff & Defendants—Respondents.

Appeal No. 416 of 1922, Decided on 22nd January 1925, from a decision of the Addl. Sub. J. Shahabad, D/- the 4th January 1922.

Hindu Law — Debts — Liability increased by father who stood surety for guardian of a minor under Guardians and Ward's Act binds son.

What a guardian appointed under the Act is required to do is to give a bond, with or without sureties, engaging duly to account for what he may receive in respect of the property of the ward. The undertaking is simply an undertaking to make good a sum of money. The person standing surety cannot be said to have stood surety for the honesty of the guardian and his son is bound if liability is incurred under the surety bond. [P. 609, C. 2 ; P. 610, C. 1]

Siveshwar Dayal—for Appellant.

Dhanindra Nath Varma for *M. Mahabir Prasad*—for Respondents.

Ross, J.—The plaintiff's case was that the defendant No. 1 was appointed his guardian under the Guardians and Wards Act on the 16th of July 1913, and was required to furnish security. This security was given by the grandfather of defendant No. 2, the appellant, who is stated in the plaint to have been a relation of defendant No. 1 and whose son worked as cashier in the Kayesth Bank under defendant No. 1 who was the manager. The suretyship bond was executed for Rs. 1,250 and it was stipulated therein that in case of any money being found due from defendant No. 1, the properties detailed in the bond would remain mortgaged and hyopthecated for realization of the aforesaid money. On the 7th of December 1915 the defendant No. 1 resigned his guardianship and on an audit of his account a sum of Rs. 1,042-6-8 was found due from him. The plaintiff, therefore, claimed a decree for this amount against the defendants, to be realised by sale of the mortgaged properties specified in the suretyship bond. The principal defence was that the grandfather of defendant No. 2 had no right to execute the suretyship bond and that under the Mitakshara School of Hindu Law neither the defendant nor his property was liable for the plaintiff's claim.

The Munsif who tried the suit found that the defendant No. 2 was not benefitted by the bond; that it was not necessary for his grandfathar to stand surety for defendant No. 1 and that he did this by way of favour only. He then proceeds to say: "The security bond (Ex. 3) recites that the executant was to make good any loss caused by defendant No. 1 to the extent of Rs. 1,200. In other words it recites that the grandfather stood surety against embezzlement or misappropriation on the part of defendant No. 1 and this cannot but be called to be unlawful so far at least as the other members of the joint family were concerned;" and, therefore, the minor was not legally bound to pay this debt. The learned Additional Subordinate Judge reversed this decision and gave the plaintiff a decree. He held that the main question was whether the act of the grandfather of defendant No. 2 could be said to be unlawful or illegal ; and following the decision in *Benares Bank Ltd.* v. *Jagdip Narayan Pandey* (1), he held that the plaintiff was entitled to a mortgage decree.

The real question is as to the nature of the suretyship bond and whether the grandfather of defendant No. 2 stood surety for the honesty of defendant No. 1 or for the payment of a debt. It is conceded that in the former case the bond is not enforceable and in the latter case it is, and this is clear from the authorities: *Mahabir Prasad* v. *Sri Narayan* (2) and *Tukarambhat* v *Gangaram Mulchand Gujar* (3) and *Maharaja of Benares* v. *Ramkumar Misir* (4). Now, in my opinion there is no basis for the finding of the Munsif that the security bond recited that the grandfather stood surety against embezzlement or misappropriation on the part of defendant No. 1. It is not suggested that there is any reference in the bond to embezzlement or misappropriation. What a guardian appointed under the Act is required to do is to give a bond with or without sureties, engaging duly to account for what he may receive in respect of the property of the ward. The defendant No. 1 failed to account to the extent of Rs. 1 042-6-8 This may have

(1) [1921] 6 P.L.J. 198=62 I.C. 465=2 Pat.L.T 438.
(2) [1918] 4 P.L.W. 437=3 P. L. J. 396=46 I. C. 27= (1918) P.H.C.C. 328.
(3) [1899] 23 Bom. 454.
(4) [1904] 26 All. 611=1 A.L.J. 330

been due to a variety of causes and it cannot be held that any case of embezzlement is involved here. The grandfather of defendant No. 2 undertook to make good to the extent of Rs. 1,250 any default in the payment of the cash balance of the guardianship properties. The undertaking was simply an undertaking to make good a sum of money. The grandfather of defendant No. 2 cannot be said to have stood surety for the honesty of defendant No. 1. In my opinion the learned Subordinate Judge took the right view in this case and the appeal must be dismissed with costs. It should, however be made clear in the decree that the property of defendant No. 2 is only to be proceeded against in case the debt cannot be realized from defendant No, 1

Kulwant Sahay, J.—I agree.

Appeal dismissed.

1925 PATNA 610

SEN, J.

Shama Charan and others— Petitioners

v.

King-Emperor— Opposite Party.

Criminal Miscellaneous No. 41 of 1925, Decided on 1st June 1925, from an order of the District Magistrate, Gaya, D/. 27th March 1925.

Criminal P. C., S. 145—*Existence of* Bona fide *dispute as to land—Proceedings should be under S.* 145 *and not under Criminal P. C., S.* 107.

While it is discretionary with the Magistrate to draw up proceedings under S. 107, the proper course when there is a *bona fide* dispute as to lands is to proceed under S. 145. Otherwise, the effect would be to bind down one of the parties only to the dispute without any adjudication upon the question as to which of the two parties is in possession. 1922 *Patna* 435 (*F. B.*) *Ref.* and *Foll.* 32 *Cal.* 966 and 7 *C. W. N.* 746. *Dist.*

[P. 611, C. 1.]

S. P. Verma and *S. Prasad*—for Petitioners.

B. K. Singh—for Opposite Party.

Sen, J.—The petitioners four in number are amlas of Gidhour estate against whom proceedings under S. 107 Cr. P. C. have been drawn up by the Sub-divisional Officer of Nawadah. They pray that the proceedings may be quashed or in the alternative, for a transfer of the case to the file of some other Magistrate.

The circumstances under which they apply are briefly as follows :—

On the 30th July 1924 one Gursahay applied to the Maharaja of Gidhaur for a lease of village Suarkole Dumarkole in Rajauli police station. On the same date the Maharaja gave a *hukumnama* to Gursahay in the name of the *amlas* of the village. It is said that the *hukumnama* contained a condition to the effect that if a *patta* were not executed within a fortnight then the *hukumnama* would be deemed inoperative. A fortnight having elapsed notice was then given to Gurusahay to the effect that the *mouza* would be settled with another person. Thereafter one Dasrath Ram appplied for *thika* and a *hukumnama* was issued in his favour. Afterwards Dasrath took possession and Gursahay made a verbal complaint to the Sub-Divisional Officer of Nawadah ; and the Sub-Divisional Officer made an enquiry on the 22nd September 1924. On the 26th September final orders were passed in a proceeding under S. 144 drawn up by the Sub-divisional Officer whereby he purported to come to a finding that Gursahay had been in possession for two months prior thereto, and he issued notice under S. 144 against Dasrath, Mahabir and some others. It is to be noted that the servants of the Maharaja were not parties to these proceedings. It is said that Dasrath then relinquished his *ticca* and took back his money ; and the petitioners on behalf of Gidhaur estate took possession of the *mouza*. In January last Gursahay filed a further Petition alleging that he was being wrongfully dispossessed by the Maharaja's men and praying for proceedings under S. 107 Cr. P. C. On the 4th of February 1925 the Sub-divisional Officer issued notices calling upon the petitioners and some others to show cause why proceedings under S. 107 of the Code of Criminal Procedure should not be drawn up against them. On the 4th March 1925 the proceedings were amended finally by including two more names. It appears that an application was then made before the learned District Magistrate praying either for a transfer of the proceedings from the file of the Sub-divisional Officer to that of some other Magistrate or, in the alternative, that the proceedings might be quashed or proceedings drawn up under S. 145 Cr. P. C. instead. The learned District Magistrate thought that it was doubtful whether he had power to quash

the proceedings or to order proceedings to be drawn up under S. 145; and he refused the application for transfer.

On the question of transfer the learned Counsel appearing for the petitioners has not laid much stress, nor is there much to be said in favour of it. He has addressed his arguments in the main on the subject of quashing of the proceedings. It is urged that unless and until the Court is in a position to say that the party sought to be bound down is clearly in the wrong, S. 107 of the Code of Criminal Procedure should not be resorted to especially when there is a *bona fide* dispute on the question of possession. Reliance is placed on numerous reported cases out of which the following may be mentioned :—*Balajit Singh* v. *Bhoju Ghose* (1), *Dolegobind Chowdhry* v. *Dhanu Khan* (2) and *Shebalak Singh* v. *Kamaruddin Mandal* (3). Upon the authorities the principle is clear that the provisions of S. 145 are mandatory and while it is discretionary with the Magistrate to draw up proceedings under S. 107, of the Code of Criminal Procedure the proper course when there is *bona fide* dispute as to lands is to proceed under S. 145. Otherwise, the effect would be to bind down one of the parties only to the dispute without any adjudication upon the question as to which of the two parties is in possession. The other side relies on the case of *Sheoraj Roy* v. *Chatter Roy* (4), *King Emperor* v. *Basiruddin Mollah* (5). The facts and circumstances of these two cases are clearly distinguishable from those of the present. The law on the subject was fully discussed in *Shebalak Singh* v. *Kamaruddin Mandal* (3) and it was laid down there that where one party is clearly in the wrong and threatens to disturb the rights of another who is in actual possession of the land, S. 145 has no application. This is more than what can be said in the present case. The facts of the case, to my mind, do not show that one party is clearly in the wrong but, on the contrary, that there are circumstances which point to a *bona fide* dispute as to possession that should be adjudicatedupon

(1) [1908] 35 Cal. 117=6 C.L.J. 697=12 C.W.N. 487=6 Cr. L. J. 398.
(2) [1898] 25 Cal. 559.
(3) 1922 Patna. 425=2 Pat. 94=(1922) P.H.C.C. 241=3 P.L.T. 573=1 Pat. L. R. Cr. 2=23 Cr. L. J. 549 (F. B.)
(4) [1905] 32 Cal. 966=10 C.W.N. 288=2 Cr. L. J. 969.
(5) [1903] 7 C.W.N. 746.

In the circumstances, I think, the proceedings under S. 107 should be quashed. I therefore order accordingly.

Proceedings quashed.

1925 PATNA 611

ROSS AND KULWANT SAHAY, JJ.

The East Indian Railway Company and another—Defendants—Appellants.

v.

Sagar Mull—Plaintiff—Respondent.

Second Appeal No. 495 of 1922, Decided on 23rd January 1925, against the decision of the Addl. Sub. J., Arrah, D/- 17th January 1922.

Limitation Act. Art. 31—*Suit for non-delivery of goods by Railway Company—Art.* 31 *applies.*

Article 31 and not Art. 115 applies to a suit for damages for non-delivery of goods against a Railway Company. [P. 116, C. 1]

Naresh Chandra Sinha and *S. N. Bose*—for Appellants.

Lakshmi Narain Singh—for Respondent.

Ross, J.—The question in this appeal is whether the suit is barred by limitation or not. The suit was for damages for non-delivery of a bale of cloth which was despatched on the 9th of May, 1919 from Bombay to Arrah. On the 1st of October, 1919 the plaintiff sent a notice to the Railway Company demanding the value of the goods and claiming that payment should be made within one month. Clearly, therefore, by that date the plaintiff took it that the goods ought to have been delivered and that this was reasonable is clear from the fact that the despatch from Bombay was on the 9th of May. The suit was not brought until the 15th of December, 1920. Consequently if the Article of the Limitation Act which applies to this case is Article 31, then the suit is out of time as was held by the Munsif. The Subordinate Judge, however, applied Article 115 on the authority of *Radha Sham Basak* v. *The Secretary of State for India* (1). Now that decision has been considered by a Division Bench of this Court in *Gobind Ram Marwari* v. *The East Indian Railway Company* (2) a case similar to the present case, where it was held that

(1) [1916] 20 C. W. N. 790=34 I. C. 130=23 C. L. J. 547.
(2) S. A. 985 of 1921.

Article 31 laid down the rule of limitation applicable : see also *Rameshwar Dass Mali Ram* v. *E. I. Ry. Co.* (3) and Civil Revisions Nos. 154 and 155 of 1924 where the same rule has been followed. In my opinion this case is clearly governed by Article 31 of the Limitation Act and the suit was out of time. The appeal must therefore be decreed with costs and the suit dismissed with costs throughout.

Kulwant Sahay, J.—I agree.

Appeal allowed.

(3) 1923 Patna. 298=4 P. L. T. 331.

★ 1925 PATNA 612

KULWANT SAHAY, J.

Harihar Prasad Singh — Plaintiff — Appellant.

v.

Gharbharan Koeri and others—Defendants—Respondents.

Second Appeal No. 391 of 1922, Decided on 7th April 1925, from a decision of the Addl. Sub. J., Sahabad, D/-10th January 1922.

★ (a) *Civil P. C., O.* 41, *R.* 27—*Evidence not in existence at the time of suit—It may be admitted in appeal.*

Where an appeal was pending and another suit was filed between the same parties and the latter went to the appellate stage when the prior appeal was decided and the decision in the previous appeal had a material bearing on the decision in the subsequent appeal,

Held : that the decision in the previous appeal should be admitted in evidence in the subsequent appeal. 6 *C. L. J.* 74 ; 6 *C. L. J.* 92 *and* 6 *C. L. J.* 102 *Rel, on.* [P, 613, C. 2]

(b) *B. T. Act, S.* 182—*Tenant holding only a portion—That portion not a part of any other holding of his—B. T. Act does not apply.*

Where the defendants had a tenancy right in a part of land which was however not a part of any other holding of theirs as a raiyat.

Held : that such tenancy is not governed by the provision of the Bengal Tenancy Act. The provisions of S. 182 are not applicable to such a case. [P. 614, C. 1]

★ (c) *Landlord and Tenant—Tenant constructing a dwelling house—Possession held for a long time—No claim arises for holding rent free.*

The Mere fact of the tenants having constructed a dwelling house on the land in dispute and having been in possession thereof for any length of time will not give them a title to remain on the land permanently as rent free tenants. 8 *Cal.* 696 *Ref.* [P. 614, C. 1]

L. N. Singh and Bhagwati Kumar Sinha— for Appellant.

Mahabir Prasad—for Respondents.

Kulwant Sahay, J.—This is an appeal by the plaintiff against the decision of the Additional Subordinate Judge of Shahabad, dated the 10th January 1922, whereby he reversed the decision of the Munsiff and dismissed the suit of the plaintiff.

The suit was for ejectment of the defendants from 13 decimals of land in Mouza Bhelain on the allegation that the said land was the *gair mazrua* parti land of the proprietor. The plaintiff is admittedly the 16 annas malik of the Mouza ; and his case is that the 13 decimals of *gair mazrua* land were settled with the ancestor of the defendants over which they built a house and began to live therein. The condition of the tenancy as alleged by the plaintiff was that the defendants were to render service by ploughing the proprietors' land and doing transplantation work for 4 days in the year, and by drawing water from the well, and supplying vegetables at six pies per *paseri* on ceremonial occasions ; that the defendants had refused to render the service and a notice was served upon them requiring them to quit the land ; that the term of the notice having expired, and the defendants having refused to quit the land the present suit was brought by the plaintiff for ejectment of the defendants.

The defence was that the land in dispute was not a service tenure of the defendants ; but that it was a homestead land and formed a part of the ancestral Kasht holding of the defendants. The conditions of the service alleged by the plaintiff were denied ; and it was further averred that no notice to quit was served upon them.

The learned Munsif held that the homestead land in dispute was not a part of any tenancy holding of the defendants and that the incidents of the tenancy as regards the land in dispute were as alleged by the plaintiff, and that the tenaney of the defendants will not be governed by the Bengal Tenancy Act. He held that the defendants had refused to render service and as such were liable to ejectment. He found that the notice to quit had been proved to have been served on the defendants ; and he accordingly made decree for ejectment.

On appeal by the defendants the learned Subordinate Judge held that the plain-

tiff had failed to prove that the tenancy of the defendants was on condition of rendering service. He held further that the entry of *belagan* in the Survey *khatian* as regards the land in dispute merely indicated that no rent was paid for the land, and that such an entry signified nothing more. The Munsif had held that the entry of *belagan* was only consistent with the allegation of the plaintiff that the tenancy was a service tenure and therefore no rent in cash or kind was paid for the land and he drew an inference from such entry that the conditions of the tenancy being various and numerous and also unrestricted by the provisions of the Bengal Tenancy Act the Survey authorities entered the land as *belagan*.

In Second Appeal by the plaintiff it has been contended that the learned Subordinate Judge has misconstrued the entry of *belagan* in the Survey *khatian* and has drawn erroneous presumption therefrom. It has further been contended that the learned Subordinate Judge was wrong in holding that the tenancy of the defendants was not a service tenure.

It appears that in the *khatian* the defendants were recorded as *qaimi* tenants in respect of 5 *khasra* plots in Khata No. 74. Four of these plots were agricultural lands and the fifth was plot No. 1014 which was the homestead land now in dispute. As regards the 4 plots other than the plot No. 1014 the case of the present plaintiff was that those plots were not the tenancy holding of the defendants but were the Zirat land of landlord which were temporarily settled with tenants from time to time, and sometimes cultivated directly by the landlord. There was proceeding under S. 145 of the Criminal Procedure Code in respect of the 4 plots referred to above and the plaintiff was declared to be in possession thereof. The present defendants brought a title suit for a declaration of their title as raiyats of those four plots and the Munsif dismissed the suit on a finding that it had not been proved that the plaintiffs of that case (the present defendants) had any *qaimi* or occupancy right therein. The Munsif further found that it had not been proved that the then plaintiffs were settled raiyats of the village and he further found that the plaintiffs of that suit were out of possession for more than two years and the suit was barred by limitation.

Now, this judgment of the Munsif in the title suit was passed on the 10th of April 1922 and an appeal was preferred against it and it was pending before the Subordinate Judge at the time the Munsif decided the suit out of which the present appeal arises, He referred to the finding of the Munsif in the title suit and as the matter was pending in appeal and the decision had not become final he refrained from coming to any finding as regards the defendants being settled raiyats of the village. In this Court an affidavit has been filed on behalf of the appellant to the effect that the appeal of the present defendants in the title suit referred to above has been disposed of by the Subordinate Judge whereby the decision of the Munsif in that suit has been affirmed. A copy of the judgment of the Subordinate Judge dated the 28th March 1923 has been produced with the affidavit. In this judgment the Subordinate Judge has found that none of the four plots in dispute in that case had been in possession of the then plaintiffs (the present defendants) or their father for a period which would have given them a right of occupancy in the land and that the plaintiff had entirely failed to show that he had held any land or parcel of land as raiyat in the village for a period of 12 years. In the affidavit filed on behalf of the plaintiff it is further stated that this judgment of the Subordinate Judge has become final, no appeal having been preferred against it. It has also been stated in the affidavit that the defendants-respondents in the present case have no Kasht land either in the village Bhelain or in any other village.

Objection has been taken on behalf of the respondents to the affidavit and the copy of the judgment of the Subordinate Judge in the title suit filed with it being taken or referred to in this appeal. I am of opinion that having regard to the circumstances of the case it is open to the appellants to produce this judgment in this Second Appeal and that it is open to this Court to refer to it. As an authority for this view, I need only refer to the decisions of the Calcutta High Court in *Ram Ratan Sahu* v. *Bishun Chand* (1), *Hazarimal* v. *Janki Prasad* (2) and *Ramyad*

(1) [1907] 6 C. L. J. 74=11 C. W. N. 732
(2) [1907] 6 C. L. J. 92

Sahu v. *Bindesri Kumar Upadhya* (3). The facts stated in the affidavit have not been denied on behalf of the respondents. The position therefore is that the defendants are not raiyats of any land in village Bhelain or in any other village and the land in dispute is the only homestead land of which they are in possession.

As regards the nature of the defendants' tenancy although the Munsif on a consideration of the evidence found that the tenancy was on condition of rendering service as stated by the plaintiff yet on appeal the learned Subordinate Judge has come to a contrary conclusion. His finding that the tenancy is not a service tenure is a finding based upon the evidence in the case and must be accepted as conclusive in the present appeal.

The position, however, of the defendants is that they have got a tenancy right in the 13 *kathas* of land which is not a part of any other holding of theirs as a raiyat and therefore such tenancy is not governed by the provision of the Bengal Tenancy Act. Reference has been made by the learned Vakil for the respondents to S. 182 of the Bengal Tenancy Act In the first place the learned Subordinate Judge does not base his decision upon S. 182. In the second place it has now been established by competent Court that the defendants have got no holding as a raiyat either in the village Bhelain or in any other village, and, therefore, the provisions of S. 182 are not applicable and the incidents of the defendants' tenancy of the homestead land in dispute are not governed by the provisions of the Bengal Tenancy Act. This being so, it is, clear that the defendants' tenancy must be considered either as a tenancy at will or a tenancy from year to year and as such is liable to be terminated on a proper notice to quit. It has been found by the Munsif and this finding has not been displaced by the Subordinate Judge that a proper notice to quit was served on the defendants. It is clear, therefore, that the defendants have no right to remain on the land against the wishes of the plaintiff. I fail to understand upon what ground the defendants can claim a right to remain on the land without payment of any rent to the landlord. The mere fact of the defendants having constructed a dwelling house on the land in dispute and having been in possession thereof for any length of time will not give them a title to remain on the land permanently as rent free tenants. Reference may in this connection be made to the decision in the case of *Prosunna Kumar Debya* v. *Sheikh Ratan Bepari* (4).

I am, therefore, of opinion that the plaintiff-appellant is entitled to decree for possession. The decree of the Subordinate Judge will, therefore, be set aside and that of the Munsif restored. The appellants are entitled to their costs throughout.

Appeal allowed.

(3) [1907] 6 C. L. J. 102,

(4) [1877-78] 3 Cal. 696=1 C. L. R. 577.

★ 1925 PATNA 614

DAWSON MILLER, C. J. AND
JWALA PRASAD, J.

Mt. Gobinda Kuer—Petitioner.

v.

Jai Narain Chaudhry—Opposite Party.

Civil Review No. 22 of 1925, Decided on 14th May 1925.

★ *Civil P. C., O 3, R. 4 (3)—Advocate of Patna High Court need not present document empowering him to act on behalf of his client.*

An Advocate of the Patna High Court is not required to present any document empowering him to act on behalf of his client because the Government of India Act repeals and re-enacts the Indian High Courts Act and therefore the reference in Civil P. C., O. 3, R. 4 (3) to the High Courts established under the High Courts Act of 1861 includes the Patna High Court which was established under the provisions of the Government of India Act. [P. 615, C. 1.]

Lakshmi Narain Singh for *Banwari Lal*—for Petitioner.

Order.—The question is whether an Advocate of this Court is exempted under Order 3 rule 4 clause (3) of the Civil Procedure Code from presenting any document empowering him to act on behalf of his client.

The only point which arises is whether the reference in that rule to the High Courts established in India under the Indian High Courts Act, 1861, includes the Patna High Court which was established not under the provisions of that Act but under the provisions of the Government of India Act, 1915. There can be no doubt that under the provisions of Ss. 45 and 47 of the Government of India Act, 1919 and since the amendment

of the General Clauses Act, 1897 by the Repealing and Amending Act XVIIof 1919 any reference in an Act of the Indian Legislature either to an earlier Act of the Indian Legislature or to an Act of the British Parliament which has been repealed and re-enacted by a subsequent enactment, must be taken as a reference to the subsequent enactment in so far as it re-enacts the repealed Act, and in fact under the Government of India Act, 1919, it is clear that any reference in an Act of the Indian Legislature to the Indian High Courts Act, 1861 must now be taken as a reference to the repealing and re-enacting enactment of 1915 as now amended and known as the Government of India Act.

It is clear therefore that an Advocate of the Patna High Court is not required to present any document empowering him to act under the Rules as they now exist.

1925 PATNA 615

MULLICK AND ROSS, JJ.

F. F. Christian—Plaintiff—Appellant,

v.

Prasad Raut and others—Defendants—Respondents.

Appeals Nos. 566, 663, 680 to 687, and 732 to 737 of 1922, Decided on 24th April 1925 from Appellate Decrees of the Dt. J. of Monghyr, D/- 27th March 1922.

Civil P. C. O., 21, R. 94—Sale cannot pass anything more than that indicated by proclamation and attachment.

There is nothing in the Code which makes a certificate of sale conclusive as to the property sold. In granting a certificate it is the duty of the Court not to determine what property is to pass by the sale but merely to record the already accomplished fact of a transaction that has taken place and to state what has been sold. The Court has no power to do more or to alter the fact of the sale which has actually taken place. Its action in granting the certificate is ministerial and not judicial. The sale is an offer and acceptance; the offer is made by the Court and is advertised by the proclamation of sale and so far as concerns the identification of the property to be offered for sale, this is the only declaration which is authorized or required. Unless there is something to show that the Court sold something else than was advertised for sale, the sale proclamation is conclusive. If the petition for execution, the writ of attachment and the sale proclamation are clear and unambiguous, any discrepancy from the description of the property contained in these documents which occurs in the sale certificate can have no effect. 10 *Mad.* 241 (*P. C.*); 27 *Bom* 334, and 41 *Cal.* 590 (*P. C.*) *Foll.* [P 616 C 1 2]

P. K. Sen, A. K. Ray and *Raghunandan Prasad*—for Appellant.

N. C. Sinha and *Bindheshwari Prosad*—for Respondents.

Ross, J.—In Appeals Nos. 663 and 680 to 687 of 1922, the Appellant is the Plaintiff in certain suits for rent against the Defendants. The suits out of which these appeals arise were either wholly or partially dismissed. In Appeals Nos. 566 and 732 to 737 of 1922, the tenants are the Appellants, these suits having been decreed against them. The Plaintiffs sued for the rent for years 1324 to 1327 as being *mokarraridars* of certain shares in taluka *Gadi mahesri*. His title arose in various ways by private purchase, by lease and by mortgage from the co-sharers in the *mokarrari* and also by purchase in execution of two decrees. The execution cases in which these last purchases were made were No. 78 of 1913 and No. 253 of 1913 and it is with the shares purchased in these executions that the present controversy is concerned. The case for the plaintiff is that he purchased an interest in the *mokarrari* of the entire taluka *Gadi mahesri*. The case for the Defendants is that the purchases were confined to shares in the *mokarrari* of mauza *Gadi mahesri* only and as the suits relate to villages in the taluka other than mauza *Gadi mahesri* the Defendants denied that the relation of landlord and tenants existed between the Plaintiff and themselves so far as the interest claimed to have been purchased in these executions extends to these villages. The learned Munsif who tried the suits disallowed the Plaintiff's claim under both executions. The learned District Judge on appeal disallowed the claim under Execution Case No. 78 of 1913 but allowed it so far as Execution Case No. 253 of 1913 was concerned. Consequently there are appeals by both parties.

I shall deal first with the Ptaintiff's appeals. The relevant documents are the petition for execution (Ex. 19), the writ of attachment (Ex. 24), the sale proclamation (Ex. 25), the writ of delivery of possession (Ex. 18) and the sale certificate (Ex. 21). The petition for execution shows that execution was sought in respect of certain shares in Dakshinwari *khut*, *khut* Kalan and Uttarwai *khut* in taluka *Gadi mahesri*, *asli mazi dakhli* in

cluding *tolas*, *chaks*, *kitas*, houses, jungles hills, mines, etc., together with the surface and sub-soil rights appertaining to the lands of the said taluka held in perpetual *mokarrari*, tauzi No. 327. The *jama* sadar of the entire taluka along with that of *nisf* Katauna is stated and also the gross annual *jama* of the shares proceeded against and their respective values. The writ of attachment follows the petition for execution exactly and the sale proclamation is in similar terms. The report of the peon who delivered possession of the property purchased in execution states that he reached mauza *Gadi mahesri* and put the decree-holder auction purchaser in possession of the mahal. The receipt for delivery of possession granted by a servant of the auction purchaser states that the peon arrived at mauza *Gadi mahesri* and delivered possession of the perpetual *mokarrari* right noted in the writ of delivery of possession. From the first three of these documents therefore it is clear that what the decree-holder proceeded against in execution and what the Court attached and proclaimed for sale was certain shares in three *khuts* of taluka *Gadi mahesri* and the report of delivery of possession is not inconsisent with these documents. The sale certificate however, while following the earlier documents in other respects in close details, contains the words mauza *Gadi mahesri* instead of taluka *Gadi mahesri* and it is on this solitary expression that the whole defence in these suits has been based.

Now the law on the subject is clear and undisputed. As Lord Watson observed in *Pettachi Chettiar* v. *Sanili Vira Pandia Channatambiar* (1) the question is, "What did the Court intend to sell ; and what did the purchaser understand that he bought.' In *Balvant Babaji Dhondge* v. *Hirachand Gulabchand Gujar* (2) there was a mortgage decree directing that the interest of five brothers in the mortgaged property should be sold. The proclamation of sale followed the decree but in the sale certificate, the name of one of the brothers only was mentioned. The learned Judges there pointed out that there was nothing in the Code which made a certificate of sale conclusive as to property sold ; that in granting a certificate, it is the duty of the Court not to determine what property is to pass by the sale but merely to record the already accomplished fact of a transaction that has taken place and to state what has been sold. The Court has no power to do more or to alter the fact of the sale which has actually taken place. Its action in granting the certificate is ministerial and not judicial. It is pointed out that the sale is an offer and acceptance ; that the offer is made by the Court and is advertised by the proclamation of sale : and that so far as concerns the identification of the property to be offered for sale, this is the only declaration which is authorised or required. In *Thakur Barmha* v. *Jiban Ram Marwari* (3) in which there was a conflict between the sale proclamation and the certificate subsequently granted it was held by the Judicial Committee that what is sold at a judicial sale can be nothing but the property attached and that that property is conclusively described in and by the schedule to which the attachment refers. As against such description it was held that the certificate of sale had no effect. Unless therefore there is something to show (and it is not suggested in the present case that there is anything) that the Court sold something else than was advertised for sale, the sale proclamation is conclusive. This being the law, it seems clear that if the petition for execution, the writ of attachment and the sale proclamation are clear and unambiguous, any discrepancy from the description of the property contained in these documents which occurs in the sale certificate can have no effect. Then the sale certificate itself is by no means unambiguous and it is not necessary to suppose that it was intended to refer to a different property. The term "mauza" might include the whole mahal and from the fact that the tauzi number is given this was apparently the intention. A village which was merely a constituent of the mahal would not have a tauzi number. The learned Munsif based his decis on entirely on the fact that the annual *jama* as stated in the various documents was much lower than what the annual *jama* of the whole mahal would have been and was more likely to be the *jama* of the single village. The learned

(1) [1887] 10 Mad. 241=14 I. A. 84=5 Sar 38. (P. C.)
(2) [1903] 27 Bom. 334=5 Bom, L. R. 247.
(3) [1914] 41 Cal. 590=41 I. A. 38=18 C.W.N. 313=15 M. L. T. 137=12 A. L. J. 156=19 C L J.161=26 M. L. J. 89=(1914) M W. N. 1 8=21 I. C. 936=16 Bom. L. R. 156 (P. C.)

District Judge has also accepted this argument and has further proceeded on the ground that the price paid seems to be far too low for a share in the entire taluka. Now even if the *jama* is misstated, if the document is otherwise unambiguous, this then would be disregarded as misdescription. But there are in truth no materials for the conclusion that the *jama* stated in these documents is the *jama* of mauza *gadi mahesri* rather than of the entire mahal. The learned Munsif seems to have confused the *jama* with the annual income. The sale proclamation and other documents do not pretend to state what the annual income of the share is. The learned Munsif has pointed out that the cash rental of mauza *gadi mahesri* is about Rs. 600 and that there are more than 250 acres of *kamat* lands and there is also *batai* land. Now the produce of *kamat* lands would not naturally be included in the term *jama* and there is nothing to show that the income of the *batai* land is. Moreover there are no materials whatsoever for estimating the *jama* of the entire taluka; and the ground upon which the Munsif had decided this case must therefore be treated purely speculative and it is not warranted by the terms of the documents themselves.

With regard to the observations of the learned District Judge on the price, it may be that the property was purchased cheap but there may be many reasons for that. It is impossible to say on the material before us how low the price was and this is no criterion for construing the documents. It seems to me that this is a very plain case which does not admit of doubt; the documents with the doubtful exception of the certificate of sale are all consistent with only one conclusion, namely, that what was purchased was a share in the entire taluka. But the decisions above cited show that the certificate of sale cannot override the other documents which are conclusive as to the property actually sold.

The learned Vakil for the Respondents contended that the case is concluded by findings of fact. In my opinion this is not so. It is true that the learned District Judge has mentioned the execution petition and the writ of attachment and the sale proclamation in stating the argument on behalf of the Plaintiff but there is nothing to show that he considered these documents or their legal effect. I would therefore allow these appeals with costs.

With regard to the appeals of the Defendants, the ground upon which the Munsif limited the purchase in Execution Case No. 253 of 1913 to a share in mauza *gadi mahesri* was that the shares mentioned in the sale certificate in this case are the shares which were actually owned by the judgment-debtors in that village, whereas they had different shares in the different villages constituting the taluka. He was therefore of opinion that the proceedings in execution must be limited in their operation to mauza *gadi mahesri* alone. The learned District Judge has properly refused to give effect to this argument pointing out that, if in fact the judgment-debtors have larger shares in some of the villages than those stated in the sale proclamation, the excess will not be affected by the sale. In this case all the documents are consistent and leave no room for doubt that the shares which were proceeded against in execution and were attached and proclaimed for sale and sold were the shares of the judgment-debtor in the entire taluka. It was suggested that the learned District Judge has erred in his calculation of the price because he has under-stated the shares that passed by the sale. But as I have pointed out in dealing with the Plaintiff's appeals, there are no materials for ascertaining the real value of this property; and in any case if the purchaser purchased at a low price, that is not a matter which affects the present question.

The defence in these suits appears to me to be entirely without merit and to rest on nothing better than a clerical mistake in a document of minor importance.

The result is that the Plaintiff's appeals must succeed and are allowed with costs and the suit out of which these appeals arise must be decreed in full with costs throughout. The tenants' appeals are dismissed with costs.

Mullick, J.—I concur entirely. It was argued that this being a second appeal it was not competent to us to interfere with the District Judge's finding in regard to the identity of the property which was sold. The answer to this is that as the finding relates to a mixed question of fact and law it is open to revision in second appeal.

★ 1925 PATNA 618

MACPHERSON, J.

Basudeo Singh—Petitioner.

v.

Mahadeo Lal—Opposite party.

Criminal Rev. No. 160 of 1925, Decided on 25th May 1925, against an order of the D. M., Gaya.

★ *Criminal P. C., S.*, 145—*Co-sharers in separate possession of shares—Exclusive possession of disputed item claimed by either party—S.* 145 *applies.*

Where the joint owners of a lease of the right to collect rent of certain lands are actually in separate possession of certain shares of the right but there is a dispute as to the possession of a certain other share of which each party claims exclusive possession, S. 115 is applicable. The criterion in such cases is whether the parties claim exclusive possession. 5 *All.* 607, 23 *Cal.* 80, 10 *C. W. N.* 1088 *and* 36 *Cal.* 986 *Dist.* 27 *Cal.* 259, 17 *M. L. T.* 225, 1 *P. L. T.* 594 and 1923 *Patna* 359 *Foll.*

Fazle Ali and *S. K. Mittra*—for Petitioner.

Shiveshwar Dayal—for Opposite party.

Macpherson, J.—In this application in revision the petitioner impugns the order of the District Magistrate drawing up proceedings under S. 145 of the Code of Criminal Procedure on the ground that the order is without jurisdiction because that provision is not applicable to the circumstances. The Sub-divisional Magistrate of Nawadah passed an order under S. 144 of the Code against the petitioners and the opposite party restraining them from removing any of the crops which had been paid as *bhaoli* rent by the tenants and which were deposited in the *khalihan*, and upon an application to him under sub-section (4) the District Magistrate set aside the order as unwarranted by law, but in view of the definition of "land" in clause (2) of S. 145 as including "the rent or profits of any such property" and as

"The police report shows that a breach of the peace was imminent and clearly as long as the dispute regarding the extent of the share is not decided, there will continue to be an apprehension of a breach of the peace."

directed that proceedings under S. 145 should be drawn up in his Court in respect of the six annas share in dispute and be transferred to the Court of the Sub-divisional Magistrate of Nawadah for disposal.

In the formal proceeding drawn up under S. 145 the parties were directed to lodge. "Written statements as to their actual possession of the right of collection of the six annas share of the produce rents which is in dispute."

And a six annas share of the produce rent deposited in the *khalihan* was attached pending disposal of the case.

The following facts are admitted: Basdeo Singh and Mahadeo Lal are joint *thikadars* for seven years of Majhla *mahal* but the lease does not specify what is the share of each. For about four years the same *gomasta* Dilwar Khan, who had also worked for their lessor, represented both in the village, but Mahadeo Lal being dissatisfied with him replaced him, so far as his interest was concerned, by Behari Singh. The dispute between the parties is whether the share of Mahadeo Lal is two annas or eight annas and the collection is no longer joint. When the report of the police which led to the order under S. 144 was made, the *thikadars'* share of the produce rent of the village was gathered in the *khalihan* and was awaiting distribution. After the attachment in the S 145 proceedings, the Sub-divisional Magistrate directed the Agricultural Inspector to sell the attached produce rent (six annas of the whole) and the sale proceeds have been placed in deposit.

Now it is not in controversy that proceedings under S. 145 are not warranted by sub-section (2) in respect of disputed crops or other produce of land, or of disputed *bhaoli* rents or profits of such property when these have been severed and removed from the land. In the present instance the dispute between the *co-thikadars* as to extent of share in the distribution of the *bhaoli* rent collected in the *khalihan* could not be decided under S. 145. The pending proceeding, however, apart from the order of attachment which is not here assailed, does not relate to the six annas of the *bhaoli* rent deposited in the *khalihan*. The subject of dispute is the right to collect the six annas share of the rent of *mahal* Majhla.

The petitioner claims that S 145 is not applicable to the circumstances as the parties are in joint possession of the village. Mr. Fazle Ali on their behalf relies

upon the rulings in *Beni Narain* v. *Achraj Nath* (1) approved in *Surb Narain Singh* v. *Birj Mohan Thakur* (2); *Nritta Gopal Singh* v. *Chandi Charan Singh* (3) and also *Akaloo Chandra Das* v. *Mohesh Lal* (4) as showing that a dispute as to the right to realise rent of an undivided share of land is not a dispute falling within S. 145. In reply Mr. Shiveshwar Dayal relies on *Sri Mohan* v. *Narsingh* (5), referred to with approval by Spencer, J. in *Balkis Bibi* v. *Nagoor Kanni Rowther* (6) and to two cases of this Court *Sham Lal Mahto* v. *Rajendra Lal* (7) and *Ramjharia* v. *Piar Koeri* (8).

The first two cases cited by Mr. Fazle Ali were decided prior to the amendment of the Code of Criminal Procedure in 1898 in which the terms of S. 145 were greatly altered and in particular by the extension of the definition of "land" made by sub-section (2) so as to include *inter alia* the rents of land. No doubt the principle has been approved in *Nritta Gopal Singh* v. *Chandi Charan Singh* (3) but that case related to impartible property in which the possession of *co-shebaits* was necessarily joint. It was also there admitted that the facts in *Srimohan* v. *Narsingh* (5) were distinguishable. In *Akaloo* v. *Mohesh Lal* (4) which relates to tolls of a *Hat*, the decision was that there is no jurisdiction under S. 145 to determine the method by which the possession of the parties is to be exercised or the agency whereby the party in possession is to collect the rents. These rulings and others relating to management of property to which the parties are jointly entitled are distinguishable and do not afford assistance in the present circumstances.

Here the two partners in the lease are admittedly in separate possession of their shares; there is no dispute that the parties hold actual separate possession of the right of collection in respect of eight annas and two annas respectively of the rent of the village. It is not a case in which one party claims joint possession and another contests the claim. There is no dispute as to management. It is a pure case of rival claims to exclusive possession of six annas of "land" as defined in sub-section 2. It does not appear that the authority of *Srimohan* v. *Narsingh* (5) decided soon after the Code of 1898 came into operation has been seriously impaired and it goes much further than is necessary for the purpose of the present case. It was there held that there is no want of jurisdiction under S. 145 when the dispute is regarding the right to the collection of rent between joint owners of the land under Mitakshara law. The two rulings of this Court which have been cited show that the criterion is whether the parties claim exclusive possession; if they do, S. 145 is not inapplicable. In the present case each party claims separate possession of the "land" in dispute.

Accordingly on the facts as represented, the proceeding under S. 145 drawn up by the District Magistrate is not without jurisdiction. As to the order of attachment and the subsequent sale of six-sixteenths of the crop of the past year deposited by tenants in the *khalihan* nothing has been said in this Court, the parties apparently realising that that order, whether made with jurisdiction or not, was in the circumstances the most beneficial order for all concerned which could have been made.

The rule is accordingly discharged. An endeavour should be made to dispose of the case under S. 145 with all reasonable expedition.

Rule discharged.

(1) [1883] 5 All. 607=(1883) A. W. N. 163.
(2) [1895] 23 Cal. 80.
(3) [1906] 10 C. W. N. 1088=4 Cr. L. J. 215.
(4) [1909] 36 Cal. 986=4 I. C. 696=11 Cr. L. J. 28.
(5) [1900] 27 Cal. 259=4 C. W. N. 420.
(6) [1915] 17 M. L. T. 225=(1915) M. W. N. 267=28 I. C. 332=16 Cr. L. J. 284.
(7) [1920] 1 Pat. L. T. 594=58 I. C. 518=21 Cr. L. J. 790.
(8) 1923 Patna 369=2 Pat. L. R. Cr. 6=24 Cr. L. J. 557=4 P. L. T. 308.

1925 PATNA 619

KULWANT SAHAY, J.

Ram Saran Singh and others—Petitioners.

v.

Nikhad Narain Singh and others—Opposite Party.

Criminal Revision No. 448 of 1924, Decided on 15th September 1924, against an order of the Sub. Div. Magistrate of Begusarai, D/- 12th July 1924.

(a) *Criminal P. C., Ss. 344 and 204—Issue of process can be postponed even in warrant cases.*

S. 344 is applicable to cases even before the issue of process under S. 204 and the Magistrate

is entitled under S. 344, if there be a reasonable cause for doing so, to postpone any enquiry or trial and to postpone the issue of process under S. 204 even if the case be a warrant case. [P. 620, C. 2; P. 621, C. 1]

(b) *Criminal P. C., S. 344—Though policy of law is against postponing trial, postponement for reasonable cause is not illegal.*

It is the policy of the law that a Court should proceed to enquire into and try the case as soon as it takes cognizance of a complaint, but it is not prevented by any provision of the law from postponing the enquiry or trial if in its opinion there are sufficient and reasonable grounds for so doing. 1924 *Cal.* 634. *Ref.* [P 621, C. 1]

(c) *Criminal Trial—Simultaneous trial of counter cases is not illegal in itself.*

There is no prohibition in law for simultaneous trials of counter cases, but if the accused can show any prejudice on account of the simultaneous trial of two cases then he will be entitled to a setting aside of the conviction (if he has been convicted). [P. 621, C. 1, 2]

(d) *Criminal P. C., S. 344—Real question under Section is as to reasonable cause for postponement—High Court will not interfere where discretion has been judicially exercised.*

The real question under S. 344 is as to whether there is any reasonable cause for postponing the counter case. If there be such cause it is a matter of discretion and if the Magistrate does not exercise his discretion judicially in postpoing the case, the High Court will interfere and set aside the order, but if the discretion is exercised in a sound and judicial manner the High Court will not interfere with the discretion. [P. 621, C. 2]

C. C. Das and *D. C. Varma*—for Petitioners.

N. N. Sinha and *B. P. Sinha*—for Opposite party.

Kulwant Sahay, J.—It appears that on the 12th July 1924 two complaints were filed before the Sub-Divisional Magistrate of Begusarai; one complaint was filed by the present petitioners against the opposite party charging them with offences under Ss. 147, 325 and 447 I. P. C., and the other complaint was filed by Sampat Lal Singh, one of the opposite party in the present case, against the petitioners in the present case charging them with offences under S. 148 and other Sections of the I. P. C. The learned Sub-Divisional Magistrate examined the complaints in both cases. In the complaint of the petitioners the order passed by him was as follows: "Put up after disposal of the counter case." In the complaint filed by Sampat Lal against the petitioners the order was as follows:

"Summon Udit, Ugan, Ramdev, Ram Saran, Ram Balak, Raghunandan and Dev Lal S. 148 I. P. C. for 31-7. There are *talwar* cuts on the side of this complainant and the complainant in the counter case does not say that there are such cuts on his side. I have compared the initial statements of the complainants in the two cases and think that the case instituted by Sampat Lal should be tried first."

Against the order passed in the complaint filed by the petitioners, namely, the order to put up the case after the disposal of the counter case, the petitioners went up before the Sessions Judge in revision and the learned Judge rejected the petition summarily. The petitioners now come up to this Court against this order and pray that the order for putting up the case after the disposal of the counter case may be set aside and the Magistrate may be directed to proceed with their case simultaneously with the counter case. The learned Counsel for the petitioners has relied on the provisions of Ss. 200, 202, 203, 204, 252 and 344 of the Code of Criminal Procedure and he argues that when a complaint is filed under S. 200 and the Magistrate takes cognizance of the offence, and the complainant is examined, the Magistrate is bound to issue process under S. 204 unless he thinks it fit to dismiss the complaint under S. 203. He further argues that after issuing process under S. 204 he ought, in the present case which is a warrant case, to proceed under S. 252 and that the Magistrate was bound to proceed to hear the complainant and take all evidence as may be produced in support of the prosecution. He says that the Magistrate had no jurisdiction to postpone the case under S. 344 which does not govern the issue of process under S. 204. I am unable to agree with the learned Counsel in this contention. S. 344 occurs in Chapter XXIV of the Code which deals with general provisions as to enquiries and trials. Mr. C. C. Das argues that the provisions of S. 344 only come into operation when the enquiry or trial has commenced and he says that an enquiry or trial does not commence until after the issue of process under S. 204. I am unable to agree with Mr. Das in this contention. In my opinion S. 344 is applicable to cases even before the issue of process under S. 204 and the Magistrate is entitled under

S. 344, if there be a reasonable cause for doing so, to postpone any enquiry or trial and to postpone the issue of process under S. 204. S. 202 deals with enquiries after a Magistrate has taken cognizance of an offence on complaint and before he dismisses it under S. 203 or issues process under S. 204, and there is nothing in law which prevents a Magistrate from postponing issue of process under S. 204 if there is reasonable cause for doing so even if the case be a warrant case.

The next contention of the learned Counsel for the petitioners is that after a Magistrate has taken cognizance of a case it is the policy of the law that he should proceed to deal with the case and not to postpone the enquiry or trial and he relies upon the case of *Sheikh Bahadar* v. *Nobad Ali* (1). I agree with the contention of the learned Counsel that it is the policy of the law that a Court should proceed to enquiry into and try the case as soon as it takes cognizance of a complaint, but he is not prevented by any provision of the law from postponing the enquiry or trial if in his opinion there are sufficient and reasonable grounds for so doing. In the case relied upon by the learned Counsel for the petitioners, their Lordships after laying down the general proposition that it is the policy of the law to go on immediately with the enquiry or trial proceeded to consider whether in that particular case there were reasonable grounds to justify the order of postponement made by the Magistrate and after considering the facts of the case they were of opinion that there were no reasonable grounds.

It has been contended on behalf of the opposite party that simultaneous trial of two counter cases is illegal and reliance has been placed upon the case of *Dhako Singh* v. *King-Emperor* (2). This case does not support the contention of the learned Vakil for the opposite party. Mr. Justice Jwala Prasad, held in that case that there is no prohibition in law for simultaneous trials of counter cases and nothing has been placed before me to justify the contention that the simultaneous trial of two counter cases is illegal. In the case referred to above (2), the question arose as to whether the conviction of the petitioner in that case was bad in law on account of two counter cases being tried simultaneously and his Lordship held that the mere fact of two cases being tried simultaneously would not justify the setting aside of the conviction, but if the petitioner could show any prejudice on account of the simultaneous trial of two cases then he would be entitled to a setting aside of the conviction. Reliance has been also placed by the learned Vakil for the opposite party upon the case of *Lalji Singh* v. *Naurangi Lal* (3). In that case two counter-complaints were filed before the Sub-Divisional Magistrate and he referred both the cases to a Sub-Deputy Magistrate for enquiry and report and on receipt of the report he issued process in one case and directed the counter case to be put up after the disposal of the former case and it was held that the action of the Sub-Divisional Magistrate did not contravene any rule of procedure and that the discretion exercised by the Magistrate in postponing the case was not revisable by the High Court. In my opinion the only question to be decided in such cases is as to whether there is any reasonable cause for postponing one case until after the disposal of another. The power given to a Court to postpone the hearing of one case until after the disposal of another case is conferred by S. 344 which provides that if, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any enquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody. Therefore, the real question is as to whether there is any reasonable cause for postponing the counter case. If there be such cause it is a matter of discretion and if the Magistrate does not exercise his discretion judicially in postponing the case, this Court will interfere and set aside the order, but if the discretion is exercised in a sound and judicial manner there is no reason why this Court should interfere with the discretion. In the present case the complainant in the counter case, who

(1) 1924 Cal. 634=28 C. W. N. 487=26 Cr. L. J. 65.

(2) [1920] 1 Pat. L. T. 498=58 I. C. 243=21 Cr. L. J. 739.

(3) 1922 Patna 618=1922 P. H. C. C. 304=3 P. L. T. 164.

is one of the opposite-party in the present application, admits having assaulted the complainant, who is the petitioner in the present case. The only question for decision, therefore, would be whether he did so in exercise of the right of private defence of property or person. That question can be conveniently decided after the disposal of the complaint made by the opposite-party in the present case. I, therefore, see no reason to interfere with the order of the Sub-Divisional Magistrate. It is, however, desirable that the counter case should be taken up immediately after the conclusion of the case which is now being tried, namely, the case started on the complaint of Sampat Lal Singh, and as soon as this case, namely, the case started on the complaint of Sampat Lal, is concluded, the counter case, namely, the case started on the complaint of the petitioner, should be taken up and, if possible, the judgment in the case of Sampat Lal should be postponed until after the conclusion of the trial of the case instituted by the petitioner.

Rule discharged.

1925 PATNA 622

MULLICK AND BUCKNILL, JJ.

Secretary of State for India in Council—Appellant.

v.

Ramtahal Ram and others—Respondents.

Appeal No. 311 of 1922, Decided on 20th January 1925, from a decision of the D. J. Arrah, D/-2nd November 1921.

Riparian owners—Irrigation canal—Damage caused by overflow, can be recovered.

Government by constructing an irrigation canal undertakes a duty to protect other parties against damage arising from the water of the canal. If it does not take adequate precautions for an outlet at the tail-end of the canal, to allow the overflow of water to pass away, it is liable to compensate those to whom damage would be caused by the overflow. 3 *H. L.* 830 *Foll.* [P 623, C 1]

The Government Pleader—for Appellant.

P. Dayal and *D. N. Varma*—for Respondents.

Mullick, J.—The Courts below have given a decree for damages against the Secretary of State on the ground that he has caused injury by allowing canal water to flow through the side-cutting canals connected with the Chousa Branch canal, into the plaintiff's lands which adjoin the East Indian Railway at Chousa. The defendant's case was that water from the Chousa Branch canal was distributed according to the irrigation rules to the tenants of Mouza Salarpur on the west and Mouza Chuni on the east of the Branch canal and that if any damage has been done to the plaintiffs' lands on the north, the fault lies not with the defendant but with the tenants concerned. The findings, however, in the Court below are, firstly, that the water from Mouza Salarpur, after the tenants there have irrigated their lands, flows back into the side-cutting canal which runs from south to north along the branch canal; and secondly, that the water supplied to the Chuni tenants is taken by a syphon from the field of those tenants into the side-cutting canal to the east of the branch canal and that the water in both side-cuttings flows northwards to the point H marked on the map filed by the defendant. At the point H; the tail end of the canal has been blocked, but the finding of the Munsif which seems to have been affirmed by the District Judge, is that the water in the two side cuttings flows into the rectangular piece of land marked "S-cutting" and from there into an old channel marked "existing channel" and thence on to the plaintiffs' land which is shaded in red along the Railway line. The learned Munsif states that formerly the water after flowing over the rectangular piece was carried by the "existing channel" to a culvert at point A and thence under the Railway line into the fields to the north-west.

The case of the defendant that no damage has been caused by the flow of water through the side canals, but that the tenants of Salarpur and Chuni have negligently allowed the irrigation water to flow over their fields into the lands of the defendants at Khanrajpur, has not been accepted.

In these circumstances the rule in *Rylands* v. *Fletcher* (1) has been correctly

(1) (1863) 3 H. L. 330 = 37 L. J. Ex. 161=19 L. T. 220.

applied. The defendant by constructing the canal has undertaken a duty to protect other parties against damage arising from the water of that canal, and if he has not taken adequate precautions for an outlet at the tail-end of the canal, he is liable to compensate the plaintiffs for the damage caused.

The appeal, therefore, must be dismissed with costs.

Bucknill, J.—I agree.

Appeal dismissed.

1925 PATNA 623

JWALA PRASAD, J.

Jeobaran Singh and others—Petitioners.

v.

Ramkishun Lal—Opposite Party.

Criminal Revision No. 725 of 1924, Decided on 2nd February 1925, from an order of the S. J. Patna, D/- 16th December 1924.

(a) *Bengal Ferries Act* (1885), *S. 5—'Ferry'—Two points on two sides of the river for conveying persons and property are necessary.*

In order to constitute a ferry such as is contemplated by the Act, it is necessary that there should be two points on both sides of the river so that people and property may be conveyed from one side of the river to the other. It must be connected on both sides with land on the bank of the river. [P 624 C 1]

(b) *Bengal Ferries Act* (1885), *Ss. 16 and 28—Only maintenance of ferry is not criminally punishable—Conveying persons and property in addition is an offence—Each trip is separate offence.*

The maintenance of a private ferry is in contravention of S. 16 of the Act for which the person maintaining it may be liable for damages and also an injunction may issue against him. If, in addition, to maintaining such a prohibited private ferry he carries passengers and property for hire he is liable criminally under S. 28 of the Act and each trip is a separate offence. [P 624 C 2]

Manuk with *S. P. Varma* and *Nirsu Naram Sinha*—for Petitioners.

Ali Imam with *H. L. Nandkeolyar* and *Girendra Nath Mukherjee*—for Opposite Party.

Facts.—Petitioners were summoned to stand on their trial with respect to 24 complaints filed against them on behalf of a ferry contractor, by his servant, in the Court of the City Magistrate of Patna under Ss. 16 and 28 of the Ferry Act (Act I of 1885).

It was alleged that the petitioners were conveying passengers, etc., for hire in contravention of the provisions of S. 16 of the Ferry Act by maintaining a ferry between the 9th and 12th November, 1924. There were 24 complaints arising out of as many trips. On behalf of the petitioners it was argued that all these 24 trips did not constitute as many separate affences under S. 16, but that they together constituted only one offence and therefore they should be tried at one trial with respect to all the trips.

Mr. Manuk on behalf of the petitioners contended that in order to sustain a charge under S. 28 it is essential to show in the first instance that the petitioners maintained a ferry to or from any point within a distance of two miles from the limits of a public ferry which is prohibited by S. 16 of the Act.

Judgment.—[After stating facts as set out above His Lordship proceeded.]

That section (S. 16) only makes the maintaining of a ferry within the prohibited degrees an unauthorized act but is not in itself penal. It may give rise to an action for damages, but is not punishable under the criminal law. S. 28 is a penal provision which makes the maintenance of an unauthorized ferry under S. 16 an offence when the ferry is used for conveying any passenger, animal, vehicle or other thing for hire. Accordingly, it is contended that the ferry in question was used for four days, namely, from 9th to 12th November, during the Sonepur Fair, for the purpose of carrying passengers, etc., for hire and thus the ferry was maintained for the aforesaid four days for the purpose of making profit by realizing tolls from passengers. The act of realizing tolls during the four days must be deemed to be one continuous act as implying the maintaining of the ferry under S. 16 of the Act. Therefore, each time the toll was realized during those four days would not constitute a separate transaction and would not form the subject of a separate charge or trial against the petitioners.

The word "ferry" has not been defined in the Act. S. 5 simply says:

"'ferry' includes a bridge of boats, pontoons or rafts, a swing-bridge, a flying

bridge, a temporary bridge, and a landing stage."

The word must therefore be taken in its ordinary accepted legal significance. Literally it has been defined in Bouvier's Law Dictionary as :

"a liberty to have a boat upon a river for the transportation of men, horses, and carriages with their contents, for a reasonable toll. The term is used also to designate the place where such liberty is exercised. In law it is treated as a franchise, and defined as the exclusive right to carry passengers across a river, or arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another."

Continuing, the dictionary says :

"In a strict sense a ferry is a continuation of a highway from one side of the water to the other and is for the transportation of passengers, vehicles and other property."

In order to constitute a ferry such as is contemplated by the Act in this country it is necessary that there should be two points on both sides of the river so that people and property may be conveyed from one side of the river across the other. It must be connected on both sides with land on the bank of the river. In order to give full significance to this meaning of the term the Act has included in it "any other appliance by which the water is connected with the land." This purpose may be served by a bridge of boats, pontoons or rafts, etc. In this sense the public ferry is created and leased on behalf of the authorities, and to protect the rights granted under the lease with respect to a public ferry the Act has made it illegal to maintain a regular ferry on a river within two miles of a public ferry so as not to interfere with or affect the peaceful working of and making profit out of the public ferry leased to the contractor. It seems that the idea is similar to that in England where, the aforesaid dictionary notes :

"ferries are established by royal grant or by prescription, which is an implied grant : in the United States, by legislative authority, exercised either directly or by a delegation of powers to Courts, commissioners, or municipalities."

Wherever such public ferries have been created provision has always been made to protect the interest of the public ferry by forbidding individuals erecting a competition ferry near about. One provision referred to in the dictionary is :

"if an individual, without authority from the State, erects a new ferry so near an older ferry, lawfully established, as to draw away the custom of the latter, such individual will be liable to an action on the case for damages, or to a suit in equity for an injunction in favour of the owner of the latter."

This seems to have been the object with which S. 16 has been enacted. The maintenance, if any, of a private ferry by the petitioners was in contravention of S. 16 of the Act for which they may be liable for damages and also an injunction may issue against them. If, in addition to maintaining such a prohibited private ferry they carried passengers and property for hire they are liable criminally under S. 28 of the Act, and each time they did convey for hire they became liable.

It seems that each trip was a separate transaction and can be tried separately. The question, however, is whether the petitioners should be tried simultaneously for all the offences committed by them between the 9th and the 12th November, 1924.

The offences were committed within a space of one year and the principles underlying Ss. 234 and 240 of the Code of Criminal Procedure may usefully be availed of. The Magistrate should try at one time only three of these transactions and use the remaining transactions as evidence in the case for the purpose of determining the amount of punishment and damages payable under the Ferry Act. If conviction is obtained on such a trial, the Court should stay the inquiry into or trial of the other charges which will have the effect of an acquittal of the accused on those charges subject to the event of the conviction being set aside by higher authorities. If the conviction is set aside the Magistrate may proceed with the trial or inquiry of the other charges.

Appeal allowed.

★★ 1925 PATNA 625

DAWSON MILLER, C J.
ON DIFFERENCE BETWEEN
DAS, J. AND FOSTER, J.

Hitendra Singh and others—Plaintiffs —Appellants.

v.

Maharajadhiraj Sir Rameswar Singh Bahadur and others — Defendants— Respondents.

Appeal No. 206 of 1920, Decided on 16th February 1925, from a decision of the D. J., Darbhanga, from original decree, D/- 23rd June 1920.

(*a*) *Civil P. C. S. 98—There is no conflict between S. 98, Civil P. C. and Letters Patent clause 36 of Bombay and 28 of Patna.*

Per Das and Foster, JJ.—There is no conflict between the Code and the Letters Patent. The special procedure indicated in the Letters Patent applies to Letters Patent appeals; the procedure indicated in S. 98 of the Code applies to appeals from Subordinate Courts. 43 *Bom.* 433 *Foll.*
[P 667 C 1]

(*b*) *Deed — Construction — Intention is to be gathered from words, and doctrines are to be given due weight.*

Per Dawson Miller, C. J.—The intention of a deed is primarily to be gathered from the words of the instrument itself, and the application of doctrines, although they must be given due weight, must not be allowed to overrule the clear indications of intention to be gathered from the words of the document. But the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. 25 *All.* 351 *Diss.*; 42 *Mad.* 283 *Diss.*
[P 668 C 2]

★★(*c*) *Hindu Law—Gift to woman—Words indicating absolute estate are not affected by sex of the grantee—Estate of inheritance does not necessarily indicate absolute power of disposal—(Case law discussed.)*

Per Dawson Miller, C. J.—There is nothing in the Hindu Law which prohibits a woman, whether wife or widow, from acquiring an absolute estate in property including the power of alienation. If words of grant are used importing the transfer of full proprietary rights, then effect must be given to them irrespective of the sex of the grantee. It may appear, however, from the context or from the surrounding circumstances that a limited power of disposal was intended to be conferred, even where an estate of inheritance is granted. Where ambiguity exists in the document itself, or where the words are not of sufficient amplitude to confer full powers of alienation, it is legitimate to assume that the grantor had in mind the ordinary disability which the Hindu Law attaches to a woman's rights over property, and this may be considered in determining the intention even where an estate of inheritance is granted. But where words are used which in their context express an intention of transferring full rights of ownership, the other principles of interpretation are of minor importance and should not be allowed to restrict the natural meaning of the words.
[P 670 C 1]

(*d*) *Hindu Law—Gift to wife—Mithila School—Gift may confer right to alienate gifted property.*

Per Dawson Miller, C. J.—Where the donor (a Hindu governed by Mithila School) made *heba-bil-ewaz* to his wife of his share in taluka Laheri "with trees, fruit-bearing and non-fruit bearing, and ahar and pokhar and reservoir and tank and katcha and pakka wells and sair and salt sairs and houses occupied by tenants and all his zamindari rights which up to now have (or has) been in his possession without the co-partnership of anyone," and then recited that he had put the Mst. in possession and directed that by becoming possessed of the property she should spend the produce with sons, generation after generation and the declarant, his heirs and representatives shall have no concern in demanding the subject of the heba or the consideration money from the Mst. or her heirs and representatives,

Held: the words "with sons generation after generation" used in their context convey an estate of inheritance and the words zemindari rights and representatives (*qaim moqaimian*) indicated right of alienation. [P 671 C 2]

Held: further that words directing the grantee to spend the produce would not affect the power of alienation. Such words are not uncommonly used in India in conveyances which transfer an heritable and alienable estate. 24 *Cal.* 834 (*P. C.*) *Foll.*
[P 672 C 2]

(*e*) *Lim. Act, Art. 91—Where decree is binding suit must be brought to set it aside within time.*

Per Das, J.—Where a person is, *prima facie*, bound by a decree, he cannot, by suing ostensibly for possession ignore the decree and evade the operation of law; and where such a decree is an impediment to the plaintiffs' way in obtaining relief inconsistent with it, he must bring his suit within the period prescribed by law for setting aside a decree. [P 631 C 1]

(*f*) *Lim. Act, Art. 95—Heirs where bound, must sue within time allowed by the Article.*

Per Das, J.— Ordinarily a decree obtained against a person binds the heirs and if the decree was obtained by fraud, the heirs must sue within the period prescribed by Art. 95 of the Limitation Act. [P 631 C 1]

(*g*) *Civil P. C., S. 47—Heirs of mortgagor J. D. cannot challenge right of mortgagor to mortgage in execution proceedings.*

Per Dawson Miller, C. J.—The heirs of a deceased mortgagor judgment-debtor, who have been substituted in the place of a deceased in execution proceedings, cannot in those proceedings challenge the right of the mortgagor to execute the mortgage.

★★(*h*) *Civil P. C., S. 11— Mortgage by Hindu widow of inalienable estate — Decree against her does not bar her heirs from contesting her right to alienate.*

Dawson Miller, C. J.—A Hindu woman cannot in a suit on a mortgage of the property executed by herself deny that she had power to alienate the property, and, therefore, the question of her power to alienate it is not in issue in the suit so

as to bar it from being agitated by her heirs in a subsequent suit for possession after her death.

(i) *Evidence Act, S. 43—Judgment is not relevant unless as a fact in issue or as a relevant fact under other sections.*

Per Das, J.—A judgment or decree is not admissible in evidence under S. 43 unless as a fact in issue or as a relevant fact under other sections of the Act. Thus if A has obtained a decree for the possession of land against B, and C, B's son, murders A in consequence, the existence of the judgment is relevant as showing motive for the crime. So again, in a suit for malicious prosecution, the judgment in the criminal proceeding is evidence to establish the fact of acquittal, the fact, namely, that the criminal proceedings terminated in favour of the plaintiff. A reference to the finding of a judgment may explain the character, of the party's possession and the nature of the enjoyment had in the property in suit and so the finding of a judgment may be referred to in all other cases where the record is matter of inducement or merely introductory to other evidence.
[P 635, C 2]

(j) *Benami—Proof—Though slight evidence is sufficient, probabilities are not enough.*

Per Das, J.—As benami transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely, however, solely on probabilities. He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things.
[P 657, C 2]

(k) *Hindu Law—Stridhan—Gift by husband after marriage is saudayica gift and is wife's stridhan.*

Per Das, J.—A gift by the husband to the wife subsequent to marriage must be regarded as the stridhan of the wife. The gift is a saudayica gift of the husband to the wife.
]P 644, C 2]

(l) *Hindu Law—Stridhan — Mithila school—Gift from husband is heritable but inalienable, except for necessary purposes, even with husband's consent.*

Per Das, J.—Under the Mithila Law, immoveable property taken as a gift by a wife from her husband is beritable but inalienable, except for necessary purposes, even with the consent of the husband.
[P 648, C 2]

Per Foster, J.—The wife must preserve the corpus of the property while her husband lives, spending only the income subject to his permission, and after his death must preserve it for her heirs.
[P 662, C 2]

(m) *Practice—New point.*

Per Das, J.—A Court should allow a question of law to be argued which fairly arises on the allegations made in the plaint, though it is not stated in that form in the plaint.
[P 629, C 2]

(n) *Hindu Law—Texts.*

Per Das, J.—The Mitakshara is of authority in Mithila except in regard to those matters where there is a difference of opinion between Vignanesvara and the Mithila commentators.
[P 647, C 1]

(o) *Hindu Law—Gift to woman—Presumption is that gift is inalienable unless express words indicate the contrary (Per Das, J.). (Case law and Hindu texts discussed).*

Per Das, J.—In construing a deed of gift by a Hindu to his wife the Court is bound to proceed on the assumption that a Hindu knows that, as a general rule, women do not take absolute estates of inheritance which they are enabled to alienate. This does not mean that, where there are words of sufficient amplitude conveying in the terms of the gift itself the fullest rights of ownership, including the power to alienate, the Court will refuse to construe the deed of gift so as to deny to the donee the right to alienate. But that, in construing a deed of gift executed by a Hindu husband in favour of his wife, the Court would be right in leaning towards a construction which is in consonance with the ordinary notions and wishes of the Hindus with respect to devolution of property and in harmony with the law by which the parties are governed.

The ordinary notions and wishes of Hindus are well known and have been recognised by the Judicial Committee.
[P 652, C 2]

Per Foster, J.—The Courts should examine the documents of transfer with the eye to the ordinary Hindu's inclinations; he does not usually intend to make a wife absolute owner by a deed of transfer. In the earlier interpretations of this rule of the Privy Council the Courts went almost so far as to import a strong presumption that the grantee was to receive a limited estate, and it was held that something express is necessary to exclude what is tacitly implied, *Expression facit cessare tacitum.* But the rule adopted in modern times is that if by a construction of the document the grant of an absolute estate can reasonably be extracted, there is no need to insist on an express and distinct grant of an absolute estate, *Expressio eorum quae insunt nihil operatur.* Express words are not essential; the fact that the donor is a Mithila wife is not fundamental; it is to be seen whether the words are of sufficient amplitude to convey an absolute estate. 1922 *P. C. 80 Foll.*
[P 662, C 1]

(p) *T. P. Act, S. 8—S. 8 does not affect rule of Hindu Law in Mithila.*

S. 8, which is in the second chapter of the Act, must be read subject to the provision of S. 2 which provides that nothing in the second chapter of the Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist Law. Thus it does not affect the rule of Hindu Law as it is understood in Mithila that a gift by a Hindu to his wife does not carry with it the right to alienate.
[P 655, C 2]

B. C. Mitter, K. B. Dutt, A. Sen and *Lachmi Kanta Jha*—for Appellants.

Hasan Imam, Sultan Ahmad and *Murari Prasad*—for Respondents.

Das, J.—This is an appeal against a decision of the learned District Judge of Darbhanga. The appellants are the junior members of the Darbhanga Raj family and they sued the respondent, the Maharajadhiraj of Darbhanga in substance for recovery of possession of a property described in these proceedings as 7-annas 8-ganda 3-kattah share of taluka Laheri. The property in dispute belonged to Durga Dutt Singh, the father of plaintiffs 1—4. On the 17th April, 1876, Durga Dutt Singh executed a document described as a *heba-bil ewaz* in favour of his wife *Mt.* Anuragin Bahuasin (who will henceforth be referred to as the bahuasin) by which he transferred the disputed property to her after receiving from her the sum of Rs. 41,532-6-8. Various questions have been raised in this suit and in the arguments before us; but the main question turns upon the construction of the *heba-bil-ewaz*, dated the 17th April, 1876. On the 15th December, 1890, Babu Durga Dutt Singh and his wife the bahuasin mortgaged the disputed property to the then Maharaja of Darbhanga to secure the repayment of a certain sum of money which was then due by Babu Durga Dutt Singh to the Maharaja of Darbhanga. On the 5th April, 1897, the Maharaja of Darbhanga sued upon his mortgage and on the 3rd June, 1897, he obtained an *ex parte* decree against Babu Durga Dutt Singh and his wife. The Maharaja of Darbhanga then took out execution and on the 21st May, 1902, the present Maharaja of Darbhanga, the defendant in this action and the respondent before us, purchased the disputed property at the Court sale held in pursuance of the decree of the 3rd June, 1897, for three lakhs of rupees. On the 10th June, 1902, the judgment-debtors applied for setting aside the sale under S. 311 and S. 244 of the Code of Civil Procedure, 1882. The bahuasin died on the 1st February, before the disposal of the application of the 10th June, 1902; and on the 29th March, 1904, the present plaintiffs were substituted in the record of the proceedings as the heirs of their mother the bahuasin on the application of Babu Durga Dutt Singh. On the 2nd January, 1904, the application was refused and the sale was confirmed. There was an appeal to the Calcutta High Court which was dismissed.

The plaintiffs claim to have entered upon possession of the disputed property on the death of their mother the bahuasin; and on the 23rd February, 1906, they instituted a suit, being suit No. 19 of 1906, for confirmation of their possession. They made an application in that suit for an injunction restraining the Maharaja of Darbhanga from taking possession of the disputed property until the determination of the suit. On the 30th June, 1906, the Court refused to grant an injunction. On the 16th March, 1907, the suit was withdrawn with liberty to bring a fresh suit. Delivery of possession to the Maharaja of Darbhanga followed on the 14th December, 1906. The present suit was instituted on the 24th July, 1918, and it was dismissed on the 23rd July, 1920, by the learned District Judge of Darbhanga on two grounds: first, on the ground that it was barred by limitation; and, secondly, on the ground that the plaint disclosed no cause of action. In view of the decision to which the learned District Judge arrived, he did not think it necessary to try the other issues which were raised in the case. The plaintiffs appealed to this Court and on the 13th June, 1923, this Court, without expressing any opinion as to the correctness of the decision of the learned District Judge, remanded the case to him with instructions to him to try all the issues in the case. This Court drew the attention of the learned District Judge to what the Judicial Committee of the Privy Council has repeatedly pointed out, namely, that the subordinate Courts should try all the issues so as to make it unnecessary either for this Court or for the Judicial Committee of the Privy Council to remand the case afterwards should it become necessary to do so. The case then went back to the learned District Judge who took evidence and recorded his findings on the different issues raised between the parties. Although on the main question of fact his decision is in favour of the plaintiffs, he has decided the questions of law in favour of the defendants and has dismissed the plaintiffs' suit.

Before dealing with the arguments which have been advanced before us, it will be convenient to state shortly the case of the plaintiffs and the reply thereto, and the questions which fall to be considered in this case.

The plaintiffs allege that upon the payment of Rs. 41,532-6-8 by the bahuasin

to Durga Dutt Singh and the execution of the *heba-bil-ewaz*, dated the 17th April, 1876 :

"there was a complete change and transfer of ownership and possession with regard to the 7-annas 8-gandas 3-kattahs of taluka Laheri",

and that the bahuasin obtained possession of the disputed property from the date of the execution of the *heba-bil-ewaz* and that she was registered as the owner thereof in the land registration department. In regard to the mortgage of the 15th December, 1890, they say that Rs. 1,88,962-9-2 was due by Babu Durga Dutt Singh to the then Maharaja of Darbhanga on account of revenue and cesses payable by Babu Durga Dutt Singh in respect of the bahuana properties. They assert that the bahuasin was in no respect liable for those debts and that Babu Durga Dutt Singh

"taking advantage of his position of authority and influence over his wife preferred to mortgage the disputed property in the said mortgage bond, and she was induced to become a party thereto upon a misrepresentation that the debts of the husband were binding on the wife and the said Maharaja with the knowledge that the property in suit belonged to the bahuasin and with the further knowledge that it had been wrongly represented to her that the debts of the husband were binding on the wife, accepted the mortgage in his favour."

It appears, however, that plaintiff No. 2 actually signed the mortgage bond on behalf of his mother and that plaintiffs 1 and 3 were the attesting witnesses. In order to meet this difficulty the plaintiffs say that :

"they were not at all aware of the contents of the bond and as they were fully under the control of their father they had only to act according to his dictation and on the pressure of the men of the Maharaja."

The plaintiffs further say that the bahuasin was a *pardanashin* lady and had no independent advice in the matter of the execution of the mortgage bond and that she did not execute it

"knowing and understanding its contents or the importance thereof, or realising the consequences of her act."

In regard to the *ex parte* decree obtained against Durga Dutt and the bahuasin, the plaintiffs allege that summons was not served on the bahuasin according to law and that :

"as a matter of fact she was purposely kept from all knowledge of the said suits or of the decrees obtained therein and that in the circumstances of the case she was neither in law nor in equity bound by the proceedings taken in the above suits, the decrees passed therein or by subsequent proceedings in execution of which also she had absolutely no knowledge."

In regard to the execution proceedings, they say that they were taken without the knowledge of the bahuasin and that the Maharaja purchased the property

"for an inadequate price of 3 lakhs of rupees though its actual price then was not less than 6 lakhs of rupees."

They allege that as the heirs of the bahuasin they succeeded to the disputed property and came into possession thereof ; but that they were dispossessed on the 16th December, 1906, and they say that their cause of action arose on the 16th December, 1906,

"the date of their wrongful dispossession."

It will be noticed that two important questions of fact are pleaded : first, that there was a complete defence to the mortgage action and that the decree obtained against the bahuasin was a fraudulent decree which does not affect the rights of the plaintiffs as the heirs of the bahuasin ; and, secondly, that the execution proceedings were fraudulent and that the property was purchased by the defendant for the very inadequate price of three lakhs of rupees and that all the proceedings from start to finish ought to be set aside. But it is obvious that these questions were not available to the plaintiffs. The bahuasin applied for setting aside the *ex parte* decree and failed. That question could not be raised by the bahuasin except on the ground that the decree against her was obtained by fraud. So far as the execution sale is concerned she again applied for setting it aside under S. 311 and S. 244 of the Code of Civil Procedure. Pending the disposal of that application the bahuasin died and the plaintiffs were substituted in the record of that application as the heirs of the bahuasin. That application again

failed and it is not open to the plaintiffs to reagitate the same question in a regularly constituted suit between the parties. It is quite true that although the bahuasin might have failed first in her application for setting aside the *ex parte* decree, secondly, in her application for setting aside the sale, she might still have maintained a suit for setting aside all the proceedings as a fraud upon her from start to finish. But to such a suit, Article 95 of the Limitation Act affords a complete reply. It is not open to doubt that the *bahuasin* did some time or other become aware of the fraud practised on her. Article 95 of the Limitation Act provides:

"that a suit to set aside a decree obtained by fraud or for other relief on the ground of fraud must be instituted within three years' from the time when the fraud became known to the party wronged."

It seems to me therefore that it is not open to us to consider the main questions of fact raised by the plaintiffs in this case; and if there were no other questions which could legitimately be raised by the plaintiffs on the plaint as presented by them there is no option but to dismiss the suit.

But a very important question was raised by the plaintiffs in the Court below, the adjudication of which does not depend on any question of fact. It was insisted on behalf of the plaintiffs that both under the Hindu Law as also under the *heba-bil-ewaz* of the 17th April 1876, the *bahuasin* took a heritable but inalienable interest, and that consequently the plaintiffs are not embarrassed by the decree or the execution proceedings against the *bahuasin* and that it is not necessary for them to ask the Court to set aside the proceedings in connection with the mortgage suit as a condition precedent to this action. The question is a pure question of law, and arises on the *Mithila* School of Hindu Law by which the parties are governed and on the construction of the *heba-bil-ewaz*. It was directly raised by the plaintiffs in the Court below and the learned District Judge has given his decision on the point. The plaintiffs assert that they are entitled to raise this point on their allegations in the plaint that there was a conveyance of the property by Durga Dutt Singh in favour of the *bahuasin* and that upon the death of the *bahuasin* they became entitled to succeed to the property as her heirs. It is quite true that they do not allege in the plaint that in the hands of the *bahuasin* the property was alienable, but they contend that, if they can satisfy the Court on Hindu law and on the construction of the *heba-bil-ewaz* of the 17th April 1876, that in her hands the property was inalienable, the Courts cannot refuse to consider the point merely because they have not put their case in that form in the plaint. In my opinion, it would be wrong on our part not to allow a question of law to be argued before us which fairly arises on the allegations made in the plaint, though it is not stated in that form in the plaint.

It is not necessary for me in the view which I take to refer to those allegations in the written statement which expressly deny that there was any undue influence exerted over the *bahuasin* either by Babu Durga Dutt or by the Maharaja of Darbhanga or to those which deny that there was any fraud either in connection with the *ex parte* decree obtained in the mortgage suit or in the course of the execution proceedings which followed the decree. The main question of fact raised by the defendant in this case is that the *heba-bil-ewaz*, dated the 17th April 1876, was a *farzi* document not intended to be acted upon. The defendant asserts that the *heba-bil-ewaz* was "merely a nominal and colourable transaction without consideration" and that Babu Durga Dutt Singh "was very much indebted and he took the opportunity of and taking advantage of the payment by him out of the joint family funds of the decretal dues of Rai Banwari Lal Sahu he (the said Babu Durga Dutt Singh) brought into existence the *heba-bil-ewaz* in favour of his wife, the said Mussammat Anuragin Bahuasin as a subterfuge and means for protection of the property from his creditors, that the said *heba-bil-ewaz* does not evidence a real or *bona fide* transaction, that no consideration passed thereunder and neither the said *bahuasin* paid the money recited therein nor had she means of her own to make such payment," and he alleges that the property was throughout in the possession of Durga Dutt Singh. The reference in the written statement to Rai Banwari Lal Sahu should be explained. The *heba-bil-ewaz* shows that there was a sum of Rs.

41,532-6-8 due by Babu Durga Dutt Singh to Banwari Lal Sahu on a decree obtained by Banwari Lal Sahu against him, that the disputed property and another property were advertised for sale to recover the sum of Rs. 41,532-6-8, and that Babu Durga Durga Dutt Singh failed to procure the money in order to pay off Banwari Lal Sahu and that the *bahuasin* gave him the money to enable him to save the property. The suggestion of the defendant is that, taking advantage of the proceedings in connection with the suit of Banwari Lal Sahu against him, Babu Durga Dutt Singh put this property in the name of his wife so as to defeat his creditors. This is the main question of fact raised by the defendant ; and on this issue the decision of the learned District Judge is in favour of the plaintiffs. The other question raised by the defendant is that the suit is not maintainable and that it is barred by limitation. It is obvious that if these questions be decided in favour of the defendant, the plaintiffs' suit must fail, and it will be necessary for us to discuss these questions before proceeding to deal with the more serious questions raised before us.

I will first deal with the question of the maintainability of the suit and whether the plaintiffs' suit is barred by limitation. Now, I quite agree that it is not open to the plaintiffs to maintain the suit on any of the grounds which were available to the *bahuasin*. I have dealt with the point, and I do not desire to repeat myself. But the plaintiffs contend that the property was inalienable in the hands of the *bahuasin* and that, as her heirs, they are entitled to recover possession of the property from anyone into whose hand the property may have passed by an act of the *bahuasin*. Three questions fall to be considered : first, whether there are sufficient allegations in the plaint to entitle the plaintiffs to raise such a case ; secondly, whether it is open to them to ask the Court to consider such a case ; and thirdly, whether the consideration of such a case is not barred by lapse of time.

I am of opinion that all the material facts are stated which entitle the plaintiffs to contend that the property was inalienable in the hands of the *bahuasin*. They allege that Durga Dutt executed a deed of gift in favour of his wife and put her in possession of the property. They also allege that upon the death of the *bahuasin*, they succeeded to the property as her heirs. On these facts—"the material facts" in the words of the Code—they contend that they are entitled to ask the Court to hold that the property was inalienable in the hands of the *bahuasin*. Now, whether the property was or was not inalienable is not a question of fact ; it is an inference of law, and it is not necessary to set out an inference of law in the pleading. There is no question of surprise in this case ; for the point was stated to us before we remanded the case for trial of all the issues raised in the case. The question was argued at great length before the District Judge ; and, in my opinion, it would be wrong on our part to refuse to hear the plaintiffs on this point on a needlessly technical view of the plaint.

The second question must also be answered in favour of the plaintiffs. If the property was in fact inalienable, then the plaintiffs must have the right to claim the property if it had been alienated, unless the *bahuasin* could herself set up the inalienability of the property as a defence to the mortgage action. But it is well established that "the grantor cannot dispute with his grantee his right to alienate the land to him." That being so, the *bahuasin* could not claim adversely to her own deed, and her failure to set up the inalienability of the property in the mortgage action cannot operate as constructive *res judicata* in this case. It was contended that the mortgage decree binds the heirs and that the property having passed away in execution sale, the present suit is not maintainable. I am unable to assent to this proposition. It is true that the plaintiffs are heirs; but the property being inalienable, they are wholly unaffected by the mortgage decree. To hold otherwise is to say that property which is inalienable may become alienable by the act of alienation. In my opinion, the plaintiffs are entitled to maintain this suit and to show that the property was inalienable in the hands of their mother.

On the question of limitation, it is material to remember that, on the plaintiffs' case, they entered upon possession of the property on the death of their mother and that they were dispossessed on the 16th December, 1906. It is the common case that on the death of the

bahuasin, the plaintiffs were substituted in the record of the proceeding under S. 311 of the Code which was then pending in the place of the bahuasin. It is admitted by the defendant that he obtained delivery of possession on the 16th December, 1906. That being so, the suit is governed by Article 142 of the Limitation Act and is within time.

But it was contended that the plaintiffs cannot sue for possession until they had cleared the way for such a suit by securing the annulment of the mortgage decree and the sale thereunder: and that, in that view, the suit is barred by the provision of Article 95 of the Limitation Act. Now I quite agree that where a person is *prima facie* bound by a decree, he cannot, by suing ostensibly for possession, ignore the decree and evade the operation of law; and where such a decree is an impediment to the plaintiffs' way in obtaining relief inconsistent with it, he must bring his suit within the period prescribed by law for setting aside a decree. But the argument assumes that the plaintiffs are bound by the decree obtained against the bahuasin. If I may say so with respect, the confusion in the argument is due to the fact that the plaintiffs' claim as the heirs of the bahuasin. Ordinarily a decree obtained against a person binds the heirs; and, if the decree was obtained by fraud, the heirs must sue within the period prescribed by Article 95 of the Limitation Act. But the argument overlooks two important points: first, that plaintiffs are not bound by the alienation, and therefore by the mortgage decree; and secondly, it was not open to the bahuasin at any time to claim adversely to her own deed. The bahuasin could not claim to have the decree set aside on the ground that she was not competent to mortgage the property. That being so, the plaintiffs could not bring a suit to have the decree set aside on that ground. But although they were not entitled to bring a suit to have the decree set aside, they were entitled to bring a suit for possession, if, being in possession, they were dispossessed from it; but to such a suit Article 142 clearly applies. The whole question is: Are the plaintiffs entitled to recover possession without having the mortgage decree and the sale thereunder set aside? In my opinion, since they were not bound by the decree and the sale thereunder, they could treat those proceedings as a nullity without the intervention of any Court, and they showed their election to do so by commencing an action to recover possession of the property. In my opinion, the suit is governed by Article 142 of the Limitation Act and is consequently within time.

I now come to the question of *benami*. Now, in dealing with this question, it is to be remembered that the case is not one that Babu Durga Dutt Singh purchased the property in the name of his wife. The property stood in his name and undoubtedly belonged to him, and he conveyed it to his wife by a document which is described as a *heba-bil-ewaz*. Cases are to be found in the books which lay down that where a person purchases a property in the name of his relative, the important point to be considered is, who paid the purchase money. But here the purchase money was undoubtedly paid by Babu Durga Dutt Singh and he transferred it to his wife on the 17th April, 1876. The case of the defendant is that the transfer was wholly fictitious; but before deciding this question in favour of the defendant, we must ask ourselves the question, What was the motive for this fictitious transfer? The case of the defendant on this point is contained in the 14th paragraph of his written statement which runs as follows:

That the alleged deed of gift to Mt. Anuragin Bahuasin was merely a nominal and colourable transaction without consideration, that Babu Durga Dutt Singh was very much indebted and he took the opportunity of and taking advantage of the payment by him out of the joint family funds of the decretal dues of Rai Banwari Lal Sahu he (the said Babu Durga Dutt Singh) brought into existence the *hiba-bil-ewaz* in favour of his wife, the said Mt. Anuragin Bahuasin, as a subterfuge and means for protection of the property from his creditors, that the said *heba-bil-ewaz* does not evidence a real or *bona fide* transaction, that no consideration passed thereunder and neither the said bahuasin paid the money recited therein nor had she means of her own to make such payment, and this defendant submits that upon execution of the said deed or at any time thereafter the possession of the share in question of taluka Laheri aforesaid did not pass to the alleged donee but on the other hand the said share of the property remained as before in the possession of the said Babu Durga Dutt

Singh until possession thereof was delivered to this defendant under the process of the Court after this defendant's purchase thereof and after disallowance by the Courts of the plaintiffs' and their father's objection to the sale as set forth above. This defendant further submits that the said deed is otherwise invalid and inoperative and that there was no transfer of any beneficial interest thereunder.

The suggestion of the defendant accordingly is that the object of Durga Dutt in entering into the transaction of the 17th April, 1876, was to defeat his creditors. In view of the case made, it is important for us to consider whether at the date of the execution of the *heba-bil ewaz* Babu Durga Dutt Singh was in such embarrassed condition as would induce him to enter into a fictitious transaction for the protection of his property.

In dealing with this question it must be remembered that Babu Durga Dutt was in possession of bahuana properties which even now yield an income of a lakh and a half of rupees. In 1873 Durga Dutt and his brother Girdari sold certain valuable properties belonging to them for six lakhs of rupees by which they paid off all their debts then existing. At the date of the *heba-bil-ewaz* Durga Dutt owed Rs. 41,532-6-8 to Rai Banwari Lal Sahu Bahadur on a decree which had been obtained by the latter against the former. The *heba-bil-ewaz* shows that he raised this sum from his wife and satisfied the decree of Rai Banwari Lal Sahu. The positive evidence in the case is that at the date of the transaction in question there were no other debts due by Babu Durga Dutt Singh. The case put to Amarendra Singh, one of the plaintiffs, by the defendant, was that Durga Dutt was indebted to various persons including Ram Narain Thakur, Mussamnat Fulbati Kumari, Tulsi Sahu, Mr. Henry Gyll, Jhumak Furbey, Subans Sahu and Jailal Sahu. But no attempt has been made by the defendant to establish the case put to Amarendra Singh. In my opinion the evidence establishes that by the transaction of the 17th April, 1876, Durga Dutt satisfied his debt and that at the date of the transaction there were no other debts due by him. That being so, the positive case made by the defendant on this point fails. The defendant sought to supplement the weakness of his evidence on this point by attempting to prove an admission on the part of Babu Durga Dutt Singh. The evidence adduced on behalf of the defendant on this point is to the effect that when it was proposed that Babu Durga Dutt should in some way secure the debt which was due by him to the Maharaja of Darbhanga in 1890, and Durga Dutt offered to execute a mortgage in respect of taluka Laheri, a question arose whether the *heba-bil-ewaz*, which had been executed by him in favour of his wife was a genuine transaction or a fictitious transaction and that Babu Durga Dutt admitted to the Maharaja of Darbhanga in the presence of various persons that he had entered into that transaction to save his properties as he was heavily indebted at that time. The evidence is furnished by Bhikhai Lal Missir, and Lalji Singh, both called on behalf of the defendant. In his evidence in examination-in-chief Bhikhai narrated the incident which took place in the Maharaja's durbar in 1890. His account is as follows:

Durga Dutt came to the Maharaja and offered to execute a document to secure the debt which was due by him to the Maharaja. Upon that the Maharaja asked him; 'What kind of document he would execute? Durga Dutt said that he would execute a mortgage document. The Maharaja thereupon asked him what properties he would mortgage. Durga Dutt answered that he would mortgage Laheri. Thereupon Balbhadar Misser, who was a mushahib in the durbar, pointed out that that property stood in the name of the bahuasin. Durga Dutt thereupon said, 'The property is really mine but I have kept it in her name and that if asked we both would execute the document'.

In cross-examination the witness stated that Durga Dutt admitted that there were debts due by him and so he entered into a fictitious transaction in regard to the property. This is in substance the evidence of Lalji Singh. The learned District Judge has not accepted this evidence, and I entirely agree with his judgment on this point. It is improbable that,if Durga Dutt had entered into a fictitious transaction in order to save this property from his creditors, he should have made a solemn admission before the full durbar ; and it is unlikely that these witnesses should remember the details of a conversation which took

place thirty-three years ago. The story is inherently improbable since there is no evidence to establish that at the date of the *heba-bil-ewaze* Durga Dutt had any debts to pay other then that which was satisfied by the execution of the *heba-bil-ewaz*.

The suggestion of Mr. Hasan Imam, for the respondent, is that although Durga Dutt was not indebted to anyone at the date oi the *heba-bil-ewaz*, he knew that, being a man of extravagant habits, he would sooner or later be involved in debts and that the *heba-bil-ewaz* was executed, not with a view to defeat any any existing creditors, but with a view to save the property from future creditors. It is quite true that the affairs of Babu Durga Dutt became involved later on in his life, but it is impossible to indulge in a speculation of the kind suggested by Mr. Hasan Imam especially as the positive case made by the defendant has failed.

It is well established that an apparent transaction must be assumed to be real until the contrary is shown. The onus is accordingly on the defendant to show that the transaction of 1876 was a fictitious transaction. I have already shown that the definite case made by the defendant as to the motive which induced Durga Dutt to put the property in the name of his wife has failed. The only other questions are: first, whether the bahuasin in fact paid Rs. 41,532 6-8 to Durga Dutt as alleged in the *heba-bil-ewaz*; secondly, whether Durga Dutt continued to be in possession of the property although he had executed a document in favour of his wife ; and, thirdly, whether the surrounding circumstances throw any light on the question. It is not possible to get any direct evidence at this distance of time as to a transaction which took place in 1876. It is true that there is some evidence on each side bearing directly on the character of the transaction; but this evidence has not been believed by the learned District Judge. It is therefore useless for me to go through that oral evidence as I see no reason for differing from the conclusion of the learned Judge on this point. In regard to the first question, namely, whether consideration was paid by the bahuasin, the view of the learned District Judge is on the whole in favour of the defendant. But in arriving at this conclusion the learned District Judge assumed that the onus was entirely on the plaintiffs. The learned District Judge was impressed by the fact that undoubtedly Banwari Lal Sahu had obtained a decree for Rs. 41,532 against Babu Durga Dutt and had attached taluka Laheri in the execution proceedings in connection with that decree and that undoubtedly the decree was satisfied and the property released from attachment. The inquiry being thus limited, the learned District Judge rightly thought that the only question for determination was whether payment was made out of the husband's or the lady's money. He considered the evidence of the three witnesses examined on behalf of the plaintiffs on the question of the payment of the consideration by the lady. He conceded that the witnesses on this point were all competent witnesses, but he thought that their evidence was not wholly acceptable. Conceding that the money may have come from the lady he held that "there was no sufficient evidence to show if it was her own money or her husband's" and the conclusion at which he arrived may be stated in his own words: "that being the case I am of opinion that it has not been proved that the money was her own money. Therefore I find that plaintiffs have failed to prove that the lady had paid the money out of her private funds."

The conclusion of the learned District Judge is somewhat halting. It is not quite clear whether he rejected the case of the plaintiffs that the money was actually paid by the bahuasin (whether it belonged to herself or to her husband) or whether he rejected the case of the plaintiffs that the money which was in fact paid by the bahuasin belonged to her and not to her husband. If I had to come to a conclusion on this point, on the actual evidence of the three witnesses to which the learned District Judge refers, I would unhesitatingly agree with the conclusion at which the District Judge has arrived. They are speaking of an incident which took place in 1876 and, in my opinion, it is impossible for this Court to rely on that evidence.

But as I have said before, the onus is on the defendant and not on the plaintiffs and, in my opinion, the defendant has not shown that the money was not in

fact paid by the *bahuasin* in regard to the transaction of 1876. It is quite true that the account books which would show the payment of the money by the *bahuasin* to Durga Dutt have not been produced by the plaintiffs; and I am not prepared to assent to the argument that the onus being on the defendant it was not necessary for the plaintiffs to produce the best evidence on the point. But there is one circumstance in connection with this point which should not be ignored by us: and it is this, that it is somewhat difficult for the plaintiffs to produce the account books of 1876. The account books actually produced in the case are in such decayed condition that I cannot altogether reject the plaintiffs' story that the account books other than those produced cannot be traced.

There being no reliable direct evidence on this point, we are bound to consider the surrounding circumstances. These surrounding circumstances are, first, that *taluka* Laheri was attached in execution of a decree obtained by Banwari Lal Sahu against Durga Dutt, and, secondly that the property was released from attachment after payment by Durga Dutt of the decretal amount due to Banwari Lal Sahu. The *heba-bil-ewaz* recites that Babu Durga Dutt tried to procure the money from the market but failed, and that as a last resort he took the money from his wife. I can find no sufficient reason for holding that the recitals in the *heba-bil ewaz* are deliberately false. A lady of the rank and position of the *bahuasin* might well have Rs. 41,000 in her hand, though it may be that, in point of law, the money belonged, not to herself, but to her husband; and it is not improbable that she should make over the money to her husband to save her husband's property from sale. The conclusion at which I arrive on this point is that it has not been shown by the defendant that the money was not actually paid by the *bahuasin* to her husband, and that there is no reason why we should not rely upon the recitals in the document.

On the question of actual possession, the evidence adduced on behalf of the plaintiffs is, in my opinion, conclusive. The *bahuasin* was recorded in the Land Registration Department as the owner of the property and the public demands were admittedly paid in her name. Mr. Hasan Imam contends that if the original transaction was fictitious all public transactions must of necessity be in the name of the fictitious owner. I entirely agree with this argument; but it is for the defendant to show that the original transaction was fictitious. It is not disputed by Mr. Hasan Imam that since September 1882 all the accounts stand in the name of the *bahuasin*; but he contends that there is no evidence to show that the income of the property was appropriated by the *bahuasin* between 1876 and 1882. In 1881 the *bahuasin* instituted an account suit against her agent Turant Lal; and in that suit Turant Lal raised the defence that the *bahuasin* was a *farzidar* on behalf of her husband. The defence succeeded, and it is Mr. Hasan Imam case that since 1882 false account books were prepared by Durga Dutt in order to make it appear that the *bakuasin* was the owner of the proqerty.

[His Lordship on discussion of evidence held that jamabandis and *deori* account books supported the case of plaintiff and rejecting the evidence of Mr. Onraet held that the evidence of Mr. King did not touch the point.]

It is necessary now to notice some of the arguments which have been advanced by Mr. Hasan Imam on behalf of the defendant. Mr. Hasan Imam strongly relies upon the decision in suit No. 6 of 1881 which was a suit by the *bahuasin* against Turant Lal for account in regard to his management of *taluka* Laheri. Turant Lal admittedly accepted the appointment from the *bahuasin*: and when the suit for account was brought against him he raised the plea that the *bahuasin* was a *benamidar* for her husband. How this plea was allowed to be raised in view of the admitted fact that he was appointed by the *bahuasin* as her agent is a matter of considerable surprise to me; but allowed to be raised it was, and the learned Judge who tried that case solemnly examined the evidence to find out whether the plea of Turant Lal was sustainable, and he came to the conclusion that the *bahuasin* was in fact the *benamidar* of her husband.

In my opinion the judgment in Suit No. 6 of 1881 is inadmissible in evidence as against the plaintiffs. Secs. 40—43 of the Evidence Act deal with the subject of relevancy of judgments, orders or

decrees of Court. Judgments *qua* judgments or adjudications upon question in issue and proofs of the particular points they decide are only admissible either as *res judicata* under S. 40 or as being *in rem* under S. 41, or as relating to matters of a public nature under S. 42 of the Evidence Act. The judgments, orders and decrees, other than those admissible by Ss. 40, 41 and 42, may be relevant under S. 43, *if their existence is a fact in issue or is relevant under other provisions of the Act*. It is obvious that the judgment in question is not relevant either under S. 40 or under S. 41 or under S. 42 of the Evidence Act. The question which we have to decide is whether it is relevant under S. 43. As has been pointed out by the learned authors of Woodroffe and Ameer Ali on the Evidence Act, the cases contemplated by S. 43 are such as the section itself illustrates, namely, where the fact of any particular judgment having been given is a matter to be proved in the case. Under that section a judgment may be admissible as relevant under some other provisions of the Act.

The question was debated in the leading case of *Gujju Lal* v. *Fateh Lal* (1), decided by the Full Bench of the Calcutta High Court. That was a suit between *A* and *B* in which the question was whether *C* or *D* was the heir of *H*. If *C* was the heir of *H* then *A* was entitled to succeed; otherwise not. The same question had been raised in a former suit brought by *X* against *A* and was decided against *A*; and the question arose whether the former judgment in the suit brought by *X* and *A* was admissible in evidence in the suit between *A* and *B*. It was held by the Full Bench of the Calcutta High Court (Mitter, J., dissenting) that a former judgment which was not a judgment *in rem* nor one relating to matters of a public nature was not admissible in a subsequent suit either as *res judicata* or as a proof of the particular point which it decided unless between the same parties or those claiming under them. In the view of the learned authors of Woodroffe and Ameer Ali on the Evidence Act, the decision of the Full Bench of the Calcutta High Court in *Gujju Lal* v. *Fateh Lal* (1) has not been touched by the decisions of the Judicial Committee, and it is somewhat remarkable that that case has been followed by the Bombay High Court, by the Madras High Court and by the Allahabad High Court.

I propose to refer to three cases upon which the plaintiffs relied, and which seem to me to be directly in point. In *Kashi Nath Pal* v. *Jagat Kishore Acharya Chowdhry* (2) it was held by Mookherji and Roe, JJ., that although a judgment not *inter partes*, may be used in evidence in certain circumstances, as a fact in issue, or as a relevant fact or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties. In *Devendra Nath Haldar* v. *Bisheshwar Haldar* (3) the plaintiff sued for recovery of his share in the land in suit. The Subordinate Judge in appeal admitted a judgment in a previous suit brought by another person against the defendants, and mainly relying on a certain passage therein, as proving an admission by the defendant, decided in favour of the plaintiff. It was held by Richardson and Mullick, JJ., that the judgment was inadmissible in evidence for the purpose of proving the alleged admission and that the error committed by the Subordinate Judge in using the judgment for a purpose for which it could not be legitimately used vitiated the decree. In *Abdul Latif Kazi* v. *Abdul Haq Kazi* (4), which was a case of *benami*, it was held by Mookherji and Rankin, JJ., that the fact that a judgment was admitted in evidence in order to prove that there was a litigation which terminated in a certain way, did not make all the recitals in that judgment part of the evidence of the subsequent action. It is not necessary for me to deal with the numerous cases on the point; it is sufficient for me to say that I entirely agree with the view expressed by the learned authors of Woodroffe on Evidence that a judgment or decree is not admissible in evidence under S. 43 of the Evidence Act unless as a fact in issue or as a relevant fact under other sections of the Act. Thus if *A* has obtained a decree for the possession of land against *B*, and *C*, *B's* son, murders *A* in consequence, the existence of the judgment is relevant as showing motive for the crime. So again,

(1) [1881] 6 Cal. 171=6 C. L. R. 439 (F. B.).

(2) [1916] 20 C. W. N. 643=35 I. C. 298=23 C. L. J. 583.

(3) [1916] 20 C. W. N. 648=30 I. C. 821=22 C. L. J. 270.

(4) 1924 Cal. 523=28 C. W. N. 62.

in a suit for malicious prosecution, the judgment in the criminal proceeding is evidence to establish the fact of acquittal, the fact, namely, that the criminal proceedings terminated in favour of the plaintiff. Again a reference to the finding of a judgment may explain the character of the party's possession and the nature of the enjoyment had in the property in suit, and so the finding of a judgment may be referred to in all other cases where the record is matter of inducement or merely introductory to other evidence. Other instances may be cited where a judgment is admissible in evidence in a subsequent litigation; but it must be shown that the existence of the judgment is a fact in issue, or that it is relevant under the other sections of the Evidence Act. This has not been shown in this case; and I must hold that the judgment in Turant Lal's case is not relevant in this case.

The next circumstance upon which Mr. Hasan Imam relies is the institution of a suit by Tara Dutt and Sashi Sekhar, sons of Amarendra Singh plaintiff No. 2, in which they alleged that the transaction of 1876 was a *benami* transaction, that the property belonged to the joint family and that, being *babuana* property, it was inalienable. The evidence of Amarendra in this suit is that he knew nothing about that suit. The evidence is worthless, and I have no doubt whatever that the plaintiffs were well aware of that suit. But then the question arises, What weight should we attach to the incident? I have already stated that the Maharaja of Darbhanga sued upon the mortgage executed by the *bahuasin* and her husband and obtained an *ex parte* decree on the 3rd June 1897. The property was sold on the 21st May 1902. There was then an application for setting aside the sale under Ss. 311 and 244 of the Code of Civil Procedure. That application failed and the sale was confirmed. On the 23rd February 1906, a suit, being Suit No. 19 of 1906, was instituted by the present plaintiffs for confirmation of their possession. In that suit they alleged that the transaction of 1876 was a perfectly genuine one, and they set out various circumstances in support of their case that the sale of the 21st May 1902 did not affect their interest. They also applied for an injunction restraining the defendant from taking possession of the property until the determination of their suit. That application failed, and the plaintiffs thereupon presented an appeal to the Calcutta High Court against the order of the learned Subordinate Judge, dated the 30th June 1906, refusing to grant a temporary injunction. On the 15th August 1906, the High Court dismissed the appeal. Thereupon Tara Dutt and Sashi Sekhar filed a suit on the 4th of September 1902, in which they claimed that the property belonged to the joint family and that, being *babuana* property, it was inalienable. They also applied for an injunction restraining the defendant from taking possession of the property until determination of the suit. This application was dismissed on the 10th December 1906, and the defendant recovered possession of the property on the 14th December 1906.

In my opinion, no weight ought to attach to the circumstance connected with Suit No. 410 of 1906. It is obvious that the family was making frantic efforts to save the property. First, the plaintiffs filed a suit on the allegation that the property belonged to their mother and the sale did not affect their interest. They failed in inducing the Court to give them a temporary injunction restraining the Maharaja of Darbhanga from taking possession of the property. Thereupon they caused Tara Dutt and Sashi Sekhar to institute a suit on different allegations altogether with a view to induce the Court to issue an injunction. I am therefore not prepared to attach any weight to the admission made by the plaintiffs in Suit No. 410 of 1906. It may be mentioned that Suit No. 19 of 1906 and Suit No. 410 of 1906 were both withdrawn soon after the Maharaja of Darbhanga got possession of the property. Mr. Hasan Imam also relies upon the judgment in Suit No. 29 of 1900 between the *bahuasin* and the present defendant The Maharaja, in execution of a decree against Durga Dutt, had attached certain properties as being in the possession of Durga Dutt. The *bahuasin* preferred a claim to those properties alleging that at the date of the attachment those properties were in her possession and not in the possession of her husband. The Court rejected her claim, whereupon a suit was instituted by her for declaration of her title to the properties which were the subject

matter of her claim. Now it is important to remember that the property which is in dispute in this suit was not involved in the litigation of 1900; but a question arose as to the means at the disposal of the *bahuasin* to enable her to acquire those properties. The *bahuasin* alleged that at the time of her marriage her father-in-law made a gift to her of five gold *mohurs* and certain *kamat* lands in twelve *mauzas* and a *mauza* named Sonepatha. She also alleged that she was in possession of *mauza* Laheri, and the Court had to consider whether *mauza* Laheri in fact belonged to her. It is obvious that the question as to her title to *mauza* Laheri aroses very incidentally and was not a matter in issue in that case. The learned Judge in dealing with the case said as follows:

"The second source of plaintiff's income is said to be the *mauza* Laheri. This property is said to have been purchased by her in 1284 from her husband. But it appears that for the debts of her husband alone, amounting to one lakh and eighty-eight thousand rupees and odd, this property was mortgaged on the 15th December 1890, by a deed executed by the plaintiff and her husband in favour of defendant 1's predecessor-in-title. This is quite clear that because the plaintiff became the apparent owner by the execution in her favour of a deed of sale by her husband, the mortgage-deed was taken from her husband as well as from her. Of course, in the body of the deed, the plural number is used both in respect of the debt and the ownership of the property; but that is merely a matter of form. The list given in that deed clearly shows that the debts for which the mortgagee-deed was executed were of the husband alone. If the mortgaged property had really been sold to her by her husband, why should she mortgage her property for her husband's debt, or why should she allow her husband to allege himself as co-owner of the property? I make these observations simply with a view to show that the alleged second source of income is also a myth and a nonentity."

Any attempt to come to a conclusion on this point on the judgment in Suit No. 29 of 1900 (Exhibit F-5) would operate as a gross injustice in this case; but it is not open to me to criticise the judgment of the learned Subordinate Judge in that case. It is sufficient for me to state that for the reasons which I have already given this judgment is not admissible in evidence against the plaintiffs.

I think I have dealt with all the arguments bearing on this point; it is not necessary to deal with the numerous cases on the question of *benami*. These cases are quoted in the judgment of Mookherji, J., in *Promode Kumar* v. *Madan Mohan Shah* (5). I would respectfully appropriate the following passage appearing in that judgment as part of my judgment: "It is important to bear in mind in this class of cases that, as pointed out by Lord Phillimore in *Seth Maniklal* v. *Raja Bijoy Singh* (6), the decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. This recalls the earlier pronouncements to the same effect by Lord Westbury in *Sreman Chunder* v. *Gopaul Chunder* (7) and by Sir Lawrence Jenkins in *Minakumari* v. *Bijay Singh* (8). But we are not unmindful that, in the words of Lord Hobhouse in *Uman Prashad* v. *Gandharpa Singh* (9) and of Lord Shaw in *Muhammad Mahbub* v. *Bharatindu* (10) as benami transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely, however, solely on probabilities, as Lord Buckmaster observed in *Irshad Ali* v. *Kariman* (11). He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person who claims contrary to the tenor of a deed and alleges that the apparent is not the

(5) 1923 Cal. 228=36 C. L. J. 396=27 C. W. N. 305.
(6) [1921] 25 C. W. N. 409=62 I. C. 356=(1921) M. W. N. 80 (P. C.)
(7) [1866-67] 11 M. I. A. 28=7 W. R. 10=2 Sar. 215=1 Suther 651 (P. C.)
(8) [1917] 44 Cal. 662=44 I. A. 172=1 P. L. W. 425=5 L. W. 711=32 M. L. J. 425=21 C. W. N. 585=21 M. L. T. 344=15 A. L. J. 382=25 C. L. J. 508=40 I. C. 242=19 Bom. L. R. 424=(1917) M. W. N. 473 (P. C.)
(9) [1888] 15 Cal. 20=14 I. A. 127=5 Sar. 71 (P. C.)
(10) [1919] 23 C. W. N. 321=53 I. C. 54=(1919) M. W. N. 507 (P. C.)
(11) [1918] 28 C. L. J. 173=5 O. L. J. 197=20 Bom. L. R. 790=24 M. L. T. 86=(1918) M. W. N. 394=46 I. C. 217=22 C. W. N. 530=21 O. C. 36 (P. C.)

real state of things [*Azimut Ali* v. *Hurdwaree* (12), *Faez Buksh* v. *Fakeeroodeen* (13), *Suleiman* v. *Mehndi Begum* (14), *Nirmal* v. *Mahomed* (15) and *Moti Lal* v. *Kundan Lal* (16)]. The most important test to be applied in these cases is, as observed by Mr. Ameer Ali in *Nrityamoni* v. *Lakhan Chandra* (17), the source whence the consideration came. Sir George Farwell formulated the same test in different language, when he observed in *Bilas Koer* v. *Desraj* (18) that where it is asserted that an assignment in the name of one person is really for the benefit of another person, the principle applies that the trust of the legal estate results to the man who pays the purchase money. To the same effect is the decision of the Judicial Committee in *Parbati* v. *Baikuntha* (19), which recalls the earlier pronouncement by Lord Campbell in *Dhurm Das* v. *Shama Soondri* (20), and by Knight Bruce, L. J., in *Gopeekrist* v. *Gungapersaud* (21), Where, however, from the lapse of time direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. Sir Arthur Wilson emphasised this when he observed in *Dalib Singh* v. *Chaudhrian Nawai Kunwar* (22), that if evidence on neither side is wholly convincing as to the fundamental criterion, namely, the source of the purchase money, if the evidence given and withheld is open to adverse criticism, the Court must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property [see *Upendra* v. *Bhupendra* (23)]. We must further look to the substance of the transaction as evidenced in the deeds of the parties, not permitting the real question to be obscured by what Knight Bruce, L. J., calls, in *Hunooman* v. *Babooee* (24), the form of expression, the literal sense, nor by what Lord Macnaghten describes in *Lal Achal Ram* v. *Raja Karim* (25), as exhibitions of the art of the conveyancer in the shape of recitals of obviously untrue statements introduced to impart some additional solemnity to an instrument." Applying these tests to the present case, I have no doubt whatever that the defendant has failed to establish that the transaction of 1876 was a fictitious transaction. The actual oral evidence produced is not convincing, and there is no option but to found our conclusion mainly on the surrounding circumstances. I have no doubt whatever that the *bahuasin* has been in possession of the property ever since the *heba bil ewaz* of 1876. I can see no motive which would lead Durga Dutt to put the property in the name of his wife; and even if I were to hold that no consideration was in fact paid by the *bahuasin*, my conclusion on this point would be the same. In *Ismail Mussajee Mookerdam* v. *Hafiz Boo* (26) the defendant relied upon a document which, on the face of it, purported to be a deed of sale in her favour. The plaintiff contended that the transaction was a

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(12) [1868-69] 13 M. I. A. 395=14 W. R. 14=2 Suther. 343 (P. C.).
(13) [1869-70] 14 M. I. A. 234=9 B. L. R. 456=2 Suther. 490=2 Sar. 733 (P. C.).
(14) [1898] 25 Cal. 473=25 I. A. 15=2 C. W. N. 186=7 Sar. 254 (P. C.)
(15) [1899] 26 Cal. 11=25 I. A. 225=7 Sar. 383 (P. C.),
(16) [1912] 32 M. L. J. 468=15 A. L. J. 329=1 Pat. L. W. 490=25 C. L. J. 581=19 Bom. L. R. 471=21 C. W. N. 929=22 M. L. T. 10=39 I. C. 964=(1917) M. W. N. 464=9 L. W. 62 (P. C.).
(17) [1916] 43 Cal. 660=20 C. W. N. 522=30 M. L. J. 529=(1916) 1 M. W. N. 332=3 L. W. 471=18 Bom. L. R. 418=33 I. C. 452=24 C. L. J. 1=20 M. L. T. 10 (P. C.)
(18) [1915] 37 All. 557=42 I. A. 202=19 C. W. N. 1207=29 M. L. J. 335=2 L. W. 830=18 M. L. T. 248=13 A. L. J. 991=17 Bom. L. R. 1006=22 C. L. J. 516=30 I. C. 299=(1915) M. W. N. 757 (P. C.),
(19) [1914] 18 C. W. N. 428=16 Bom. L. R. 101=12 A. L. J. 79=19 C. L. J. 129=15 M. L. T. 66=(1914) M. W. N. 42=22 I. C. 51=26 M. L. J. 248 (P. C.),
(20) [1841-46] 3 M. I. A. 229=6 W. R. 43=1 Suther 147=1 Sar 271 (P. C.).
(21) [1854-57] 6 M. I. A. 53=4 W. R. 46=2 Suther. 13=1 Sar 493 (P. C.).
(22) [1908] 30 All. 258=35 I. A. 104=12 C. W. N. 609=10 Bom. L. R. 600=14 Bur. L. R. 151=4 M. L. T. 141 (P. C.).
(23) [1916] 21 C. W. N. 280=32 I. C. 267.
(24) [1854-57] 6 M. I. A. 393=18 W. R. 81 (Footnote)=2 Suther. 29=1 Sar 552 (P. C.).
(25) [1905] 27 All. 271=32 I. A. 113=9 C. W. N. 477=8 O. C. 155=15 M. L. J. 197=3 Sar. 772 (P. C.).
(26) [1906] 33 Cal. 773=33 I. A. 86=10 C. W. N. 570=3 A. L. J. 353=3 C. L. J. 481=8 Bom. L. R. 379=16 M. L. J. 166=1 M. L. T. 137 (P. C.).

benami one and that it did not operate to confer any title on the defendant. It was found as a fact that no consideration was in fact paid by the defendant; but notwithstanding this, the Judicial Committee came to the conclusion that the transaction was one of gift. The decision destroys one part of the argument of Mr. Hasan Imam where he contended that if we found on the evidence that no consideration was paid, we must hold that the transaction was a fictitious one, there being no reason for putting a false recital in the document if the document was intended to have operation. I have anxiously considered all the evidence in this case and I entirely agree with the conclusion at which the learned District Judge has arrived on this point. I hold that the transaction of the 17th April 1876 was a genuine transaction and operated as a transfer of the property to the *bahuasin*.

Before coming to the points which have been decided by the learned District Judge in favour of the respondent it will be convenient to dispose of a short question which was answered by the learned District Judge in favour of the appellants. Mr. Hasan Imam contends that section 244 of the Code of 1882 operates as a bar to this suit. In order to deal with the question it is necessary to remember that the sale took place on the 21st May 1902, and that the *bahuasin* and her husband applied for setting aside the sale on the 10th June 1902. The *bahuasin* died in February 1904. Thereupon the present plaintiffs were subsituted in the record of the application in the place of the *bahuasin* on the application of Durga Dutt. The substitution was effected on the 31st May 1904, and the application was dismissed on the 2nd June 1904. The contention of Mr. Hasan Imam is that the plaintiffs on being substituted, should have raised the question whether the sale of the property affected their interests; and Mr, Hasan Imam relied upon various cases which are all (with one exception) cases of money decrees.

Now, in my opinion, it is impossible to regard the application of the 10th June 1902, as an application under section 244 of the Code. No doubt the applicants described the application as one under S. 311 and S. 244 of the Code; but it is a not very material how an appllication is headed if we know what questions are substantially raised by the application. It must be remembered that an order under S. 244 of the Code of 1882 operated as a decree, whereas an order under S. 311 did not operate as a decree. It used to be the constant endeavour of the litigants to bring their applications for setting aside a sale within the terms of S. 244 in order to get a second appeal to the High Court. It is for this reason that applications for setting aside a sale used to be invariably made both under Ss. 311 and 244, just as they are now made under Order XXI, rule 90, and S. 47 of the present Code. It may be conceded that an application for setting aside a sale could be brought within the terms of S. 244 if there were sufficient allegations to support such a case. For instance, an application for setting aside a sale on the ground of fraud could be made under the provisions of S. 244 of the Code. It is therefore necessary to examine the allegations made by Durga Dutt and the *bahuasin* in their application, dated the 10th June 1902, in order to determine whether their application was one under S. 311 or one under S. 311 and S. 244 of the Code. The application is Exhibit M-3. Now it will he noticed that the allegations are all allegations necessary to enable a party to succeed in an application under S. 311 of the Code. There is not a single allegation made in the petition which would enable the Court to try the case under S. 244 of the Code I am of opinion therefore, that the application of the 10th June 1902, though described as one under S. 311 and S. 244 of the Code of 1882, could only be investigated under the provisions of S. 311 of the Code. That being so, S. 244 cannot operate as a bar to the present suit.

But there is a more serious objection to the argument. It will be remembered that the decree was a mortgage decree, and there is abundant authority for the view that where a decree directs the sale of specific property the Court executing the decree has no power to go behind the decree and say. "I will not sell the property because the interest of the judgment debtor has come to an end." The exact point has been decided in cases far too numerous to mention. In *Liladhar* v. *Chaturbhuj* (27) there was a decree for sale of certain mortgaged properties

(27) [1899] 21 All. 277=(1899) A. W. N. 64.

against Mussammat Jhuno. Mussammat Jhuno died on the 29th October 1895, and on the 30th June 1896 an application was made for execution of the decree which was dated the 28th June. The plaintiffs who were entitled on their case to succeed to the property on the death of Mussammat Jhuno were made parties to the execution proceedings as the legal representatives of Mussammat Jhuno. They raised several objections in regard to the application for execution, the first of which was to the effect that the decree was a decree for the sale of the life interest of Mussammat Jhuno and that the estate having determined on her death the decree was no longer capable of execution. They also contended that Mussammat Jhuno was not competent to effect a mortgage of the property to enure beyond her life-time, and that there was no justifying necessity for such a mortgage. The Court executing the decree overruled the objections and directed the sale of the mortgaged properties. Thereupon a suit was instituted by the plaintiffs and they sought a declaration that the decree of the 28th June, 1893, which was obtained by the defendants against Mussammat Jhuno became void and inoperative at her death and that the property mentioned in the plaint which was in the possession of the plaintiffs and which the defendants caused to be advertised for sale was not liable to be sold in the events which had happened. It was contended on behalf of the defendants that S. 244 operated as a bar to the suit. The learned Judges deciding the case conceded that if the matter in controversy between the parties in the suit could be decided under S. 244 then there could be no doubt that the suit was not maintainable. But they came to the conclusion that the Court executing the decree could not consider the question of the validity of the decree. In delivering the judgment, the learned Judges said as follows, "A Court executing a decree is bound to give effect to it as it finds it and it is not in the province of that Court to consider whether the decree was or was not rightly passed. The decree in this case was a decree for the sale of the property; the plaintiffs, who were parties to the execution proceedings in the character of legal representatives of Mussammat Jhuno Kunwar, could only raise objections relating to the execution, discharge, or satisfaction of the decree, or to the stay of execution thereof, starting with the assumption that the decree was a valid one. That a judgment-debtor cannot dispute the validity of a decree, is a proposition for which we have abundant authority. We may refer to the recent case of *Maluji* v. *Fakir Chand* (28). It is clear that a person claiming title through the original judgment-debtor cannot dispute the validity of the decree. and where a decree directs the sale of particular property, a person who does not claim through the mortgagor cannot in execution contend that the mortgagor was not competent to make the mortgage. and that the decree was one which ought not to have been passed. Such questions would, in our opinion, be outside the province of the Court executing the decree; for instance, in the present case, if we assume that the present plaintiffs could properly raise the objection upon which they mainly rely, the Court executing the decree would have to determine, after taking evidence, whether the mortgage was effected by Jhuno Kunwar, that is, whether the mortgage bond was executed by her, whether there was consideration for the mortgage, and whether there was valid necessity for it. Such an inquiry is certainly not contemplated by S. 244 of the Code of Civil Procedure." With reference to the cases which were cited before the learned Judges relating to decrees for money where there was no direction in the decree for sale of specific property, the learned Judges said as follows "The case of a decree for money in which after the death of the debtor, property is attached as the assets of the debtor, and in which the legal representative of the deceased debtor objects to the attachment on the ground that the property attached is no part of the assets of the deceased debtor, is different from the case of a decree which orders sale of specific property; a case of the former class is contemplated by the ruling of the Full Bench in *Seth Chand Mal* v. *Durga Dei* (29)" and then the learned Judges proceeded to say as follows, "But when a decree specifically orders the sale of particular property no question of assets can arise, and the Court executing the decree is bound to execute it as it stands. Any question relating to the validity of that

(28) [1898] 22 Bom. 225.
(29) [1890] 12 All. 313=(1890) A. W. N. 137 (F. B.)

decree must, in our opinion, be decided in a separate suit." This is the view which has been accepted by both the Madras High Court and by the Calcutta High Court [see *Kumaretta Servaigaran* v. *Sabapathy Chettiar* (30) and *Khetrapal Singh Roy* v. *Shyama Prosad Barman* (31)]. Mr. Hasan Imam relies upon *Rajbansi Roy* v. *Mahabir Roy* (32) where the learned Judges appear to have held that when a judgment-debtor does not challenge the validity of a mortgage decree but contends that in execution thereof certain property should not be attached and sold in consequence of circumstances arising subsequent to the decree, such contention ought to be dealt with under S. 244 of the Code, and not by a separate suit. With all respect, I am unable to agree with that decision and prefer to follow the decision of the Allahabad High Court in the case to which I have already referred. I have no doubt whatever that the decision of the District Judge on this point is right, and I must hold that S. 244 of the Code does not operate as a bar to this suit.

I now come to the real point in controversy between the parties, namely, What was the effect of the transaction of 1876 on the power of the *bahuasin* to mortgage the property? The plaintiffs contend that the gift in favour of the *bahuasin* was a *saudyaica* gift and the the *bahuasin* by virtue of that gift took a heritable but inalienable interest in the property and that accordingly it was not in the power of the *bahuasin* to enter into a mortgage transaction with reference to the property so as to bind the interest of the plaintiffs who claim through the *bahuasin* and not through their father. Mr. Hasan Imam on behalf of the defendant contends, first, that the transaction of 1876 was a transaction of sale and not a transaction of gift and that accordingly the *bahuasin* took an absolute interest in the property; that if the transaction was one of gift the *bahuasin* took an absolute interest in the property under the Hindu Law and that in any event the consent of her husband as evidenced by the fact that he joined in the mortgage validated the mortgage if it were otherwise invalid; and that, thirdly whatever may be the position under the Hindu law, the *bahuasin* took an absolute heritable and transferable interest under the terms of the *heba-bil-ewaz*. The questions raised in the arguments before us are not easy of solution, and it is necessary to proceed with care.

The first question which must be considered is whether the transaction of 1876 was one of sale or one of gift. The document is described as a *heba-bil-ewaz*; and Mr. Hasan Imam contends that the parties having elected to use a term which is well known in Muhammadan Law must in this instance be deemed to be governed by the Muhammadan Law in regard to the effect of the transaction. As authorities in support of his proposition Mr. Hasan Imam relied upon *Abdul Aziz Khan* v. *Appayasami Naicker* (33) and *Ram Narain Singh* v. *Chota Nagpur Banking Association* (34). These cases establish that the rights of the parties to a contract are to be judged of by that law by which they may justly be presumed to have bound themselves. In the case of *Abdul Aziz Khan* v. *Appayasami Naicker* (33), the question arose whether a purchaser at an execution sale of an impartible zamindari could be allowed to put forward the case that he had purchased an absolute interest in it. In order to understand the decision it is well to point out that it was understood in India up to the decision of the Judicial Committee in *Sartaz Kuari* v. *Deoraj Kuari* (35) that a holder of an impartible zamindari had only a limited interest and that, except for special justifiable causes, he had no power of alienation beyond his life-time. While this was the view of the law, the plaintiffs purchased the right, title and interest of the holder of an impartible zamindari at a sale held in execution of a decree against such holder. Subsequently this interpretation of the law was reversed, as I have said, by the Judicial Committee in *Sartaj Kuari's* case (35) and in the Pithapur case *Rama Krishna Rao* v. *Court of Wards* (36) which decided that the holder of an impartible estate had an absolute and alienable interest in it unless a custom against alienation was proved. The plain-

(30) [1907] 30 Mad. 2[illegible]=16 M. L. J. 545.
(31) [1905] 32 Cal. 265.
(32) [1909] 9 C. L. J. 358=4 I. C. 121.
(33) [1904] 27 Mad. 131=31 I. A. 1=8 C. W. N. 186=6 Bom. L. R. 7=8 Sar. 568 (P.C.)
(34) [1916] 43 Cal. 332=36 I. C. 321.
(35) [1888] 10 All. 272 = 15 I. A. 51 = 5 Sar. 139 (P. C.)
(36) [1900] 22 Mad. 383=26 I. A. 83=1 Bom. L. R. 217 = 3 C. W. N. 415 = 9 M. L. J. Sup. 1=7 Sar. 481 (P. C.)

tiff who was the purchaser of the right, title and interest of the holder of the impartible estate brought a suit against the successor by survivorship for possession of the subject of sale on the ground that the plaintiff had purchased an absolute interest in it. It was held that the reversal of the previously accepted interpretation of the law did not displace its application to the contract contained in the certificate of sale of 1876, the parties to which were bound by the law as then understood and that only the life interest of the then holder passed by the sale. In *Ram Narain Singh* v. *Chota Nagpur Banking Association* (34) the question arose as to the meaning of the expression istemrari mukarrari in a lease granted by the Raja of Ramgarh. The learned Judges pointed out that at the time when the leases were granted the idea was universally held that the holder of an impartible zamindari like the Ramgarh raj could not encumber the corpus of the estate so as to bind the co-parceners except for justifiable special causes, and that it was not till the decision in *Sartaj Kuari's* case (35) that the contrary view was authoritatively formulated. Mookherji, J., referred to the words of Willes, J., in *Lloyd* v. *Guibert* (37) and said that the rights of the parties to a contract are to be judged of by that law by which they may justly be presumed to have bound themselves. But it will be noticed that the law by which they were held to be bound was their personal law, a law which was applicable to them, and that there was no difficulty in applying that law to them although the previously accepted interpretation of that personal law was subsequently reversed by an authoritative decision of the Judicial Committee. No authority has been cited to us to the effect that a Hindu may, by adopting a term well known to Muhammadan Law, make himself bound by the Muhammadan Law. Indeed it is impossible, in my opinion, to maintain that view. It is not necessary to discuss the various cases which have been cited to us by Mr. Hasan Imam to the effect that a *heba-bil-ewaz* is looked upon in Muhammadan Law as a sale: but I may usefully refer to the following observations of Mahmood, J., in *Rahim Baksh* v. *Muhammad Hasan* (38), "*Heba-bil-ewaz* is a transaction made up of mutual or reciprocal gift between two persons each of whom is alternately the donor of one gift and the donee of the other."

After all it is not very material to consider how the parties describe a transaction, if we know what the transaction is; for it is the substance of the transaction, and not the form of it, to which we must have regard. I must accordingly consider the terms of the document itself to see whether the transaction was one of sale or one of gift. In considering the terms it is only necessary to remember, as Mr. Hasan Imam has admitted before us, that the income of the property at the time of the transaction in question was anything between Rs. 30,000 and Rs. 40,000 per year. The document itself has been printed, but I have adopted the translation of Mr. Hasan Imam which has been accepted by the plaintiffs. The document runs as follows:

"The decree of Raj Banwari Lal Sahu against me for Rs. 41,532-6-8/16 cr./16 ms. is under execution in the Court of the District Judge at Muzaffarpur and the shares of me, the executant in taluka Laheri, pargana Jabdi, T. N. 1522 and in mauza Pandual, pargana Hati, T. N. 54167 have as per inventory filed by the said decree-holder, been advertised for sale on the 17th April 1876. Although I, the executant, tried to procure money from creditors, etc, for payment of the decretal amount to the said decree-holder, I could not get it and I see no means to safeguard my milkiat properties from sale as mentioned in the inventory. As the sale will entail loss of the said milkiat properties on sale, belonging to me, the executant, my share of 7/8 3/4 ga. situate in taluka Laheri asli with dakhli, pargana Jabdi, T. N. 1522 appertaining to Registration Office, District Darbhanga, and sub-district Madhubani, and thana Lockhe, with trees fruit-bearing and non-fruit-bearing, and ahar, pokhar and reservoir and tank and kachcha and pakka, wells, and sair, and salt sair and houses occupied by tenants, and all my zamindari rights which up to now have been in my possession without the co-partnership of anyone, to my wife Mt. Anuragin Bahuasin, having taken Rs. 41,532-6-8/16 cr./16 ms. in each, I have made, of my free-will and accord, *heba-bil-ewaz*

(37) [1865] 1 L. R. Q. B. 115=6 B & S. 100=35 L. J Q. B. 74=13 L. T. 602.
(38) [1888] 11 All. 1=(1888) A. W. N. 265.

and having with the said amount paid up the amount of the decree of the aforesaid decree-holder, and got the property released from sale, have put the aforesaid Mussmmat in possession of the subject of the *heba*. The aforesaid Mussammat should by becoming possessed of the subject of the *heba* spend the produce of the property with sons generation after generation. (*ha farzandan naslan bad naslan*). I, the declarant, or my heirs and representatives (*quam moqaimain*), shall have no right or concern in demanding the subject of the *heba* or the consideration money from the aforesaid Mussammat or her heirs and representatives. Should I, the executant, my heirs and representatives, make any claim or put forward any demand in respect of the gift properties or the consideration thereof, the same will be deemed null and void. I have, therefore, given, in writing, these few words in the shape of a *heba-bil-ewaz* so that it may be of use when required."

No doubt the payment of a consideration of Rs. 41,532 is mentioned ; but the question is whether the transaction was substantially one of gift or one of sale. If Mahmood, J., is right in his view that a *heba-bil-ewaz* is a transaction made up of mutual or reciprocal gifts between two persons, then it would appear that there was a gift by the bahuasin of Rs. 41,532 to her husband and a gift of taluka Laheri by her husband to her. The income of the property was anything between Rs. 30,000 and Rs. 40,000 a year ; and, in my opinion, it is impossible to regard the transaction as a sale when all that was paid by the *bahuasin* was Rs. 41,532. I have no difficuty whatever in understanding the transaction. Durga Dutt was in need of Rs. 41,532 to save the property from sale. He had tried to procure the money from the market and had failed. The *bahuasin* had Rs. 41,532. In order to save the property she handed it over to her husband. The husband in return made a gift of the property to his wife. In my opinion the transaction was substantially one of gift,although Durga Dutt received Rs. 41,532 as a gift from his wife.

Mr. Hasan Imam has drawn our attention to certain statements alleged to have been made by the *bahuasin*, suggesting an inference that the transaction in her favour was one of sale. In Suit No. 6 of 1881, which was the suit instituted by her against Turant Lal Chowdhury, she is alleged to have put forward the claim that she was the purchaser of the property in question. The plaint filed by her in that case is however not in the record. But Mr. Hasan Imam relies upon the recitals in the judgment itself; but as I have said before, the recitals in the judgment are not admissible in evidence against the plaintiffs in this suit. The next admission upon which Mr. Hasan Imam relies is that alleged to have been made by her in Suit No. 29 of 1900. That was a suit by her as against the Maharaja of Darbhanga under the provisions of S. 283 of the Code of 1882 to establish her right to certain property which did not include the property now in suit. The Maharaja had obtained a decree against Babu Durga Dutt and in execution of that decree had attached certain properties alleged to belong to him. The *bahuasin* laid a claim to those properties and was defeated in the claim case. Thereupon a title suit was instituted by her. Neither the plaint filed in that suit nor her deposition is in the record. It appears that the question arose as to the source of the *bahuasin's* income which enabled her to acquire the properties in dispute in that suit; and in dealing with this point the learned Subordinate Judge says as follows:

"The second source of plaintiff's income is said to be the *mauza* Laheri. This property is said to have been purchased by her in 1284 from her husband."

As I have said before the recital in the judgment is not admissible in evidence against the plaintiffs, and assuming that the admission as alleged was made by the *bahuasin*, I cannot attach any importance to it, since, on the construction of the document itself, we are in a position to say what the transaction was. I come to the conclusion that the transaction of 1876 in favour of the *bahuasin* was one of gift.

The next question is, What is the effect of that gift ? The plaintiffs contend that by virtue of the *Mithila* law, by which the parties are admittedly governed, the *bahuasin* took a heritable but inalienable interest in the property and that the terms of the gift did not confer on her a larger interest. I will first consider the case under the Hindu law. The

question must be determined in accordance with the doctrine to be found in the *Vivada Chintamani*. Bachaspati Misra, the author of *Vivada Chintamani*, adopts the enumeration of women's peculiar property which is to be found in *Manu* and *Katyayana*, but says that the "six kinds of property" which is to found in *Manu* "means that there cannot be a less number." In fact Bachaspati Misra gives other kinds of *stridhan* which are not to be found in *Manu*. It is not necessary for our present purpose to go through Bachaspati Misra's list, which appears to be exhaustive. The plaintiffs contend that the gift in this case is what is known as a gift subsequent and constituted the *saudayica* of the *bahuasin*. The original text upon which the claim is founded is that of *Vishnu* which is referred to by Bachaspati Misra and which runs as follows in the translation of *Vivada Chintamani* by Mr. Tagore :

The property of a female is what her father, mother, son, or brother has given her ; what she recieved before the nuptial fire ; or at the bridal procession; or when her husband took a second wife ; what her husband agrees should be regarded as her perquisites ; what she received from his or her kinsmen as a gift subseqent to the marriage."

The gloss of Bachaspati Misra on the text of *Vishnu* as translated by Mr. Tagore is as follows :

"What is received by a woman after marriage from the kinsmen of her lord or those of her parents is called a gift subsequent."—(Mr. Tagore's edition, page 259).

Mr. Hasan Imam contends that a gift from a husband is not within the text, for the husband cannot be referred to as "the kinsman of her lord"; but there is no doubt whatever that the translation of Mr. Tagore is not very accurate. The words used in the original are *bhartri kul* भर्तृ कुल which mean the *kul* or the family of her husband and includes the husband. The correct translation of the passage is as follows:

"That which is received by a woman from the family of her husband subsequent to marraige is called *anvadheya* or gift subsequent ; so also that which is similarly received from the family of her father."

A reference to *Vivada Ratnaker*, Chapter 12, verse 10, which is also of authority in *Mithila*, will show that this translation is correct. The passage is translated as follows by Mr. Shastri:

"Whatever is received by a woman after marriage from the husband's family or from her own family is called gift subsequent.'

I am of opinion, therefore, that the gift in the present case, being a gift by the husband to the wife subsequent to marriage, must be regarded as the *stridhan* of the wife. According to Bachaspati (*see* Mr. Tagore's edition, page 259):

"*Saudayica* is the name by which the different kinds of the peculiar property of women are known."

That being so, the gift in the present case was a *saudayica* gift of the husband to the wife.

This was not seriously disputed before us ; but it was contended that such a gift is niether heritable nor inalienable. That such a gift is heritable admits of no doubt whatever. Bachaspati Misra refers to the text of *Manu* on this point which is as follows :

"On the death of the mother let all the uterine brothers (and if unmarried) the uterine sisters divide the maternal estate in equal shares. It is fit even to the daughters of those daughters something should be given from the estate of their maternal grandmother on the ground of natural affection."

The words "uterine brothers" obviously do not mean the brothers of the donee, as is shown by the text of *Brihaspati* to which Bachaspati Misra next refers in these words:

"*Brihaspati* confirms this," namely, the text of *Manu*, by declaring that "a woman's property goes to her children, and the daughter is a sharer with them, provided she be unaffirmed ; but if she be married, she shall not receive the maternal wealth. Something should be given to her that her feeling may not be wounded."

Bachaspati Misra makes the position perfectly clear by interpreting the words "to her children" in the text of *Brihaspati* as meaning "to her son." The other text to which he refers on this point is that of *Gautama* which lays down that a woman's separate property goes to her daughters unmarried and unprovided for.

In this case at the date of the transaction, namely, the 17th April, 1876, the *bahuasin* had a daughter Aparajita and five sons who are the plaintiffs in this action. Aparajita was married in 1869 and was cited as defendant third party in the action. It is nobody's case that Aparajita was unmarried and unprovided for at the time when the succession opened out. That being so, the plaintiffs, as the sons of the *bahuasin*, were entitled to succeed to the property after her death as her heirs and not as the heirs of her husband.

I now come to the question whether, in her hands, the property was inalienable. I propose to consider the point first on the Hindu Law itself apart from the terms of the *heba-bil-ewaz*. Bachaspati Misra refers to the following text of *Narada* :

"Property given to her by her husband through pure affection, she may enjoy at her pleasure after his death or give away, with the exception of lands or houses". and draws the following conclusion from that text :

"Consequently a woman can dispose of moveable property which has been given to her by her husband, *but she can never dispose of immovable property*. The same rule holds good in the case of saudayica or the gifts of affectionate kindred" [see Tagore's edition, page 261].

It would appear from this passage that it was the view of Bachaspati Misra, who is of paramount authority in Mithila, that a woman can under no circumstances dispose of immovable property given to her by her husband. Bachaspati Misra then refers to the text of Katayayana which provides that a woman, on the death of her husband, may enjoy his estate according to her pleasure ; but that in his life-time she should carefully preserve it. He concedes that the text admits of two meanings :

"The one is that, on the death of the husband his property devolves on his wife and becomes her own in default of other heirs ; the other is that the property she enjoys with the consent of her husband in the life-time is to be regarded as her peculiar property."

It will be noticed that the text of Katyayana is open to two interpretations, and this has given rise to a difference of opinion amongst the commentators. The word used in Katyayana is 'daya.' Now the dictionary meaning of 'daya' is both 'heritages' and 'gift' and this is the sense in which Bachaspati Misra understands the term 'daya' as used in Katyayana. On the other hand, the author of Smriti Chandrika, which is of paramount authority in Madras, interprets the term 'daya' as meaning a 'donation'.

According to Bachaspati Misra the words, "let a woman on the death of her husband enjoy her husband's property at her discretion" refer to a heritage, that is to say, to the property which devolves on the widow in default of other heirs, and the words, "while he lives she should carefully preserve it," refer to a donation, that is to say, to what is received by the wife in the life-time of her husband ; and the conclusion at which Bachaspati Misra arrives is as follows :

"As a woman cannot make a present of or at pleasure dispose of immovable property given to her by her husband in his life-time, so she cannot dispose of any immovable property which she inherits on his death."

and he says that the same opinion is maintained in Ratnakara and the Prakashakara which are of authority in Mithila. In my opinion, a reference to the scheme set cut by Bachaspati Misra makes it abundantly clear that a wife receiving a gift from her husband is incapable of alienating it except under circumstances which would enable a widow taking the property of her husband by inheritance to alienate it. He is at some pains to show that a wife taking a gift from her husband is exactly in the same position as a widow succeeding to the property of her husband by inheritance. If that be so, it follows that in the absence of legal necessity or the consent of those persons who are entitled to succeed to the property on her death, there is no power of alienation in a woman taking a property by gift from her husband.

The next question is whether the consent of her husband has the effect of validating the transaction, and, if so, whether there was "consent" in this case, within the meaning of that term as used in the Hindu texts. It is contended on behalf of the plaintiffs that Bachaspati Misra is perfectly clear on this point and reference is made to the following passage

in Vivada Chintamani as translated by Mr. Setlur :

"Just as in the case of immovable property given by the husband the widow has no power of gift, etc., even with the permission of the husband, so also in the case of immovable property of the husband which is descended to the widow. The Prakashakara and the Ratnakara are to the same effect" (Part II, page 257).

If Mr. Setlur's translation be correct, then the point is concluded by the authority of Bachaspati Misra; but the original passage in *Vivada Chintamani* has been translated by Mr. Tagore, by Mr. Ghose and by Golap Chandra Sarkar. The translation of Mr. Tagore is as follows :

"As a woman cannot make a present of or at pleasure dispose of immovable property, given to her by her husband in his life-time, so she cannot dispose of any immovable property which she inherits on his death. The same opinion is maintained in the Ratnakara and the Prakashakara"—(Mr. Tagore's translation, page 263).

Mr. Ghose adopts the translation of Mr. Tagore. Mr. Shastri translates the text as follows :

"Just as in immovable property given by the husband there is incompetency of women in making gift and the like by reason of this text, so also in the husband's immovable property devolving by inheritance on the wife".

The text referred to in Shastri is the text of Katyayana referred to above.

It would appear then that Mr. Setlur stands alone in his translation that there is prohibition on the wife to dispose of immovable property taken by her under a gift from her husband even with the consent of the husband. The critical words in the original are *'etat bachanat'*. It is contended on behalf of the plaintiffs that there are two readings of this passage and that in one of these readings the word *'etat'* is omitted. The contention is that if the word *'etat'* be omitted, the word *'bachanat'* is capable of being rendered as "by the command or order," and the disputed passage is capable of being rendered as follows :

As by virtue of the order or permission (of the husband) a woman cannot make a present of or at pleasure dispose of immovable property, given to her by her husband in his life-time, so she cannot dispose of any immovable property which she inherits on his death,"

but that if the word *'etat'* be taken into consideration, the passage would mean that as by virtue of the text a woman cannot make a present of, etc. It is contended that the word 'bachanat' may mean either a text or order, command, permission, etc., but it appears that in the text as quoted in Shastri the word *'etat'* is omitted and still he renders the word 'bachanat' as text.

In view of the authority of Tagore and Shastri, I am unable to come to the conclusion that there is a direct prohibition in *Vivada Chintamani* on the power of a woman to deal with immovable property even with the consent of her husband.

But I am of opinion that Mr. Setlur has rendered the spirit of Bachaspati Misra. The whole idea running through the mind of Bachaspati Misra is that the property taken by a woman by a gift from her husband must be protected during her life-time and that she is in the same position in regard to that property as a widow taking the property of her husband by inheritance after his death. Now a widow can alienate such property only for legal necessity or with the consent of those who are entitled to succeed to the property on her death. So also it would seem that in the view of Bachaspati Misra, a woman taking the property by gift from her husband can only alienate the property in case of necessity or with the consent of those who are entitled to succeed to the property on her death.

It has been urged before us that if there is no express text on this point in *Vivada Chintamani* we must decide the point on the interpretation of the texts of *Mitakshara* with such assistance as may be afforded by other commentaries (though not recognised as authorities in *Mithila*) and by modern text books. It is conceded that there is no express text on this point in the *Mitakshara* ; but it is contended that both in the *Mayukha* and *Smriti Chandrika* it is expressly provided that the prohibition on the right of a woman to alienate property taken by her as a gift from her husband is not absolute, but that she may alienate such property with the consent of her husband ; and a decision of the Bombay High Court

in *Bhau Bin Abaji* v. *Raghunath Krishna* (39), has been cited before us :

I will consider the case first under the *Mitakshara* ; for the *Mitakshara* is of authority in *Mithila* except in regard to those matters where there is a difference of opinion between *Vignenasvara* and the *Mithila* commentators. Now it is conceded that there is no text in the *Mitakshara* dealing with the question whether a woman taking a property by gift from her husband can alienate such property with the consent of her husband.

But Mitra Misra, who is of very high authority in the Benares School is of opinion that :

" in the disposal of women's property. females have not independence without the permission of their husbands" (see Sircar's edition of Viramitrodya, page 224).

At first sight the text of Mitra Misra would appear to be conclusive in this case. but on further investigation it will be noticed that the opinion of Mitra Misra is based on a text of *Manu* which has been interpreted in a different sense in the *Mithila* school. The text of *Manu* (Chapter 9, upon which reliance is placed in all the schools, verse 199 has been translated as follows inthe Sacred Books of the East :

" Women should never make a hoard from (the property of) their families which is common to many, nor from their own (husband's particular) property without permission' . (Volume 25, page 372).

It is obvious that there is wide scope for different interpretations, since the critical words "husband's particular" are missing in the text, and are left to be inferred from the context. Now Mitra Misra (and, as I shall presently show, the authors of Smriti Chandrika and Mayukha) declined to read these words in the text, with the result that he rendered the text as follows :

" Women shall not make any disbursement out of family property which is common to many. or even out of their own property, without the permission of their husbands."

The conclusion at which Mitra Misra arrived followed directly from the text of *Manu* as he read it, which he accepted as of undoubted authority. Now this text of *Manu* is not referred to in *Vivada Chintamani* ; but Chandreswar, who is of equal authority in *Mithila*, refers to it only to show that he has read the text differently. The passage occurs in chapter 7, paragraph 2, and is rendered as follows by Sircar :

"Manu says, 'woman shall not make abstraction from family (property) common to many, nor even from her husband's own property, without permission'."

And then follows the commentary of Chandreswar in these words :

"Here by the word 'family' is intended family property by reason of contextual association : hence, out of joint property, 'abstractions', *i. e.*, secret appropriation of property, should not be made by women without the permission of the owners. Likewise 'from even husband's own property', *i. e.*, from husband's property, held not in common with other members of the family, secret appropriation should not be made, without the permission of the owner of the property. This is the meaning."

It is obvious that there is a difference, and a serious difference, between Mitra Misra and Chandreswar on the critical text of Manu, and that the view of Mitra Misra, based as it is on his interpretation of the text of Manu, can be of no authority in Mithila.

The view of Mitra Misra as to the text was shared by Nilkantha, the author of the Mayukha. In the Mayukha (chapter 4, S. 10, page 93 of Mr. Mandlik's edition) the text of Manu is rendered as follows :

"Hence, says Manu (Chapter 9, verse 199): 'A woman should never make any expenditure out of the family (property) belonging to several or even (out of) her own wealth without the assent of her husband'."

This passage is prominently referred to in the judgment of Jenkins, C. J., in *Bhau Bin Abaji Gurav* v. *Raghunath Krishna Gurav* (39), in support of the proposition that a woman's power of disposal over her stridhan is during coverture subject to her husband's consent.

The author of the Smriti Chandrika also adopts the interpretation placed upon the text of Manu by Mitra Misra and Nilkantha. That text is rendered as follows in Smriti Chandrika :

"Manu therefore says : 'Women should never make expenditure from the wealth of the family common to many, inclusive of themselves, or even from their sepa-

(39) [1905] 30 Bom. 229=7 Bom. L. R. 936.

rate property without the permission of their respective lords."

And the comment of the author on the text is as follows :

"The meaning is that women who are naturally wanting in independence cannot of their own choice, make disbursements. use, or the like, of the property belonging in common to themselves and their husbands, or of property belonging to them exclusively." (Chapter 9, Ss. 14 and 15, Setlur's Collection of Hindu Law Books on Inheritance, Part 1, page 259.)

Now I quite agree that, in dealing with this point, we may take such assistance as may be afforded by other commentaries, though not recognised as authorities in Mithila ; but I think that I have shown with sufficient clearness that the view presented in the Viramitrodya, the Mayukha and the Smriti Chandrika on this point cannot be regarded as of authority in *Mithila*. The foundation of the rules enunciated in those schools is the text of *Manu*; and, when that text is interpreted in a different light in the *Mithila* school, it follows that the rule based on a particular interpretation of the text, not accepted in *Mithila*, cannot have any operation in *Mithila*.

And a careful examination of *Vivada Chintamani* will lead to the conclusion that there is no question of the control of the husband in property given by him to his wife. Bachaspati Misras refer to the text of *Katyayana*, only to put it aside. He then quotes the text of *Narada* and draws the conclusion, binding in *Mithila* that a wife can never dispose of immovable property given to her by her husband (Mr. Tagore's edition, page 261). Later in the chapter he says that: "The immoveable property which a woman gets after the death of her husband, cannot be disposed of at her pleasure "and that" the meaning of this is consonant with that of the husband's donation (which can only be enjoyed but not spent)": and lastly he points out that: "as a woman cannot make a present of or at pelasure dispose of immovable property, given to her by her husband in his life-time, so she cannot dispose of any immoveable property which she inherits on his death."

It will be noticed that, in the scheme of Bachaspati Misra, the gift and the heritage stand on the same footing and that he deduces the rule that the widow cannot dispose of any immovable property which she inherits on the death of her husband as a logical consequence of the rule that the wife cannot make a present, or at pleasure dispose of immovable property.

Now if the gift and the heritage stand on the same footing then it follows that the subject-matter of the gift, if immovable property, cannot be dealt with by the wife, except for purposes which may be denominated "necessary purposes." The consent of the husband, who has parted with his proprietary interest in the property, will not validate the transaction, though the consent of the next heirs may raise a presumption of the existence of necessity. In this case the transaction did not rest on any necessity, nor is it pretended that it did. Babu Durga Dutt, it is true, owed a sum of money to the Maharaja; but he had valuable properties of his own which could be offered as a security for the debt It is urged that Durga Dutt and his sons were under the impression that *bahuana* properties were inalienable; but the Maharaja was not of that opinion, and the impression of Babu Durga Dutt and his sons cannot decide the question of necessity to the prejudice of the *bahuasin*. It is for the party founding title on an alienation by a limited owner to show necessity in respect of the alienation: and the Maharaja obviously cannot establish necessity, since he never assented to the doctrine that *bahuana* properties were inalienable. I have no doubt whatever that under the *Mithila* Law immovable property taken as a gift by a wife from her husband is heritable but inalienable except for purposes which may be denominated necessary purposes, and that in this case there was no legal necessity to support the transaction.

Assuming that I am wrong in my view that the consent of the husband will not validate the alienation, I have still to enquire into the question whether there was in this case "the consent" of her husband to the mortgage. Now the case cannot be put on a higher footing than this, that, while the husband is living, his consent will raise the presumption that there was necessity to support the transaction. But presumption

is a rule of evidence, not a rule of law; and we have all the facts to enable us to decide the point on evidence. Those facts are not in dispute; and I am unable to assent to the proposition that the act of the husband in consenting to a transaction for his benefit is to be regarded as a consent which will validate the transaction. The control exercisable by the husband in regard to the dealings of the wife with property given to her by him is in no sense proprietary. It may be incident to his status as the guardian of his wife; but if his control is to be put on that footing, he is bound to exercise it for the protection of his wife and the preservation of the property. It cannot be suggested that it is in the power of a guardian to give validity to a transaction by the ward by consenting to it, when the transaction is wholly for the benefit of the guardian; and in this case, the Maharaja must be regarded as a party to the breach of trust, since he knew that the debt was of Durga Dutt Singh, and in no way binding on the *bahuasin*.

It was next contended on behalf of the respondent that the Hindu Law allows the husband, under certain circumstances, to deal with the property of his wife for his benefit, and that the transaction ought to be supported on this ground. The texts of *Devala Yanjnavalkya* and *Katyyaana* have been adopted by all the schools as the law on the subject; but we are concerned with the interpretation put on these texts in the *Mithila* school. *Devala* gives a complete enumeration of the peculiar property of woman. According to him, it consists of:

"food and vesture, ornaments, perquisites and wealth received by a woman from a *kinsman* (*Vivada Chintamani*, Tagore's edition, page 263).

According to him, the husband has no right to it except in extreme distress. He provides, however:

"If he (the husband) give it away on a false consideration, or consume it, he must make good the value to the woman with interest; but he may use the property of his wife to relieve a distressed son."

Bachaspati Misra's gloss on this text is important, and I give it in full as Mr. Hasan Imam strongly relies on it in support of his case. The gloss is as follows:

"The property of a woman should not be improperly given away or consumed without her consent, but it may be used for the relief of a distressed son. It is declared by the same writer that the husband has power to use it with or without the consent of his wife. If the husband having obtained her consent used the property amicably, he shall be required to pay the principal when he becomes rich. If the wife give her peculiar property through affection, when her husband is ill, or in danger, or has been confined by a creditor, he may give her the value of it when he pleases. The meaning of the above is that if the wife, observing her husband's illness and the like, give her wealth, it may be repaid by him at his pleasure."

Mr. Hasan Imam contends that the text gives the husband the power "to use the property amicably having obtained her consent;" but it is obvious that the rule is confined to such properties as are enumerated by *Devala* which, according to him, constitute "the several kinds of peculiar property of woman." They are (1) food and vesture, (2) ornaments, (3) perquisites, that is, wealth given to a damsel on demanding her in marriage, and (4) wealth received from a kinsman. We are not concerned in this suit with the first three classes of *stridhan*, for property given by a husband to a wife does not fall within these classes. Does it fall within the words "wealth received from kinsman?" The word in the original for kinsman is '*bandhu*' which word is also used in *Yajnavalkya* and which is rendered in the *Mitakshara* as *matribandhus* and *pitribandhus*, that is to say, persons related to mother and father (*see* Colebrook, 2-xi-6, Ghaipure's edition of the Mitakshara, page 273, and Banarji's Stridhan, page 299). It is obvious that the husband is not comprehended within the term, and that the text of Devala cannot be cited as authority for the proposition that the husband may deal with the property given by him to his wife with her consent.

In the next place it seems to me that neither in form nor in substance was the transaction one in which the husband, "having obtained her consent, used the property amicably." Now what was the transaction? In point of form the mortgage was by Durga Dutt and the bahuasin on the footing that the property be

longed to them, and that the debt, to secure which the mortgage was executed, was binding on both. If, however, the substance is to be regarded then obviously the Maharaja secured the execution of the mortgage by both of them for his own safety, because there was a hebanamah in favour of the bahuasin, and it might be urged if he took the mortgage from the bahuasin that the heba did not operate to convey any title to the bahuasin. The transaction was not a transaction of the husband with the consent of the wife, but a transaction of the husband and wife on the footing that the title was in both of them, so that the Maharaja would have a claim good on the mortgage, if the title was in either.

Lastly, I am of opinion that it has not been established that the bahuasin consented to her husband mortgaging the property for her personal benefit. Now I am quite aware that the plaintiffs cannot, in this action, raise the question whether there was not undue influence exerted on the bahuasin in regard to the execution of the mortgage by her. On the hypothesis that the property was alienable by her, no question of undue influence can now arise, since the bahuasin had the right and the opportunity to establish a case of undue influence in the mortgage action against her. But if I am right in holding that the property was not alienable by her, then the question of "consent" becomes material in discussing whether there is an answer to the plaintiff's suit. The plaintiffs say that the property was inalienable and that accordingly they became entitled to recover the property on the death of the bahuasin. To that, the defendant relies that under the Hindu Law, Durga Dutt had complete power to mortgage the property with the consent of the bahuasin. Thereupon the plaintiffs retort. "Prove that the bahuasin consented to her husband mortgaging the property for his personal benefit." Now this question was not in issue in the mortgage action, either directly or constructively, for it was a simple suit to enforce a mortgage executed by Durga Dutt and the bahuasin, on the footing that the property belonged to both of them. The only defence that could be put forward by the bahuasin in that litigation would be that there was undue influence exerted on her in the matter of the execution of the bond. That issue cannot be raised by the plaintiffs in this Court. But at the same time it must be remembered that the question as to the inalienability of the property could not be put in issue in that litigation ; for, as I have said before, the bahuasin could not claim adversely to her own deed. The plaintiffs raise the question of inalienability in this action, and, in answer to the defendant's case that, though the bahuasin could not mortgage the property, her husband could mortgage it with the consent of the bahuasin, they are entitled to ask the defendant to prove that the bahuasin did consent to her husband mortgaging the property for his personal benefit.

It is therefore, necessary to examine the circumstances connected with the execution of the mortgage bond. In dealing with the point, it is to be remembered that the bahuasin was an illiterate *pardanashin* woman living with her husband at the date of the transaction. The evidence of Amarendra Singh, one of the plaintiffs in this action is as follows :

"The Maharaja had several decrees against Durga Dutt which were under execution. Mr. Duff, a sub-manager of the Darbhanga raj, brought an account of the money due to the raj and informed Durga Dutt that the Maharaja wanted a mortgage document to secure the debt. After some conversation Mr. Duff left but came back again after a few days and said that the Maharaja wanted the Laheri property to be mortgaged. Durga Dutt said : The property is not mine. I have given a heba of it to my wife." Mr. Duff went away, but came back again and said, "Maharaja has ordered me to get the mortgage deed executed by both of you as the property is in the name of your wife." Durga Dutt thereupon directed the maternal uncle of the witness to ask the bahuasin, and said "whatever decrees there are on me, she also ought to pay." The person so directed went to the bahuasin, and related everything to her. The bahuasin said: 'I know nothing. What is proper may be done.' Durga Dutt on hearing this, informed Mr. Duff that the deed would be executed by both of them. The witness denied that the bahuasin had any independent legal advice.

This is substantially the evidence of Amarendra Singh ; and whatever difficulty there may be in accepting the whole of that evidence, this at least is clear that

the lady did not have any independent advice and that she executed the document because she was asked to do so by her husband for this part of the evidence of Amarendra Singh remains unchallenged and contradicted.

The defendant's version of what took place in connection with the transaction is as follows :

" Durga Dutt Singh accompanied by his son, Amarendra Singh, came and saw the Maharaja and said : 'I owe you money but I am unable to pay it now. So I want to execute a mortgage bond for the whole amount.' The Maharaja asked him what property he wanted to mortgage. He said that he would mortgage Laheri. Balbhadra Misir, a senior musahib of the Maharaja, thereupon said that Durga Dutt had already executed a farzi deed in respect of that property in favour of his wife. To this Durga Dutt said : 'This is true. But the property is mine, but I have actually executed the farzi deed. This should not stand in the way as I and my wife would jointly execute the mortgage.' The Maharaja thought over the matter and said that he was agreeable if there was a joint execution of the document by Durga Dutt and his wife."

It is not necessary for me to say which of the two versions is true. It is sufficient for me to point out that, whether the suggestion that a mortgage bond should be executed to cover the debt proceeded from the Maharaja or from Durga Dutt, the parties are agreed that the whole of the negotiation was conducted by Durga Dutt without any reference to his wife, and that her consent was assumed rather than taken, and that, if her consent was at all taken, it was taken as a matter of form, and that no opportunity was given to her to consult her interest in the matter. It is, in my opinion, not open to doubt that her consent was obtained by pressure through her husband, and without independent advice.

In these circumstances the question arises whether a Court of Equity will give effect to the argument advanced on behalf of the Maharaja that the bahuasin consented to her husband mortgaging her property for his personal benefit. In *Turnbull and Company* v. *Duval* (40) Lord Lindley said as follows :

" Whether the security would be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it. It is in their Lordship's opinion quite clear that Mrs. Duval was pressed by her husband to sign, and did sign, the document, which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull and Company, are unaffected by such pressure and ignorance." In *Bank of Montreal* v. *Stuart* (41) the evidence was summed up in these words by Lord Macnaghten : The evidence is clear that in all these transactions Mrs. Stuart, who was a confirmed invalid, acted in passive obedience to her husband's directions. She had no will of her own. Nor had she any means of forming an independent judgment even if she had desired to do so. Upon this evidence, the House of Lords had no hesitation in refusing to support the transaction by which Mrs. Stuart gave her own properties as securities for advances made by the Bank to her husband. Other cases may be cited ; but it is not necessary to pursue the subject. In my opinion, "consent" has not been proved as a fact. If, however, it is to be inferred from the circumstances that she was a party to the mortgage bond, I have no difficulty in coming to the conclusion that a Court of Equity will disregard that consent, having regard to the fact that the bahuasin, an illiterate pardanashin lady, acted in passive obedience to her husband's direction, not having a will of her own, nor having any means of forming an independent judgment, even if she had desired to do so.

I now come to the text of Yajnavalkya, which, in my opinion, creates no difficulty whatever. The text is as follows :

" A husband is not liable to make good the property of his wife, taken by him in a famine, or for the performance of a duty or during illness or while under restraint "

The conditions which would enable Durga Dutt to deal with the property of his wife were not present, and the Maharaja was aware that those conditions were not present.

(40) [1920] A. C. 429.

(41) [1911] A.C. 120=80 L. J. P. C. 75=103 L.T. 641=27 T.L.R. 117.

The only other text on this point is that of Katyayana who declares that.

"money taken by a man from his wife, for performing some imperative duty, when he has no means of doing so, shall not be repaid."

The text has no application, and it is not necessary to pursue the point.

In my opinion, the subject-matter of the gift was under the Hindu Law heritable, but inalienable except under circumstances which were not present, and if the terms of the gift did not confer on the bahuasin the right to alienate the property, the plaintiffs as the heirs of the bahusasin, are entitled to succeed in the action. This brings me to the question whether the bahuasin took an alienable interest under the terms of the gift.

Now in construing the *heba-bil-ewaz* executed by Durga Dutt in favour of his wife, we are bound to proceed on the assumption that a Hindu knows that, as a general rule, women do not take absolute estates of inheritance which they are enabled to alienate. This was laid down by the judicial Committee in *Moulvie Mohamed Shumsool Hooda* v. *Sheeukram* alias *Roy Doorga Pershad* (42) and repeated by their Lordships in *Radha Prasad Mullick* v. *Ranee Mani Dassee* (43). This does not mean that, where there are words of sufficient amplitude conveying in the terms of the gift itself the fullest rights of ownership, including the power to alienate, the Court will refuse to construe the deed of gift so as to deny to the donee the right to alienate. But I think, that in construing a deed of gift executed by a Hindu husband in favour of his wife, the Court would be right in leaning towards a construction which is in consonance with the ordinary notions and wishes of the Hindus with respect to devolution of property and in harmony with the law by which the parties are governed. The ordinary notions and wishes of Hindus are well known and have peen recognised by the Judicial Committee in the cases to which I have referred. In regard to the law by which the parties are governed, I have already expressed my opinion that the Mithila law recognises that immoveable property taken as a gift by a wife from her husband is inalienable except for purposes which may be denominated "necessary purposes."

The question then is, to quote the language of Lord Buckmaster in *T. B. Ramachandra Rao* v. *A. N. S. Ramachandra Rao* (44), has the donor made use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including the power to alienate ? It is not necessary that there should be an express declaration to that effect ; but it must follow, as a matter of construction, that something more has been granted than what the law would give, that in fact the fullest rights of ownership, including the power to alienate, have been conveyed.

I have set out the document earlier in this judgment and it is not necessary to set it out again. It is conceded that there is no express declaration to the effect that the bahuasin would have the power to alienate ; but it is contended that there are various expressions in the grant itself which suggest the inference that the fullest rights of ownership were conveyed to the bahuasin.

It was argued that the donor, having described himself as a malik and having conferred all his zamindari rights upon his wife, has said as plainly as he could that she should have the power to exercise the fullest rights of ownership. The argument is an attractive one ; but it is necessary to consider the passage upon which the argument is founded. That passage is as follows :

"Having taken Rs. 41,532, I have made heba-bil-ewaz to my wife of my share of 7-annas 8¾-gandas situate in taluka Laheri . . . . . with trees, fruit-bearing and non-fruit-bearing and ahar and pokur and reservoirs and tank and kachcha and pakka wells and sair and salt sair and houses occupied by tenants and all my zamindari rights which up to now have been in my possession without the co-partnership of anyone in possession."

Mr. Hasan Imam's argument is that the words, "zamindari rights" mean rights over the zamindari and that, as the rights of the donor over the zamindari

(42) [1874] 2 I.A. 7=22 W.R. 409=14 B. L. R. 226=3 Sar. 405 (P. C.)

(43) [1908] 35 Cal. 896=35 I.A. 118=12 C. W. N. 729=4 M.L.T. 23=18 M.L.J. 287=5 A.L.J. 469=10 Bom. L.R. 604=8 C.L.J. 18 (P. C.)

(44) 1922 P.C. 80=45 Mad 320=49 I.A. 129=35 C.L.J. 545=30 M.L.T. 154=16 M.L.W. 1=(1922) M.W.N. 359=26 C.W.N. 713=20 A.L.J. 684=24 Bom. L.R. 963=43 M.L.J. 78 (P. C.)

were absolute, nothing short of an absolute estate were by these words granted to the bahuasin. With great respect, I am unable to assent to the argument. Here general words—"zamindari rights"—follow an enumeration of specific things,—"trees, fruit-bearing and non-fruit bearing, and ahar and pokar, and reservoirs and tanks and kachcha and pakka wells and sair and salt sair and houses occupied by tenants"—which undoubtedly have some common characteristic which constitutes them as genus, and the general words can be properly regarded as in the nature of a sweeping clause designed to guard against accidental omissions. That being so, the rule of *ejusdem generis* will apply, and the general words will be restricted to things of the same nature as those which have been already mentioned. The expression "zamindari rights," in my opinion, means rights to specific properties of the same nature as those specified, and not rights of a zamindar in the properties specified. If there was any doubt as to this interpretation, the words which precede and the words which follow remove that doubt. The document says: "I am making a *heba-bil-ewaz*."

Now in respect of what properties? The grantor enumerates the specific properties and ends with the sweeping clause, "all my zamindari rights," and he puts the matter beyond doubt by adding the words, "which up to now have been in my possession without the co-partnership of anyone." Now I can understand a *heba bil ewaz* of specific properties; but I do not understand a *heba-bil-ewaz* of an abstract right, the right of a proprietor to alienate the properties. Nor is it possible to speak of an abstract right as being in the possession of the donor without the co partnership of any one. In my opinion, the full description of what was intended to be conveyed shows conclusively that the expression "zamindari rights" means rights or title to properties constituting the zamindari, those properties being of the same nature as those already specified.

It was next contended that a gift by a husband to his wife, generation after generation (*ba farzandan, naslan bad naslan*) carries with it the right to alienate. Now I entirely agree that these words, in the absence of anything showing a contrary intention, pass a general estate of inheritance according to Hindu Law. This is the primary signification of these words, which denote heritability and connote an estate of unlimited duration. I also agree that the right of alienation, speaking broadly, is a necessary part of the ownership of an estate of inheritance. Hence there is a secondary signification of those words, which denote an absolute estate and connote alienability. A grant of an estate to a person '*ba farzandan, naslan bad naslan*' is a grant of an estate of inheritance. An estate of inheritance is a heritable estate. A heritable eatate is an absolute and alienable estate. Therefore an estate granted to a person '*ba farzandan naslan bad naslan*' is an absolute and alienable estate. If I am right in this view, then the words '*ba farzandan, naslan bad naslan*' are apt for conferring an estate of inheritance and therefore an absolute and alienable estate, not an estate of inheritance *and* an absolute and alienable estate.

Now it is quite true that, both in this country and in England, the right of free disposition is generally inherent in an estate of inheritance; but the holder of such an estate might be prevented by personal incapacity from exercising the right of alienation; and a restraint on alienation might be imposed by family custom or local law. For instance, an infant, though holding an estate of inheritance, is not permitted to exercise the right of alienation. So, in England, wives married before 1883, could not dispose of any property to which their title accrued before that year. So also, where the personal enjoyment of the property is essential to the performance of certain public duties, no alienation of such property can be made. So also, as I have already said, a restraint on alienation might be imposed by family custom or local law. If I am right in this view, then an estate of inheritance would not carry with it the right of alienation, when such an estate is conveyed to a person suffering under a personal incapacity or subject to a family or local custom prohibiting alienation. If this be so, then clearly a right of alienation is not necessarily inherent in an estate of inheritance, and a grant of property to a person '*ba farzandan, naslan bad naslan*' would not necessarily give that person the right to alienate the property, though these words would confer on him an estate of inheri-

tance. For instance, a grant of property to a ghatwal '*ba farzandan naslan bad naslan*' to enable him to perform certain public duties would not confer on him the right to alienate the property. I arrive at the conclusion that these words—*ba farzandan, naslan bad naslan*—are generally sufficient to confer an estate of inheritance ; that a right of alienation is generally inherent in an estate of inheritance; but that, as the incidents of every estate in land may be affected by the personal incapacity of the holder for the time being or, by the existence of the personal law by which the holder may be governed, it may be shown in any particular instance that the grant of an estate of inheritance did not carry with it the right of alienation.

Now the personal law by which the bahuasin was governed prohibited her from alienating the immovable property which she took as a gift from her husband. Bachaspati Misra has laid down in distinct terms that though a woman can dispose of moveable property which has been given to her by her husband, she can never dispose of immovable property. In my opinion, the ordinary incident of an estate of inheritance was so affected by the personal law by which the bahuasin was governed that in this case the grant of such an estate as evidenced by the words '*ba farzandan naslan bad naslan*' did not carry with it the right of alienation.

I will now consider some of the cases on the subject : but I may begin by giving the opinion of Mr. Mayne on the point :

'Gifts by a husband to his wife of immovable property,' says Mr. Mayne in his Hindu Law, "even though accompanied by express words of inheritance, are not alienable unless distinctly declared to be so. It is a quality of such gifts that though they descend to wife's heirs, she cannot alienate them." (8th edition, paragraph 397, page 542).

I am informed that this passage is omitted in the latest edition of the book : but the latest edition is not by Mr. Mayne. The only criticism that can legitimately be directed against this passage is that there is a suggestion in it that there is no power of alienation unless that power is expressly conferred. This would not be correct : nor do I think that Mr. Mayne has so stated the proposition. But the passage is valuable as indicating that an estate of inheritance granted by a husband to his wife does not carry with it the right of alienation.

In *Bhujanga Rau* v. *Ramayamma* (45) the Madras High Court held that "where property is given to a Hindu lady by her husband, and the gift is expressed only in such terms as create a heritable estate, it must be taken that it was the intention of the donor that she should acquire such an interest as the personal law of the parties recognises to be created by the transaction." The gift in that case was by a Hindu to his wife '*putra poutra paryantan*', which expression has the same significance as that conveyed by the expression '*ba farzandan naslan bad naslan.*' This decision was followed in *Nunnu Meah* v. *Krishnaswami* (46), but was disapproved of in *Muthuvenkatanarayanan Chetti* v. *Athipanduranga Naidu* (47). In the latter case, however, the question did not fall to be considered, as a power of alienation was expressly conferred on the wife. It was also disapproved of in *Ramachandra Rao* v. *Ramachandra Rao* (48) where Sheshagiri Ayyar, J., considered that it was inconsistent with the conclusions of the Judicial Committee in *Surajmani* v. *Rabi Nath Ojha* (49). In delivering his judgment that learned Judge referred to the terms of S. 8 of the Transfer of Property Act and held that, unless a different intention is expressed or necessarily implied, a transfer of property by a husband to his wife passes forthwith to the wife all the interest which the husband is capable of passing in the property or in the legal incidents thereof ; and the learned Judge said : "This is what was laid down in *Surajmani* v. *Rabi Nath Ojha* (49)."

Now if that is what was laid down in *Surajmani's* case (49), then it is obvious that *Bhujanga Rau* v. *Ramayamma* (45) can no longer be followed. The decision of the High Court in *Ramachandra Rao* v. *Ramachandra Rao* (48) was, however, reversed by the Judicial Committee on another point [see *T. B. Ramachandra Rao* v. *A. N. S. Ramachandra Rao* (44)]

(45) [1884] 7 Mad. 387.
(46) [1891] 14 Mad. 274
(47) [1919] M. W. N. 103 =51 I. C. 217.
(48) [1919] 42 Mad. 283 =52 I. C. 94 = M. L. J. 306.
(49) [1908] 30 All. 84 =35 I. A. 17=5 A. L. J. 67=12 C. W. N. 231 =18 M. L. J. 7=10 Bom. L. R. 50=7 C. L. J. 131=3 M. L. T. 144 (P. C.)

but their Lordships thought it their duty to state in clear terms what was actually decided by them in *Surajmani's* case (49), as there was some misapprehension as to the effect of that decision. "In the case referred to," said their Lordships, "when originally heard before the High Court [*Surajmani* v. *Rabi Nath* (50)], it had been stated that under the Hindu law in the case of a gift of immoveable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration. In that case, it is true that there is some comparison drawn between the gift to a widow and a gift to a person not under disability but that was not the foundation of the decision which depends entirely upon the wide meaning attributed to the words in which the gift to the widow was clothed. More recent decisions of this Board in *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury* (51) and *Bhaidas Shivadas* v. *Bai Gulab* (52) do nothing but repeat this same proposition in other words." I think that it is perfectly clear that their Lordships did not decide in *Surajmani's* case (49) that, to quote the words of Sheshagiri Ayyar, J., "unless there is an expressed or implied qualification to the contrary, the donor must be deemed to have conveyed all that he was possessed of in the property granted."

The decisions of the Indian Courts on this point afford an interesting study. *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* alias *Roy Doorga Pershad* (42) was decided by the Judicial Committee in 1874. The rule of construction formulated in that decision gradually came to be treated as a rule of law, and a tendency appeared in the decisions to treat gifts by Hindu husbands to their wives as conveying only a limited estate unless a power of alienation was conferred by express declaration. This tendency found its fullest expression in *Surajmani's* case (49) which was decided by the Allahabad High Court in 1903. An appeal was taken to the Judicial Committee which decided in 1907 that the expression '*malik wa khud ikhtiyar*' imported full proprietary rights and that, in order to cut down the full proprietary rights that the words imported, something must be found in the context to qualify it. Now this was all that was decided by the Judicial Committee in *Surajmani's* case (49); but it was thought that the decision came to this, that a gift by a Hindu husband to his wife should be construed as conveying an absolute estate, unless there was something in the contest to quality it. But, as the Judicial Committee has now plainly intimated to the Indian Courts, it decided nothing of the kind. Their Lordships found an expression in the grant, *malik wa khud ikhtiyar*, which they construed as importing full proprietary rights. The decision therefore rested on the view that the grantor had used words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership. It is obvious that there is no conflict between the decision in *Surajmani's* case (49) and the decision in *Bhujanga Rau* v. *Ramayamma* (45). In my opinion, the latter case was correctly decided, and there is no reason why we should not follow it.

I should like to say a word about S. 8 of the Transfer of Property Act on which Sheshagiri Ayyar, J., strongly relied in *Ramachandra Rao* v. *Ramachandra Rao* (48). That section provides that unless a different intention is expressly or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. But S. 8, which is in the second chapter of the Act, must be read subject to the provision of S. 2 which provides that nothing in the second chapter of the Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law. Now, it is a rule of Hindu law as it is understood in *Mithila*, that a gift by a Hindu to his wife does not carry with it the right to alienate. In my opinion, therefore, we cannot have

(50) [1903] 25 All. 351=(1903) A. W. N. 65.
(51) 1922 P. C. 63=1 Pat. 305=49 I. A. 25=26 C.W.N. 425=3 P. L. T. 133=15 M.L.W. 434=42 M. L. J. 492=24 Bom. L. R. 576=35 C. L. J. 427=20 A. L. J. 362=(1922) M. W. N. 368=30 M. L. T. 242 (P. C.)
(52) 1922 P. C. 193=46 Bom. 153=49 I. A. 1=24 Bom. L. R. 551=20 A. L. J. 289=35 C. L. J. 314=26 C. W. N. 129=15 M. L.W. 412=42 M. L. J. 385=30 M. L. T. 149.

recourse to S. 8 in construing the gift in this case.

In the Tagore case *Ganedra Mohan* v. *Upendra Mohan* (53), Sir Barnes Peacock said as follows : "It is certainly true, as stated by the learned Judge, that a gift to a man and his sons and grandsons, or to a man and his son and son's son, would, in the absence of anything showing a contrary intention, pass a general state of inheritance according to Hindu Law. I believe the words usually used in Bengal are *putra-poutradikrame* and in the upper province *naslan bad naslan*, the literal meaning of the former being 'sons and grandsons, *etc.*, in due succession', and of the latter, 'in regular descent or succession.' If I may say so with the utmost respect, this is a very accurate statement of what those expressions import. The opinion of Sir Barnes Peacock was accepted by the Judicial Committee as the basis of their decision in *Ramlal Mookerjee* v. *Secretary of State* (54). A Hindu died leaving a widow, a daughter's daughter and a brother. By his Will, he left his properties to his daughter's daughter in these terms :

"If no daughter or daughter's son of mine should be living at the time of the death of my wife, then my grand-daughter (daughter's daughter) shall become the proprietress of my property and shall remain in undisputed possession thereof *putra poutradikrame*."

The question raised in the appeal turned upon the construction of the terms of the gift to the daughter's daughter. Their Lordships quoted with approval the passage from the judgment of Sir Barnes Peacock in the *Tagore* case (53) and proceeded to say as follows : "The correctness of these observations was not questioned in the judgment on appeal. It was not denied at the Bar that these words, though undoubtedly importing the male sex in their primary signification, would in the case of a gift to a male, be read as words of general inheritance and would include female as well as male heirs, where, by the law, his estate would descend to females." Stopping here for a moment, it is to be noted that the force of these words may be profoundly affected by the law by which the grantee may be governed, and that this is what their Lordships expressly decided. This is exactly what was decided by the Madras High Court in *Bhujanga Rau* v. *Ramayamma* (45). Their Lordships continued as follows : "Their Lordships feel no greater difficulty in applying them to the female heirs of a female, where, by law, the estate would descend to such heirs, and see no sufficient reason for narrowing the construction of words which have been often recognised in India as apt for conferring an estate of inheritance." If there was nothing else in the judgment of their Lordships, it could not be contended that there is anything in the decision to encourage the argument that these words are regarded as apt for conferring an absolute estate. Mr. Hasan Imam, however, strongly relies upon the next passage in the judgment which is as follows : "They are of opinion that clause 7, if it stood alone, would confer an absolute estate on Haridasi (the grand-daughter) upon the death of the widow."

Now, in my opinion, the decision of the Judicial Committee cannot be regarded as an authority for the proposition that the words, *putra-poutradikrame* or *naslan bad naslan*, import, of their own force, an absolute estate. Their Lordships have already said that the force of these words may be qualified by the personal law of the grantee. Now, what is the actual decision ? The exact signification of these words has already been considered : and their Lordships have said very definitely that these words are recognised "as apt for conferring an estate of inheritance." But then, in the passage which followed, their Lordships said that the terms of the gift conferred an absolute estate on Haridasi. And so they did, unless there was something in the personal law by which Haridasi was governed (which there was not) which prevented her from alienating the property which she got from her grandfather. As I have said before, an estate of inheritance is, *prima facie*, an absolute estate ; and Haridasi took an absolute estate, unless she suffered from a personal incapacity or was subject to a personal law which imposed a restriction on her right to alienate the property. Obviously there was no personal incapacity which affected her in any way : and the personal law by which she was governed imposed no

(53) [1870] 4 B. L. R. O.C. 103.
(54) [1881] 7 Cal. 304=8 I. A. 46=10 C. L. R. 349=4 Sar. 925 (P. C.)

restriction on her right to alienate. [See *Dyabhaga*, 4-1-23, Setlur, Part 2, page 32].

The case of *Lalit Mohan Singh Roy* v. *Chukkulal Roy* (55) does not carry us any further. A Hindu testator who had no children devised his estate to his nephew in these terms.

"If no children are born to me, then the eldest son born of the womb of my third sister Srimati Kshiroda, my nephew Sriman Lalit Mohan Roy ...becoming on my death my *sthalbhishikta* and becoming owner (*malik*) of all my estate and properties, *etc*, shall, remaining my *sthalbkishikta*, obtaining the management of the *Iswar Sheba* . . . keeping the estate intact, enjoy with son, grandson and so on in succession, the proceeds of my estate." The quesiton raised in the appeal was whether Lalit Mohan took an absolute heritable and alienable estate, or whether there was an attempt by the testator to tie up the estate for ever, in which case the gift would fail, subject to a life estate in favour of Lalit Mohan. Their Lordships said as follows: "The words 'become owner (*malik*) of all my estate and properties' would, unless the context indicated a different meaning, be sufficient for that purpose even without the words 'enjoy with son, grandson and so on in succession' which latter words are frequently used in Hindu Wills and have acquired the force of technical words conveying a heritable and alienable estate." Their Lordships further said: "Their Lordships do not find any express prohibition in this Will against alienation of the estate, the beneficial enjoyment of which is given to the devisees, as there is of the estates appropriated to religious and charitable purposes. If there were such a clause added to a gift of a heritable estate, it would be repugnant and void."

I have no doubt whatever that their Lordships were dealing with the particular case before them, and not laying down a rule applicable to all cases. As I have said before, a heritable estate is *prima facie* alienable, and a clause prohibiting alienation added to a gift of a heritable estate would be *prima facie* void. In the case before their Lordships, the grantee took a heritable estate and therefore an alienable estate, because he was not affected by any personal incapacity nor subject to a personal law which imposed a restriction on his power of alienation. But supposing a gift was made to a person 'naslan bad naslan' on condition of rendering services of a public nature? If the wide interpretation sought to be placed on the decision of the Judicial Committee were to be accepted as correct, then obviously the grantee would have the right to alienate the lands. But exactly the opposite was held by the Judicial Committee in *Nilmoni Singh Deo* v. *Bakranath Singh* (56). Although the point is not made clear in the decision of their Lordships, there is no doubt that the grant was naslan bad naslan'. I may usefully refer to the argument of Counsel on this point. The argument was put as follows: "Again it was to be noticed that it did not follow that, because the Government might disallow the succession of an unfit person, the jagir could not be hereditary. It was hereditary, and because it was hereditary, it was alienable. Grants held 'naslan bad naslan', 'buntan pad buntan', as the jagir was, were transferable by gifts, sale, or otherwise, by the terms of Regulations 37 of 1793 and 12 of 1805." Their Lordships found that the jagir was hereditary, but came to the conclusion that it was inalienable. I take the basis of the decision to be that where the personal enjoyment of the property is essential to the performance of certain public duties, no alienation of such property can be made, although the grant may be heriditary. This is one instance where the words 'naslan bad naslan' did not convey an alienable estate, though they did convey an heritable estate. Other instances may be cited; for instance in Raj Ramgarh, there is a well-understood custom that jagirs are resumable on failure of heirs in the male line, though the grant may be to a person and his putra-poutradic [see *Ram Narayan Singh* v. *Ram Saran Lal* (57)]. The Calcutta High Court, relying upon the decision of the Judicial Committee in *Ramlal Mookherjee* v. *Secretary of State* (54) and in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (55) had come to the conclusion

(55) [1897] 24 Cal. 834=24 I. A. 76=1 C. W. N. 387=7 Sar. 155 (P. C.).

(56) [1883] 9 Cal. 187=9 I. A. 104=4 Sar. 335 (P. C.)

(57) [1918] 46 Cal. 683=36 M. L. J. 344=29 C. L. J. 332=17 A. L. J. 308=21 Bom. L. R. 597=50 I. C. 1=23 C. W. N. 866=(1919) M. W. N. 518. (P. C.)

that those words imported an estate of inheritance. The decision of the High Court was, however, reversed by the Judicial Committee. So also the force of the words, 'putra-poutradic' may give way to a family custom. This was held by the Judicial Committee in *Ekradeshwar Singh* v. *Janeshwari Bahuasin* (58). The grant in that case was to a lady and in these terms: "You and your sons and grandsons, *etc.*, (putra-poutradic), shall cultivate or get cultivated the mauza aforesaid, and enjoy the usufruct thereof yourself."

Their Lordships held that these words as used in the sanad must be regarded as words of limitation, consistent with the custom, and not as words of general inheritance.

I have laboured this point at unnecessary length because it was contended at the Bar that the decision of their Lordships in the two cases to which I have referred concludes the matter, and that the words, 'naslan bad naslan' or words having the same signification, wherever used, must be regarded as conferring an estate of inheritance with power of alienation. In those cases, these words undoubtedly did confer estates of inheritance with power of alienation: but I am unable to read those decisions as establishing a fixed and unalterable rule applicable in every case, although the grantee may be prevented by personal incapacity from exercising the right of alienation, and although the personal law governing the grantee may impose a restriction. In *Ekradeswar Singh* v. *Janeshwari Bahuasin* (58), their Lordships held that those words must be read as consistent with the custom and not as words of general inheritance. I am of opinion that, in this case, those words must be read as consistent with the personal law by which the bahuasin was governed. That law imposed a restriction on her right to alienate the lands; and reading the words, 'ba farzandan, naslan bad naslan', as consistent with the Mithila Law, I must hold that these words, although they conveyed to her an estate of inheritance, did not confer on her the right to alienate the property.

(58) [1915] 42 Cal. 582=41 I. A. 275=18 C. W. N. 1249=27 M. L. J. 375=16 M. L. T. 382=1 L. W. 863=(1914) M. W. N. 807=12 A. L. J. 1217=25 I. C. 417=21 C. L. J. 9=17 Bom. L. R. 18. (P. C.).

It was lastly contended that it ought to be held, on a construction of the covenant for title, that an alienable interest was conveyed to the bahuasin. The covenant is in these terms:

"I, the declarant, or my heirs and representatives (*quam moquaiman*) shall have no right or concern in demanding the subject of the heba or the consideration money from the aforesaid Mussammat or her heirs and representatives. Should I, the executant, my heirs and representatives, make any claim or put forward any demand in respect of the gift properties or the consideration thereof, the same will be deemed null and void."

It was contended that by the use of the words "heirs and representatives," the grantor clearly intimated that he had conferred the fullest proprietary rights on the grantee including the right to alienate the property. In my opinion the argument is without substance. I have expressed my opinion that in the actual dispositive words used by the grantor there is nothing to indicate that an alienable interest was conveyed to the grantee. That being so, can a covenant of this nature be construed as in any way enlarging the grant? In my opinion the covenant secured the grantee in the possession of that which was previously granted, and gave an additional remedy, namely, an action for damages, if the grantee was deprived of that which was previously professed to be granted, but did not enlarge that which was previously granted [see *Leech* v. *Schweder* (59) and *Davis* v. *Town Properties Investment Corporation, Limited* (60). In *Nottidge* v. *Dering* (61) Cozens-Hardy, M. R., said as follows: "Covenants for title are really ancillary to the assurance of the property, and ought not, in the absence of clear words, to be extended so as to confer a larger estate than is expressly assured." This is a sufficient answer to the argument: but I think the argument must fail on broader grounds. The estate which was expressly granted to the bahuasin was an estate of inheritance, that is to say, an estate of unlimited duration. Now whether a power of alienation is incident to such an estate

(59) [1874] 9 Ch. 463=43 L. J., Ch. 487=30 L. T. 586=22 W. R. 633.

(60) [1903] 1 Ch. 797=72 L. J., Ch. 389=88 L. T. 665=51 W. R. 417.

(61) [1910] 1 Ch. 297=79 L. J., Ch. 439=102 L. T. 145.

must depend, in my view, upon the personal law of the person who happens, for the time being, to be the holder of the estate. If the holder happened to be a person who is not subject to a law prohibiting him from alienating the land, clearly he could exercise the power of alienation; and the covenant would operate so as to prevent the grantor, his heirs and representatives from "demanding the subject of the heba" from the alienee. This is how I construe the covenant in question.

Mr. Hasan Imam referred to *Ram Narain Singh* v. *Peary Bhugat* (62) in support of his argument on this point. That was a case of a gift of immovable property by a husband to his wife. The grantor stated in distinct terms that he was conveying all his rights to his wife without exception and that neither he nor his heirs shall at any time have any claim either to the property or to the price or value of it. The Calcutta High Court held that, looking at the fact that the husband divested himself of all his rights, and that he prohibited his descendants from claiming the property or its price, the gift was a gift "out and out." I do not see how the decision throws any light on the subject. The decision proceeded on the terms of the dispositive words used in the gift, and no other conclusion could be reached on the terms of the grant.

I have anxiously considered the terms of the *hebanamah*, and I am of opinion that the grantor has not, to quote the words of Lord Buckmaster, "made use of words of sufficient amplitude conveying in the terms of the gift itself the fullest rights of ownership, including the power to alienate." It must be remembered that the language used by Hindus in instruments relating to grants of immoveable property is very often merely descriptive of the course of legal succession. A grant of immoveable property by a Hindu husband to his wife is heritable under the *Mithila* Law. The words used by Durga Dutt do no more than describe the course of succession under the law by which he was governed. Such a grant is inalienable except under circumstances which are not present here. Durga Dutt was presumably aware of the restriction placed by law on the right of the wife to alienate immovable property received by her as a gift from her husband. It is not disputed that Durga Dutt could, by use of apt words, convey the fullest rights of proprietorship in the property to his wife. The question is, Has he done so? I have come to the conclusion that, reading the whole *hebanamah* consistently with the law by which the parties were governed there is no indication in the terms of the gift that the fullest rights of proprietorship, including the right to alienate the property, were conferred on the *bahuasin*. That being so, the plaintiffs are entitled to succeed in the action.

(62) [1883] 9 Cal. 830=13 C. L. R 109.

My learned brother and I wish to acknowledge the assistance we have received in this case from Counsel and Vakils on both sides. We in this Court are accustomed to get every assistance from the leading Counsel engaged in the case; and that assistance was ungrudgingly given. But we would especially like to express our appreciation of the industry and learning shown by Mr. Lachmi Kant Jha, himself a *Maithil* Brahmin, in his wide survey of the Hindu Law texts.

I would allow the appeal, set aside the judgment and the decree of the Court below, and give the plaintiffs a decree for possession with mesne profits which must now be assessed in the usual way. The plaintiffs are also entitled to their costs both in this Court and in the Court below.

As my learned brother and I differ in opinion on two points, both being points of law, namely:

First, whether the present suit is maintainable by the plaintiffs, and whether it is barred by limitation; and

Secondly, whether, on the interpretation of the *heba bil-ewaz* the fullest rights of ownership, including the power to alienate the property were conveyed by Babu Durga Dutt Singh to his wife, this appeal must be heard, in accordance with S. 98 of the Code, on these points only, by one or more of the other Judges of this Court. The papers must be laid before the Chief Justice for the necessary orders.

Foster, J. — The following pedigree and statements appended thereto which I gather from the plaint will explain some of the facts of this case: (vide Page 660 Col. 1.)

I.—No. 3 received from the Maharaja settlement of *babuana* properties in *par-*

gana Jabdi and purchased (*inter alia*) 16-annas *taluka* Laheri.

II.—Nos. 4 and 5 partitioned Laheri, No. 5 getting as his separated share a 7-annas 8-*gandas* 3-*kauris* share.

III.—No. 5 made a gift of this Laheri share to No. 6 (1876).

IV.—Nos. 5 and 6 executed a mortgage of the Laheri property in favour of No. 5's creditor to satisfy No. 5's debts (1890).

1. Maharaja Madhab Singh Pahadur
2. Maharaja Chattu Singh Bahadur.
3. Kirat Singh (had *babuana* properties *pargana* Jabdi and purchased other properties including 16 annas Laheri.
4. Girdhari Singh.
5. Durga Dutt Singh, married to
6. Anuragin Kuer *bahuasin*.

Plaintiffs.

The plaintiffs, the eldest of whom was born about the year 1860, belong to a junior branch of the Darbhanga *raj* family and are *Mithila* Brahmins. Their father Durga Dutt Singh, after partition of *babuana* and other properties (which included *taluka* Laheri) in 1876 conveyed to his wife Mussammat Anuragin Kuer, whom I shall call the *bahuasin*, his share in *taluka* Laheri by way of *heba-bil-ewaz*. Whether this transaction was *benami* or genuine is an issue in this case. Plaintiffs say there was a complete change and transfer of ownership and possession ; defendants say it was merely nominal. In 1890 Durga Dutt Singh, being in debt to the Maharaja to the extent of about Rs. 1,89,000, at the Maharaja's instance, executed along with his wife a mortgage of the Laheri property aforementioned in favour of his creditor. The Maharaja had always been paying the land revenue of the *babuana* properties, and so a debt had accumulated. Whether this mortgage could affect the present plaintiffs' interest as heirs of the property is the main question in this case. That the plaintiffs claim as heirs of their mother is stated in the plaint. In 1897 this mortgage was decreed, the Maharaja being plaintiff and Durga Dutt Singh and his wife defendants. In 1902 the whole interest in the Laheri property was sold in execution of the mortgage decree and purchased by the Maharaja who is now defendant. In February 1904 the *bahuasin* died, at a time when an application to set aside the sale made by her and her husband was pending ; and her sons were at Durga Dutt's instance substituted as her heirs who had inherited the Laheri property. Two months or so later this application was rejected and the sale confirmed on the 2nd June, 1904. In February 1906, the plaintiffs instituted Suit No. 19 of 1906, for a declaration of their title and confirmation of possession in Laheri, on the ground that the mortgage bond was got by fraud without the knowledge of their mother the owner, and that the mortgage decree was fraudulent. Durga Dutt Singh was pro forma defendant in this case ; he died in July, 1907. In June, 1907 the plaintiffs withdrew the suit with permission to bring a frsh suit. On the 24th July 1918, the plaintiffs instituted the present suit. The cause of action in the previous plaint had been stated as having arisen in February 1906 when the frauds therein stated had been discovered. The cause of action in the present plaint is dated 16th December 1906, the delivery of possession to the Maharaja as auction-purchaser. The declarations sought in the plaint are that the property belonged to the plaintiffs' mother, and that Durga Dutt Singh had no right to execute the mortgage bond ; so the rights of the *bahuasin* and the plaintiffs were not affected by the mortgage suit, the decree, the sale and the delivery of possession. The plaintiffs pray for recovery of possession and mesne profits. It is important to note that there is no prayer for setting aside the mortgage decree—seemingly because of limitation—and the word "fraud" does not occur in the statement of reliefs sought. It is also important to note that

the plaintiffs sue not as reversionary heirs of their father, but as heirs of their mother, the position which in fact they had occupied in the execution proceedings. The present suit having been dismissed the plaintiffs are appealing and there is a cross-objection : all the important issues are thus re-opened.

It is obvious that the mortgage decree obtained against Durga Dutt Singh and his wife must stand in this case as a fundamental fact. So long as the decree stands it must bind the heirs. The decree and the execution directed the sale of the whole interest—not of a life estate or any restricted interest in the Laheri property, and the decree has been accordingly enforced in the sale. But the plaintiffs' case, which does not deny these facts. is that the decree and the sale could pass only the *bahuasin's* estate. It is urged that she had a heritable but not an alienable estate, and she had no power to mortgage the whole estate so as to disinherit her heirs. The contention purports to be based upon the Mithila Law.

Before proceeding to consider the main issue, I wish for convenience sake to take up the issue raised by the Maharaja defendant whether the *heba-bil-ewaz* of 1876 was *benami*. I have had the advantage of reading my learned brother's judgment on this point and I need not repeat his arguments, with every one of which I am in agreement. I find that the *heba-bil-ewaz* was not a *benami* transaction and that the issue has been correctly decided by the learned District Judge.

It yet remains to see what was the legal result of this *heba-bil-ewaz* of 1876. It appears to me that if Durga Dutt Singh wanted to grant an estate with restrictions on alienation, he need merely have executed a *heba* or a simple gift. By making a transfer in the form of a *heba-bil-ewaz*, which ordinarily carries the incidents of a sale, he must be taken to have intended the usual legal consequences of such a common form of transfer. I admit that in this argument I am paying more attention to form than substance ; but so, I think, did Babu Durga Dutt, whose intentions I am attempting to discover. He a Mithila Brahmin of wealth, having some knowledge himself and no doubt numerous advisers within reach, must have known the difference between a *heba* and a *heba-bil-ewaz*. Why did he choose the latter expression instead of '*heba*' or the corresponding term in Hindi *Daupatra* especially if he intended that his wife should take property as a Mithila Hindu wife. Are we justified in thinking that so much of the document was a pure mistake? After a careful examination of all the expressions of the document, I can find none which clearly indicate a limited estate. It is noticeable that the document mentions that the property transferred is to pass into the possession of the Mussammat and the produce thereof is to be enjoyed generation after generation :

"And I, the executant, and my heirs and representatives neither have nor shall have any demand or dispute with respect to the gift properties or consideration thereof as against the said Mussammat her heirs and representatives."

The adjectival word "gift" is in the original 'mahuba,' a term which is used to describe properties transferred by either *Aheba* or (as in this case) a *heba-bil-ewaz*. Now, the noticeable points are firstly that no mention is made of any specified heir such as a daughter or son, though such existed : the expressions of the document in this respect are such as might be used in a transfer to an utter stranger : secondly, as the learned Judgere remarks:

"The use of the words '*warisan wa qaem moqamian*' in respect of both the donor and the donee shows that the donor contemplated that the donee may have *qaem moqamian*', *i. e.*, representatives other than her heirs";

In the third place the passage quoted recalls the case of *Ram Narain* v. *Pearay Bhagat* (62), and certainly supports the contention that this was an absolute transfer. No doubt the facts are not set out in this reported case, and at first sight the only question appears to have been whether the wife, the donee, took an estate of inheritance or for her life-time. But the issue must have been also as to whether the gift conveyed an absolute estate ("a gift out and out"). For that is the conclusion arrived at, and the two Calcutta cases quoted dealt with what purported to be absolute alienations by a wife (devisee in one case, donee in the other). The issues governing those cases were whether she, the wife or widow, took an absolute and therefore freely alienable estate. The cases are *Kunj Behari Dhur*

v. *Prem Chand Dutt* (63) and *Srimati Pabitra Dasi* v. *Damudar Jana* (64).

As I read the Privy Council decisions they lay down uniformly the rule that the Courts should examine the documents of transfer with an eye to the ordinary Hindu's inclinations ; he does not usually intend to make a wife absolute owner by a deed of transfer. In the earlier interpretations of this rule of the Privy Council the Courts went almost so far as to import a strong presumption that the grantee was to receive a limited estate, and it was held that something express is necessary to exclude what is tacitly implied. *Expression facit cessare tacitum.* But I conceive that the rule adopted in modern times is that if by a construction of the document the grant of an absolute estate can reasonably be extracted, there is no need to insist on an express and distinct grant of an absolute estate *Expressio eorum quae insunt nihil operatur.* Express words are not essential; the fact that the donor is a *Mithila* wife is not fundamental; it is to be seen whether the words are of sufficient amplitude to convey an absolute estate [*Ramchandra* v. *Ramchandra* (44)].

It appears from the pedigree and the statements given above quoted from the plaint that *mauza* Laheri was (in spite of the recital in the *heba-bil-ewaz*) ancestral property held in co-parcenership by Durga Dutt and his sons. The gift of 1876 was made in the life-time of some of the sons, but in the circumstances it must, I think, be held that the transfer, though effected by the father, was made by him as agent of the joint family who ratified and affirmed the transaction.

After a prolonged consideration of the document, I am disposed to think that this was the transfer of an absolute estate.

The *heba-bil-ewaz* was evidently, we see from its recital, rather an act of gratitude than a sale for value. In spite of its form, it seems to me to be reasonable to regard this transfer of the Laheri property as in substance a gift (*dattam*) within the meaning of the Hindu texts—unless of course it be an absolute grant.

The learned Vakil for the appellants urges that on the *Mithila* text whatever immoveable property the husband grants to the wife, unless distinctly stated to be alienable, even though accompanied by express words of inheritance, cannot be alienated even with the consent of the husband As he forcibly put it in his argument, so far as such property is concerned, the husband is " as a dead man." The proposition is of course surprising, and it is unfortunate that it was not put forward in the plaint ; for in a case like this evidence of local usage in *Mithila* tracts would have been of great value. My learned brother's discussion of the texts has entirely unsettled my original impression that the *Mithila* law had no divergence from the law of the other schools in regard to the alienation by a wife with her husband's consent of immoveable property granted to her by him in his life-time. At the same time I am still impressed with some difficulties which do not amount to substantial doubts. As I have said, we have no evidence of local usage, a matter which is important when there is no authoritative text expressly and positively supporting the alleged *Mithila* rule. The rule is gathered by inference and is nowhere explicitly stated.

The ruling of the Madras Court, *Bhujanga Rau* v. *Ramayyama* (45), has been declared to be inconsistent with later Privy Council decisions and to be no longer law by the Editor of the 9th edition of Mr. Mayne's *Hindu Law* (paragraph 397); but this statement is a marked departure from the 8th edition. The case refers to alienations by the widow, not by a wife with her husband's consent. The form of alternative proposition in the *Mitakshara* school would, I conceive, be different from the form of alternative proposition in the *Mithila* school though both might be expressed loosely as "if not an absolute estate, inalienable." But it would have to be understood that in the *Mitakshara* law the word "inalienable" in such a context would mean "inalienable without the husband's consent" and in *Mithila* law "inalienable without legal necessity." That is how I understand the *Smriti Chandrika* (Chapter IX, S. 1, verses 13 and 14, and S. 2, verse 4, *et passim*) in regard to the *Mitakshara* law as applied in Madras. But on the whole I arrive at the conclusion that the rule that the wife must preserve the *corpus* of the property while her husband lives,

(63) [1879] 5 Cal. 684=5 C.L.R. 561.
(64) [1873] 7 B.L.R. 697=24 W. R. 397 (Note)

spending only the income subject to his permission, and after his death must preserve it for her heirs, is fairly deducible from the *Mithila* texts ; and I defer in this matter to my learned brother's arguments.

Reverting to the question whether the gift was absolute, as I understand *Bhujanga Rau's* case (45) it laid down that gifts by a husband to his wife of immovable property, even though accompanied by express words of inheritance, are not alienable by her unless distinctly stated to be so, though they descend to the wife's heirs. I think this is put forward as a rule of *Mitakshara* law and I take the meaning to be that such a gift even though it creates an estate of inheritance does not free the wife in respect of alienation from her husband's tutelage, or after his death from the limitations of a widow's estate, unless the matter is made distinctly clear. I am not convinced that such a demand for a distinct statement in the document could be applied in *Mithila* law, where the husband's tutelage can never exist in such circumstances and the grantor would (on one of the alternative constructions) be rendering his property absolutely inalienable. In *Mithila* law the alternative is ordinarily between absolute alienability, and absolute inalienability where there are no special limitations reserving control by some one. So I am not disposed to import the rule of *Bhujanga Rau's* case (45), as I construe it, into the present case. A husband, *karta* and father under *Mithila* law would be taking a very serious step in making such a gift to his wife as is suggested on the plaintiff's side : he would be surrendering his authority and control, and tying up the property for an indefinite period. In my opinion the *hiba-bil-ewaz* of 1876 was an absolute transfer, and I find that the intention deducible from its expressions was an absolute transfer. The finding is pertinent at this point because it shows why I think that the special rules of *Mithila* law as to absolute inalienability remain outside the facts of the present case.

I come now to the questions that have arisen in connection with the execution of the mortgage bond. In the first suit it was the plaintiffs' case that the mortgage was fraudulently executed and that the *bahuasin* never gave her consent at all. The discovery of this fraud was stated to have occurred in February 1906 (though the documentary and oral evidence show that three of the plaintiffs had a close connection with the document evidencing the transaction). The only evidence to suggest undue influence —which is all that is now asserted— is the statement that Babu Durga Dutt Singh, when he was being pressed by the Maharaja, sent a message to the *bahuasin* through her own relative Raghunandan Jha (a very important fact in itself) that she ought to meet the decrees against her husband. On this point as to undue influence I entirely agree with the learned District Judge who finds that there was no undue influence and that the lady had her uncle's independent advice. The matter is not in fact within the legal scope of the present case.

The position of the plaintiffs is anomalous. From the facts set out in paragraphs 1 to 3 of the plaint (the details of which I have quoted at the commencement of this judgment), I gather that *taluka* Laheri was ancestral property. In paragraph 17 of the plaint, the relief (*e*) is stated :

" That should the Court for any reason hold that the said deed of gift was only a colourable transaction, the Court may be pleased to hold that the said mortgage bond, the decree passed thereon in the absence of the plaintiffs Nos. 1 to 4 and the proceeding in execution thereof, affected, if at all, only the right, title and interest of the said Babu Durga Dutt Singh and not that of the said plaintiffs ; and the said plaintiffs are entitled to recover possession of their legitimate share in the disputed propeaty and with this declaration the Court may be pleased to pass in favour of the said plaintiffs a decree for possession of their legitimate share and for mesne profits with regard to that share from the date of this suit until the date of recovery of possession."

Now the property being co-parcenary and having been, on the facts which are assumed in this relief and asserted in the plaint, mortgaged by the father for his previous debts which were neither immoral nor illegal, and the whole property having been sold in enforcement of the mortgage decree, it is difficult to

see what the plaintiffs expect to get under this prayer; but, as I have found that the property was sold in execution of a mortgage executed by their mother who was the absolute owner thereof, and as that mortgage was decreed against her and the whole property was sold in execution, this relief need not be considered.

The next fact to note is that the mother was not a co-parcener or a manager or anything but absolute owner, and the sons, the present plaintiffs, were not co-parceners or reversionary heirs, but direct heirs who would have succeeded to the property, after the death of their mother, by simple inheritance: they derive title from their mother and are her heirs and legal representatives, they are therefore claiming under their mother. The mortgage decree still stands good, therefore the sale thereunder. In the previous suit, which was on a different cause of action from that of the present suit, as I have mentioned already, there was an express prayer for a declaration that the mortgage bond and the decree were vitiated by fraud and there was an express prayer for setting aside that decree. That suit was withdrawn and has never again been instituted. The opportunity passed away, and was lost. The present suit is quite different. I do not see how the question of undue influence can be raised in the present suit so as to have the effect of annulling the mortgage decree and the sale thereunder. As I have said before, the plaintiffs have no title independent of their mother.

I agree with the learned District Judge that the plaintiffs could not sue for possession until they had cleared the way for such a suit by securing the annulment of the mortgage decree and the sale thereunder. The point is raised in the written statement, paragraph 3, in the issues Nos. 2 and 4, and has found a place in the arguments in this Court. The policy of restraining multiplicity of suits is not merely a matter for parties to invoke in their own interest, but it is a matter of public concern, and therefore, I have no hesitation in giving it importance. The contention of the plaintiffs is that they can ignore the decree and sale, as they put it, "we are not bound by them." In my opinion, the property Laheri has passed away in the execution sale and it is now too late to set that sale aside, and so the suit is maintainable. No doubt there are cases where a person's interests are not affected by Court sales; the commonest example is where the decree and sale were without jurisdiction, as when the property of a stranger to the suit is sold in execution, that property being outside the property ordered to be sold under the decree [*Kadir Hossain* v. *Hossain Saheb* (65)]. Another instance is of course where the sale has not passed any property; as in *Motilal* v. *Karauddin* (66). In that case there were two sales of the same property, and it was found that in the second sale there was no right, title or interest of the judgment-debtor left to be sold, so the first purchaser was secure. I do not find that the present case falls within this class. There is a second class of cases in which the Court sale is valid to the extent of the judgment debtor's life interest, but the reversioners can elect to avoid the sale and indicate their election by bringing a suit for for possession [*Bijoy Gopal Mukherjee* v. *Krishna Mahishi Debi* (67)].

But this latter rule must be subjected to weighty reservations. I venture to put forward in a lengthy sentence what I conceive to be an enunciation of the law governing this case: (Later I shall refer to this as my main proposition). I am assuming, of course, that the case falls under Hindu Law.

If the *bahuasin*, as mortgagor-defendant, represented the whole estate in the mortgage suit; if the trial of that suit has not been shown to have been unfair; and even if the *bahuasin* was personally estopped from raising certain pleas, for instance, the absolute inalienability of the Laheri property; still, if the evidence before us shows that the debt was in fact due, and if we find nothing to show collusion or fraud in the obtaining from the Court of the decree in that suit, then the plaintiffs are bound by it, unless and until they get that decree set aside.

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(65) [1897] 20 Mad. 118=7 M. L. J. 52 (F. B.).

(66) [1898] 25 Cal. 179=24 I. A. 170=1 C. W. N. 639=7 Sar. 222 (P. C.).

(67) [1907] 34 Cal. 329=34 I. A. 87=11 C. W. N. 424=5 C. L. J. 334=9 Bom. L. R. 602=2 M. L. T. 133=17 M. L. J. 154=4 A. L. J. 329 (P. C.).

In order to be quite fair to the plaintiffs, I am assuming that they are in the favourable position—in view of the peculiar provisions of *Mithila* Law accepted in this judgment—of reversioners, and therefore not "claiming under" the *bahuasin* in the sense of S. 11 of the Code of Civil Procedure.

I have premised in my main proposition that there must be nothing to show collusion or fraud. We have before us the following facts: (*a*) intelligent adult members of the family, the father and three sons, either joined or took some part in the execution of the mortgage; (*b*) the father took a noticeable part in the litigation and so did the son, after the sale in execution; (*c*) the oral evidence before us consists in mere negations—attesting witnesses know nothing of the contents of the mortgage bond, processes were not served in the mortgage suit, and so forth—there is no positive evidence of fraud having the effect of misleading the Court; (*d*) the suit to annul the mortgage decree was withdrawn by the present plaintiffs and never revived.

So, to come back to my main proposition. What weight are we to give to the fact that the *bahuasin* was subject to a personal estoppel, when, so far as we can see in this suit, the mortgage debt was in fact due and there was no proved fraud or collusion in the mortgage suit? For the sake of brevity, I do not propose to go at length in the authorities. My findings of fact and law are that the *bahuasin* in the mortgage suit was the one person in the world capable of defending the property; that she was under a duty to protect it; and that she did not, because so far as we know, she could not, contest the suit; and that her personal estoppel did not detract, so far as we know, from the fairness of the trial of the suit. I agree with the learned Judge's discussion of issue 14. He might have quoted Exhibit G-3. I find that the *bahuasin* had due notice in the suit. These being my findings, I invite attention to Mayne's Hindu Law (9th edition) S. 664, read with Ss. 641 to 643, and Mulla's Commentary on the Code of Civil Procedure (7th edition), pages 50 and 51. But I quote as authorities specially pertinent *Subbamal* v. *Avudaiyammal* (68) and *Gur Nanak* v. *Jai Narain* (69).

I also quote the case of *Parekh Ranchor* v. *Bai Vakhat* (70) as I think it is useful to indicate my point of view. A widow, in spite of her duty to protect the estate, suffered a collusive decree and sale and the nearest heir of the widow's husband brought a suit for a declaration that the sale was inoperative as against him. His suit was out of time under Art. 12, but timely under Art. 95 of the Limitation Act. It was held that Art. 12 did not apply to the case and he was entitled to a decree. Now, in the present case, the plaintiffs do not allege that the mortgage decree was collusive, and they are out of time under both Articles. In the previous plaint the fraud there alleged was stated to have been discovered in February 1906, and the present suit was instituted on the 24th July 1918.

If the plaintiffs assert, as they do in the plaint, that they are the heirs of the *bahuasin*, it is clear that the decree must bind them as her heirs and legal representatives. If they attempt to assert that, having regard to the special conditions of the *Mithila* law, they are very much in the same position as reversioners, because it is the duty of the wife to preserve the property for the heirs, I would refer to my previous discussion of the legal position of reversioners. As to their claim to ignore the decree and the sale, I refer to the Privy Council decision in *Malkarjun* v. *Narahari* (71). In that case, notice of execution of a money decree was issued upon the nephew of the deceased judgment-debtor as his heir and legal representative, when in fact the judgment-debtor had left his properties by Will to his two daughters. The daughters had no notice. It so happened that a mortgagee of the property sold had purchased the property in this execution. The daughters sued the mortgagee for redemption and possession. It was held that the plaintiffs must clear the ground for redemption by a suit to set aside the sale. The omission to serve notice on the two legal representatives, though a serious irregularity, did not operate to

(68) [1907] 30 Mad. 3.
(69) [1912] 34 All. 385=14 I. C. 814=9 A. L. J. 375.
(70) [1887] 11 Bom. 119.
(71) [1901] 25 Bom. 337=27 I. A. 216=5 C. W. N. 10=10 M. L. J. 368=2 Bom. L. R. 927=7 Sar. 739 (P. C.)

divest the execution Court of jurisdiction. In such circumstances the plaintiff could not ignore the sale. The jurisdiction being there, the Court was empowered to decide wrongly as well as rightly. The case was barred under Art. 12 of the Limitation Act. There was a similar case in *Raghavendra Ayyar* v. *Karuppa* (72), a suit to recover land, with no prayer to set aside a sale effected under a Rent Recovery Act. The suit failed, being barred by Art. 12.

It is also to be remembered that the plaintiffs were present in Court as heirs and representatives of their mother and prosecuted her application to set aside the sale early in 1904. In their presence that application was rejected and the sale confirmed by the Subordinate Judge on the 2nd June 1904, and an appeal from that order was dismissed in the High Court in January 1906. The order of the 2nd June 1904 was an order "against" the present plaintiffs, in the sense of S. 312 of the old Code of Civil Procedure. So the plaintiffs were by that enactment debarred from bringing a suit to set aside the sale on grounds which would re-open the questions decided in the proceedings under S 311. It is clear that any suit to cancel the mortgage bond would be barred under Art. 91 or 125 of the Limitation Act and any suit to have the decree set aside on the ground of fraud would be barred under Art. 95. Article 141 is inapplicable, for, at the death of the *bahuasin*, the plaintiffs being equally bound with her to submit to the mortgage decree and sale were not entitled to the property in the sense of the Article. How could they be when that sale was subsequently confirmed and certified? Article 142 cannot refer to mere possessory title (as it is called): there is a special provision for that in Art. 3. At the time of delivery of possession the plaintiffs were divested of all title. No other Articles of the Indian Limitation Act appear to me to be apposite.

In my opinion, with great respect to my learned brother, whose judgment I have had the advantage of reading, this appeal should fail on the two grounds, that the mortgage of 1890 was a valid transfer made by the plaintiffs' mother, and that the present suit, which could not lie as long as the mortgage decree and the sale thereunder remain in force, is now barred and not maintainable.

(72) [1897] 20 Mad. 33=6 M. L. J. 278.

[On application by the appellants for judgment in favour of the appellants under clause 28 of the Letters Patent the following judgment was delivered :]

Judgment.—Mr. K. B. Dutt, appearing on behalf of the appellants, draws our attention to the decision of the Judicial Committee in *Bhaidas Shivadas* v. *Bai Gulab* (73) and contends that on the authority of that decision his clients are entitled to judgment in their favour. The first question is whether we have any jurisdiction to entertain the application which is now made before us.

It is well established that there is no authority to alter or add to a judgment after it is dated and signed, save as provided by S. 152 or on review. Our Code recognises the rule in O. 20, R. 3. But in this case we are not asked to alter or add to the judgment. The judgment pronounced by us remains. The only question is as to the procedure for giving effect to the judgment. We have differed in opinion on points of law; and the question is whether there should be a reference to a third Judge under S. 98 of the Code or whether the appellants are entitled to judgment in their favour under clause 28 of the Letters Patent. The order which Mr. Dutt is asking us to vary did not decide anything as of right between the parties: it merely referred the matter to the decision of a third Judge. We are now asked to vary that order because of what the Judicial Committee is said to have held in the case to which I have referred. It has been held in England that, in matters of mere procedure, a Judge has power, in dealing with what has been directed by a previous interlocutory order, when new facts are brought before him, which show that following the precise directions of that previous order will cause what he considers inconvenience or other injury to the parties, to give directions that, notwithstanding the previous interlocutory order, a different mode shall be adopted for carrying into effect the substance of the previous order. [See

(73) [1921] 45 Bom. 718=48 I. A. 181=40 M. L. J. 519=25 C. W. N. 605=33 C. L. J. 488=19 A. L. J. 409=23 Bom. L. R. 623=14 L. W. 7=60 I. C. 822=29 M. L. T. 350=(1921) M. W. N. 408 (P. C.)

Prestney v. *Colchester Corporation* (74).] The question before us is of a somewhat different nature; but we are of opinion that the order which we are asked to vary not having decided anything as of right between the parties but merely laying down the procedure by which the right should be decided, we have complete jurisdiction to vary the order if we are satisfied that the right between the parties cannot be ascertained in the mode indicated by us.

Coming to the merits of the application, it seems to us that the order passed by us is right. No doubt the Judicial Committee held in the case cited that clause 36 of the Letters Patent of Bombay (corresponding with clause 28 of our Letters Patent) prescribes a special form of procedure by which, if the Judges hearing an appeal are equally divided, the opinion of the senior Judge prevails and that that clause is not controlled by S. 98 of the Code of Civil Procedure which provides for a reference of the point in dispute to one or more other Judges. But it must be remembered that the Judicial Committee was dealing with a case which was heard on the Original Side of the Bombay High Court; and this was prominently referred to in the arguments of Mr. DeGruyther who pointed out that the case was on the Original Side and the procedure in appeal was regulated by clauses 15 and 36 of the Letters Patent of Bombay. Now there is no doubt that the provisions in S. 98 of the Code create a totally distinct method of procedure in the event of difference between two Judges from that which is laid down by clause 36 of the Letters Patent of Bombay. Under clause 36 the judgment of the Judge who is the senior Judge would be the judgment which the parties before the Court would have a right to obtain; under S. 98 the judgment to which they are entitled is the judgment of the majority of all the Judges who have heard the appeal, including the Judges to whom the points in difference may be referred.

In our opinion there is no conflict between the Code and the Letters Patent. The special procedure indicated in the Letters Patent applies to Letters Patent appeals; the procedure indicated in S. 98 of the Code applies to appeals from subordinate Courts. The matter was fully considered by the Bombay High Court in *Bhuta Jayatsingh* v. *Lakadu Dhansing* (75) and we concur so completely in the judgment of the Full Bench that we think it unnecessary to state our reasons in support of the order which we have already passed. In our opinion the application must be refused.

[The appeal was laid before the Chief Justice, owing to the difference in opinion between the learned Judges:—]

Dawson Miller, C. J.—This appeal has been referred to me under S. 98 of the Civil Procedure Code for determination upon two points of law upon which the learned judges before whom the appeal came originally have differed in opinion.

The points as formulated in the judgment of Das, J., are:—First, whether the present suit is maintainable by the plaintiffs, and whether it is barred by limitation; and secondly, whether, on the interpretation of the *heba-bil-ewaz*, the fullest rights of ownership, including the power to alienate the property, were conveyed by Babu Durga Dutt Singh to his wife.

The facts are fully recorded in the judgment of Das, J., and it is unnecessary to repeat them.

The argument before me was mainly directed towards the second point and it will be convenient to deal with it first. It was conceded at the outset by Sir Binode Mitter, who appeared on behalf of the appellants, that if the *heba-bil-ewaz* passed all rights of ownership to the grantee, the suit is not maintainable. Again it is not disputed that the instrument of 1876 conveys an estate of inheritance which would, after the death of the grantee, devolve upon her own heirs and not upon those of her husband as in the case of property inherited by a Hindu widow from her husband. It is further conceded that if the grantee had been a male or even a female under no personal disability, there is nothing in the Hindu law which would exclude the right of alienation incident to a grant of an estate of inheritance.

It is contended, however, that in determining the intentions of the grantor it must be taken that Durga Dutt Singh

(74) [1883] 24 Ch. D. 376=52 L. J. Ch. 877=48 L. T. 749=31 W. R. 757.

(75) [1919] 43 Bom. 433=50 I. C. 715=21 Bom. L. R. 157 (F. B.).

was well aware that a Hindu wife governed by the Mithila law could not alienate immovable property, the gift of her husband, and that presumably his intention would be to transfer only such powers as the ordinary law recognised, and even if he erroneously supposed that the grantee might alienate the property with his consent, this can make no difference in the present case if in fact, as now found, his consent did not validate the transaction.

The proposition contended for is stated in the judgment of the Judicial Committee in *Moulvi Mohamed Shamsool Hooda* v. *Shewakram* (42) in the words: "In construing the Will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property of Hindus. It may be assumed that a Hindu generally deires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." Bearing that in mind and having regard to all the expressions in the Will, which must be taken together, their Lordships held in that case that the testator's intention was to grant to his deceased son's wife a life interest only with remainder to her two daughters who were also mentioned in the Will as heirs and *Maliks*. This principle was again recognised by the Judicial Committee in *Radha Prasad Mulick* v. *Ranee Mani Dassee* (43). There is no doubt that the principle is one which must be given due weight. In both the cases cited, there were, however, indications in the Will itself that an interest for life only was intended to be given to the daughters with remainder over to other persons named. So clearly was this intention expressed in the later case that, notwithstanding the provisions of S. 82 of the Indian Succession Act of 1865, which was applicable under S. 2 of the Hindu Wills Act of 1870 to the case in question, their Lordships were satisfied that only a restricted interest was intended to pass.

A somewhat similar principle is sometimes expressed by saying that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention. [See *Lloyd* v. *Guibert* (37).]

But, after all, the intention is primarily to be gathered from the words of the instrument itself, and the application of this and similar doctrines, although they must be given due weight, must not be allowed to overrule the clear indications of intention to be gathered from the words of the document. Perhaps it may not be out of place to repeat here what was said by Lord Justice Turner in delivering the judgment of the Judical Committee in *Sreemutty Soorjeemoney Dossee* v. *Denubundoo Mullik* (76) The case was one of the construction of a Will. "In determining that construction," said the learned Lord Justice, "what we must look to, is the intention of the testator. The Hindoo law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the the Will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the Will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the Will or the surrounding circumstances displace that assumption."

In applying these principles to testamentary and other forms of gift, the Courts in India appear to have inclined from time to time towards two extremes: one view being that a gift of an estate of inheritance to a Hindu wife did not pass

(76) [1854-57] 6 M. I. A. 526=4 W. R. 114=1 Suther. 291=1 Sar. 583 (P. C.).

the right of alienation except when conferred by express words; the other that such a gift always gave the right of alienation except when expressly excluded.

I think it may be gathered from the decisions of the Judicial Committee that neither of these views quite correctly expresses the proper rule of construction in such cases. In *Surajamani* v. *Rabinath* (50), the High Court at Allahabad following earlier decisions of the same Court had held that under the Hindu law a testamentary gift of immovable property by a husband to his wife, although made in terms creating an heritable estate, did not confer upon her any power of alienation unless such power was given by express words in the instrument. The High Court considered that in the absence of such express power it must be presumed that as regards her power of alienation the testator intended that she should be under the same restrictions as the Hindu law imposes upon a widow in the case of property inherited from her husband. On appeal to His Majesty in Council, their Lordships overruled the decision and held that where full proprietray rights are clearly granted over the property this conferred the power of alienation unless there was something in the context or the surrounding circumstances showing a different intention and the fact that the donee was a woman was not in that case sufficient in itself to impute a different intention. [See *Surajamani* v. *Rabinath Ojha* (49)]. It is important to remember that that case, although it applied to a Will made after the year 1870, did not come within the operation of S. 2 of the Hindu Wills Act of that year and S. 82 of the Indian Succession Act had therefore no application. In that case also the decision of Mitter, J., in *Kollany Kooer* v. *Luchmee Pershad* (77) was cited with approval.

The High Court at Madras on the other hand, appears in more recent decisions to have inclined towards the opposite extreme. In *Ramachandra Rao* v. *Ramachandra Rao* (48), a case of a testamentary gift to a Hindu wife, it was held by Seshagiri Ayyar, J., that the earlier decisions of the same High Court in *Bhujanga* v. *Ramayamma* (45) and *Nunnu Meah* v. *Krishna Swami* (46)." must be deemed to have been overruled by the decision of the Judicial Committee in *Surajmani's* case (49), and that unless there is an express or implied qualification to the contrary the donor must be deemed to have conveyed all that he was possessed of in the property granted including the power of alienation. The words of the grant in that case were: "Out of the remaining property my adopted son shall be entitled to enjoy one-half of the property. Out of the remaining half my two wives shall take half and half." I do not wish to be understood either as questioning the propriety of that decision or expressing concurrence with it; I merely wish to point out that on appeal to the Judicial Committee, where the decision was overruled upon another point, their Lordships, although it was not necessary for them to determine the effect of the deed of gift at the same time thought it expedient to issue a note of warning, as some misapprehension appeared to them to exist in the High Courts in India as to the effect of certain decisions of the Board and notably that of *Surajmani* v. *Rabinath Ojha* (49). Lord Buckmaster, in delivering the judgment of the Judicial Committee, says: "In the case referred to (*Surajmani's* case), when originally heared before the High Court, it had been stated that under the Hindu law in the case of a gift of immovable property to a Hindu widow she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including of course the power to alienate, which the High Court had thought required to be added by express declaration. In that case it is true some comparison was drawn between the gift to a Hindu widow and the gift to a person not under disability, but that was not the foundation of the decision, which depended entirely upon the wide meaning of the words in which the gift to the widow was clothed. More recent decisions of this Board [in *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury* (51) and *Bhaidas Shivdas* v. *Bai Gulab* (52)] do nothing but repeat the same proposition in other words". [See *Ramchandra Rao* v. *Ramachandra Rao* (44).]

The effect of these decisions appears to me to be that there is nothing in the Hindu law which prohibits a woman,

(77) [1875] 24 W. R. 395.

whether wife or widow, from acquiring an absolute estate in property including the power of alienation. If words of grant are used importing the transfer of full proprietary rights, then effect must be given to them irrespective of the sex of the grantee. It may appear, however, from the context or from the surrounding circumstances that a limited power of disposal was intended to be conferred, even where an estate of inheritance is granted. Where ambiguity exists in the document itself or where the words are not of sufficient amplitude to confer full powers of alienation it is legitimate to assume that the grantor had in mind the ordinary disability which the Hindu law attaches to a woman's rights over property and this may be considered in determining the intention even where an estate of inheritance is granted. But where words are used which in their context express an intention of transferring full rights of ownership, it seems to me that the other principles of interpretation relied on are of minor importance and should not be allowed to restrict the natural meaning of the words.

Before considering the interpretation of the document, I desire to point out that I am bound by the findings already come to by the learned judges who heard the appeal in so far as they are agreed. I do not therefore prosose to discuss the question whether under the Mithila law as expounded in the *Vivada Chintamani*, the property was alienable during the husband's life-time and with his consent. Whether the learned judges were agreed that the *heba-bil-ewaz* was a gift or a sale is perhaps not altogether free from doubt. Das, J. held a clear view that the transaction was a gift. Foster J., thcught that it was rather an act of gratitude than a sale for value and says:

"In spite of its form it seems to me to be reasonable to regard this transfer of the Laheri property as in substance a gift (*dattam*) within the meaning of the Hindu texts",

but he adds--

"unless of course it is an absolute grant."

I have some difficulty in seeing how the nature of the transaction could depend upon whether it was an absolute or a restricted grant. I think what the learned Judge probably had in mind was that the ordinary Hindu law would not prevail over an absolute grant carrying a power of alienation, and not that the quality of the estate granted would affect the nature of the transaction. If full rights of ownership were transferred it would not matter whether the transfer was effected by gift or by sale. In either case the right of alienation would subsist. I think however I ought to assume that the learned Judges were agreed that the transaction was one of gift, and, whatever my own views on the subject may be, I must hold that on the terms of the reference I am precluded from re-opening the point. This question arose in argument in discussing the intention of the grantor in connection with what may be called the surrounding circumstances. It was urged by Mr. Hasan Imam, on behalf of the respondents, that Durga Dutt Singh would never have transferred the property to his wife in the form of a *heba-bil-ewaz*, which text-book writers appear to agree, carries with it the incidents of a sale, if he really intended the Hindu law restraining alienation in the case of a gift to a wife to apply. Foster, J., appears to accede to this argument, although as I have stated, he eventually agreed that it was a gift. It was also argued that although it has now been decided that the instrument is one of gift it does not follow that Durga Dutt Singh took the same view some 50 years ago when he transferred the property to his wife and therefore the presumption which would arise in the case of a gift either disappears or is materially weakened.

In the same connection it was also argued on behalf of the respondents that in all the cases in which the principle enunciated in *Shamsool Hooda's* case (42) has been applied, the Hindu law applicable was well known and established and knowledge thereof might well be imputed to the person making a disposition of his property whereas in the present case it does not follow that the law now laid down, after a critical examination of the texts, was so universally acknowledged in 1876 as to carry any presumption that the grantor was then aware of it. It is argued that even if it be clearly stated in the *Vivada Chintamani*, and it appears to be so, that a wife cannot at her pleasure alienate immovable property given to her by her husband, the finding that she cannot do

so even with his consent during his lifetime and in order to pay his creditors is arrived at rather as an inference drawn from the text of Bachaspati Misra than from any direct prohibition therein contained, and that there has hitherto been no decided case in which the Mithila law has been so expounded. The question then arises how far it whould be safe in the present case to presume that Durga Dutt Singh in effecting the transfer was aware of the restraint on alienation imposed by the Mithila law as now expounded, upon a wife during her husband's life time with his consent and for the purpose of satisfying his creditors. I am not sure that it would be safe to presume more than this, namely, that the grantor was aware that in the Mithila country a wife could not at pleasure dispose of the property given to her by her husband. Sir Binode Mitter contended that even then the husband's consent would not make the alienation valid if in fact the law prohibits it in spite of his consent. I quite agree but the question is not, for this purpose, what the law is, but how far it can be presumed that the grantor was aware of it and intended the transaction to be governed by it.

It was also argued by Mr. Hasan Imam for the respondents that the subsequent action of Durga Dutt Singh in joining in the mortgage transaction was in itself a strong indication that when he made the gift in 1876 he did not intend the property to be inalienable even with his consent. I think, however, it would be highly dangerous and hardly legitimate to interpret his intentions in 1876 by reference to his conduct 14 years later when the considerations which then influenced him may have been entirely different. He has not been charged and no question of estoppel by his conduct arises. I have referred to these matters somewhat fully out of respect to the learned Counsel who argued them at some length, but in the view I take of the meaning of the *heba-bil-ewaz* it is not necessary to determine how far the presumption of intention contended for by the appellants is affected by the considerations mentioned. I should be prepared to hold, if necessary, that there are circumstances present in this case which tend to weaken the presumption which, speaking generally, arises in such cases. I refer more particularly to the form in which the transfer took place and the fact that a substantial consideration passed from the donee to the donor as indications that Durga Dutt Singh may, after all, not have had in mind the restraint on alienation in the case of gifts to a wife when he transferred the property. I do not however wish to base my decision upon the strength or weakness of the presumption in the present case and it is unnecessary to discuss it further, for, giving full weight to the principle enunciated in the cases already cited, there was, in my opinion, in the *heba-bil-ewaz* a clearly expressed intention to transfer full rights of ownership including the right of alienation.

The document begins by describing Durga Dutt Singh as the proprietor (*malik*) of the Laheri property. It then recites that a decree obtained against him by his creditor for Rs. 41,532 is in course of execution in the Court of the District Judge and that the property in suit and another property of his have been advertised for sale on the following day; that he has tried and failed to raise the money and as the sale will entail loss of both the milkiat properties, having taken the sum stated above from his wife, he makes *heba-bil-ewaz* to her, his wife, of his share in taluka Laheri. "With trees, fruit-bearing and non-fruit-bearing and ahar and pokhar and reservoir and tank and katcha and pakka wells and sair and salt sairs and houses occupied by tenants and all my zamindari rights which up to now have (or has) been in my possession without the co-partnership of anyone".

It then recites that he has paid off the sum due under the decree and got the property released from sale and put musammat in possession and directs that by becoming possessed of the property she should spend the produce with sons, generation after generation and the declarant his heirs and representatives shall have no concern in demanding the subject of the heba or the consideration money from musammat orher heirs andrepresentatives. It is admitted that the words "with sons generation after generation" used in their context convey an estate of inheritance. There is no restraint either express or implied on alienation but on the contrary all the zamindari rights are transferred by the donor. The zamindar is the proprietor

and the zamindari rights are proprietary rights. I cannot accept the view of my brother Das, J., that the words "and all my zamindari rights" add nothing to the words immediately preceding them or that they must be construed by reference to the *ejusdem generis* rule. The preceding words, as he truly observes, appear to be specific items of property, but they are of a corporeal nature such as trees, wells, etc., whereas the zamindari rights are intangible or incorporeal and not of the same genus. I can hardly believe that such words would have been used had they been intended merely as descriptive of the preceding category. It would have been sufficient to say "and other things" or similar words if that were the meaning. The learned Judge appears to have had a difficulty in holding that abstract rights could be the subject of gift or could be possessed. I confess I do not share the difficulty. In connection with this point some discussion arose before me in argument as to the word which is rendered "have" in the expression.

"which up to now have been in my possession without the copartnership of of anyone."

Mr. Hasan Imam said the word in the original document, which was translated by him in Court and taken down by the learned Judge, was "has" and not "have", and that either he had made a slip in dictating the translation or he had not been properly understood. I do not think the question is one of material importance; but to set the matter at rest I sent for the translator who originally translated the document as it appears at page 7 of Part III of the record. It seems that in the original the word is "has" and as a matter of syntax it must be governed by the earlier words "my share, etc., in taluka Laheri" and not to the zamindari rights and other matters mentioned. This reading would no doubt obviate the difficulty felt by Das, J. It was further argued on behalf of the respondents that the reference to the heirs and representatives of the grantee indicated an intention to grant an alienable estate as the word "representatives" would include assigns who were not heirs. The word translated "representatives" is *qaim-moqaimian* which literally means "those who stand in another's place" and is correctly translated "representatives". I believe the word "representatives" when used in an English conveyance has a technical meaning and includes executors or administrators but not assigns. However this may be, I am not aware that the word "qaim-moqaimian" is a term of art in such a document in India. But it is clear that the expression coming as it does in what amounts to a covenant for quiet enjoyment cannot add anything to the extent of the grant. It might possibly throw some light upon the earlier part of the document if there were any ambiguity; but even assuming that it includes "assigns" the use of such a word would not indicate an absolute power of alienation, for it is admitted that in certain events, such as legal necessity, the grantee might alienate. I do not think any importance can be attached to the use of the word.

It was argued on behalf of the appellants that the words directing the grantee to spend the produce indicated that she was given the usufruct only. Those words are coupled with the words "with sons generation after generation" which admittedly passed an estate of inheritance. But it is not suggested that the sons who followed after would be in any way restrained from alienating the property. Moreover, although the grantee was directed to spend or enjoy the produce, the enjoyment was that of a person having full rights of ownership which were also conferred. Such words are not uncommonly used in India in conveyances which transfer an heritable and alienable estate An instance will be found in the case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (55). The words used there were "my nephew..... becoming on my death my sthalabhishikta and becoming owner (malik) of all my estates and properties, etc., shall..... enjoy with son, grandson and so on in succession the proceeds of my estate."

Lord Davey, in delivering the judgment of the Board, said: "Nor was it disputed that the words of gift to the appellant were such as to confer on him also an heritable and alienable estate. The words 'become owner (malik) of all my estates and properties' would, unless the context indicated a different meaning, be sufficient for that purpose even without the words 'enjoy with son, grandson and so on in succession' which latter-

words are frequently used in Hindu Wills and have acquired the force of technical words conveying an heritable and alienable estate." So far as I am aware such words have never been interpreted as restricting the full rights of ownership conferred in an earlier part of the instrument of grant.

In my opinion the *heba-bil-ewaz* was intended to and did pass an heritable and alienable estate and the words used were of sufficient amplitude for that purpose.

If this view of the meaning of the document is accepted it is admitted that the suit is not maintainable. But as this case may go before a higher tribunal, I propose to express shortly my opinion on the question of maintainability and limitation on the assumption that an unrestricted power of alienation was not conferred.

The plaintiffs who obtained possession of the property after their mother's death in 1904 and remained in possession until the 14th December 1906, when they were dispossessed by the Maharaja, would in the ordinary course have 12 years from that date in which to sue for recovery of possession under Article 142 of the Schedule to the Limitation Act. The suit was instituted in July 1918 within the period of limitation. But it is contended that they were barred by S. 47 of the Civil Procedure Code as they ought to have raised the question of their mother's right to alienate when they were substituted in her place in the execution proceedings. As pointed out by Das, J., the application made by them to set aside the sale on the ground of irregularity under S. 311 of the old Code, although purporting to be an application under S. 244 also, did not in fact raise any question coming under the latter section and did not cover the point now raised. In my opinion it was not open to the appellants to raise the question in those proceedings. The executing Court is bound to execute the decree and could not, apart from fraud, consider whether the decree ordering sale of the property was one which the trial Court ought rightly to have passed. The representatives of the mortgagor could not successfully reopen the question which, if it were open at all, should have been urged before the trial Court.

Next it was contended that the suit was barred by S. 11 of the Civil Procedure Code. It is pointed out that the appellants claim under their mother as her heirs. They are not reversioners taking as heirs of their father subject to the life interest in their mother, nor are they remainder men taking under their father's Will. Primarily therefore they would be bound by the acts of their predecessor-in-title as well as by any decree obtained against her. But in truth it can hardly be said that the mother in this case represented the estate for all purposes so as to bind those who succeeded her. *Ex hypothesi* she had no power of alienation. In this respect her position is very like that of a Hindu widow taking by inheritance. She could no more bind the estate in the hands of the heirs by an alienation than a Hindu widow inheriting from her husband could bind the reversioners. She assumed a power which the law denied her. She could not transfer a good title to the mortgagee. If the mortgage was not binding upon the heirs, then, as long as their possession was not disturbed, they could, I think, ignore it and treat it as non-existent. Being in possession they were under no obligation to assert their title by a declaratory suit or to sue for possession. Does it then make any difference that a mortgage decree was passed in favour of the mortgagee? I think not The mortgagor did not, and could not, in that suit plead her disability, she could not derogate from her grant and the question was, neither substantially, or at all in issue within the meaning of S. 11 of the Civil Procedure Code, nor could the inalienability be made a ground of defence in that suit within the meaning of Explanation IV of the section.

It is contended, however, that a decree against a Hindu widow can bind even the reversioners taking as heirs of her husband, and *a fortiori* her own heirs must be bound. *Shivagunga's case* (78) [*Katama Natchiar* v. *Raja of Shivagunga*] and *Risal Singh* v. *Balwant Singh* (79) were relied on in support of the argument. But in both those cases the question for decision had arisen and been determined

(78) [1861-64] 9 M. I. A. 539=2 W. R. 31=1 Suther. 520=2 Sar. 25 (P.C.),

(79) [1918] 40 All. 593=45 I. A. 168=28 C. L. J. 519=24 M. L. T. 361=9 L. W. 52=23 C. W. N. 326=(1919) M. W. N. 155=35 M. L. J. 597=48 I. C. 553=21 Bom. L. R. 511 (P.C.)

in the previous suit to which the widow was a party and all the pleas available to the reversioners had been taken by her and after a fair trial had been determined against her.

In the present case I think the principle followed by their Lordships of the Judicial Committee in *Bijoy Gopal Mukherji* v. *Krishna Mahishi Debi* (80) is applicable. That case, it is true, was a case of alienation by lease by a Hindu widow followed by a suit by the reversioners after her death to recover the property; but the ground of the decision was that the alienation was not binding on the reversioners who could therefore treat it as a nullity without first seeking the intervention of the Court to set it aside and I think the same principle is applicable to the heirs whom the alienation did not bind. Nor do I consider that the fact that a decree has been passed against the mortgagor in the present case can give the transaction any more binding force if the mortgagor's power of alienation was not in question before the Court which passed the decree.

I agree, however, that if, contrary to the view just expressed, it is necessary to set aside the decree before the present suit is maintainable, the period within which the decree could be set aside has long since passed and the suit in that case could not proceed. In my opinion, however, on the assumption that the right of alienation did not exist the suit is maintainable and is not barred by limitation.

The result of my findings is that the suit fails and the appeal should be dismissed.

(80) [1907] 34 Cal. 329=34 I. A. 87=11 C.W.N. 424=5 C. L. J. 334=9 Bom. L. R. 602=2 M. L. T. 133=17 M. L. J. 154=4 A. L. J. 329 (P.C.)

★ 1925 PATNA 674

MULLICK AND ROSS, JJ.

Bhimnath Misra and others—Plaintiffs—Petitioners.

v.

Jagarnath Prosad and others — Defendants—Opposite Party.

Civil Revision No. 361 of 1924, Decided on 7th May 1925.

★ (a) *Civil P. C., O. 14, R. 2—Issues of fact—Decision on, cannot be postponed.*

O. 14, R. 2 of the Code gives the Court power, where issues both of fact and of law arise in the same suit, to postpone the settlement of the issues of fact until after the issues of law have been determined, if the Court is of opinion that the case or any part of it may be disposed of on the issues of law at first. There is no such power to separate the issues of fact. [P 676 C 2]

Per Mullick, J.—There is no authority under the Code for postponing the trial of an issue of fact except on the ground of embarrassment. [P 676 C 1]

A plaintiff is entitled to a trial of the issues of fact which he raises and the Court has no authority to refuse to try these issues if the suit is properly framed. [P 677 C 1]

★ (b) *Civil P. C., O. 2, R. 4—Plaintiff cannot be allowed to claim alternative titles arising out of inconsistent facts.*

Per Mullick, J.—A plaintiff may join as many causes of action as he pleases subject to (1) the provisions of O. 2, R. 4. of the C. P. Code and (2) the general rule that though he may base his claim on alternative and inconsistent titles he should not in any event be allowed to claim on alternative titles which arises out of inconsistent facts. [P 675 C 1]

(c) *Civil P. C., S. 115—Trial Court indefinitely postponing some issues of fact—Loss of evidence to parties almost certain—High Court will interfere under general powers, if not under S. 115—Govt. of India Act S. 107.*

If the effect of an order of the trial Court indefinitely postponing the trial of an issue of fact in an almost certain loss of material testimony to plaintiff as well as defendant the High Court will interfere in the exercise of its powers of superintendence though S. 115 of the Code may not apply. [P 676 C 1]

A. K. Ray—for Petitioners.

S. M. Mullick, Ram Prosad and *Bindeshri Prosad*—for Opposite Party.

Mullick, J.—The question in this case is whether an order made by the Subordinate Judge of Bhagatput on the 28th July 1927 is to be set aside.

The plaintiffs are the sons of Rani Padmabati, the widow of Raja Padmanand Singh of Benaili. This lady executed a Will on the 24th September 1908 of which probate was granted by the High Court of Calcutta to defendant No. 1, Babu Jagarnath Prasad, and to certain other persons. The plaintiffs admit that claiming under a trust declared by the Will and also a trust deed executed on the 19th April 1912, the first party defendants have taken possession of the entire properties left by the Rani and they bring the present suit for a declaration that the Rani had no disposing power over the properties in question and that no trust deed was executed and they pray for recovery of possession with mesne profits and in the alternative for the construction of the Will and the trust deed and for the rendition of accounts, the removal of the trustees for misappropriation and for the appointment of new trustees.

The first 12 issues relate to the title of the plaintiffs and their right to recover possession and they are admittediy quite distinct and based on a different cause of action from issue No. 13 which ran as follows :—

"Are the trustees or any of them liable to removal for misappropriation and misconduct ?" On the 28th July 1924 the Subordinate Judge decided to try issues Nos. 1 to 11 first. Issue No. 12 concerns mesne profits and admittedly it cannot be conveniently tried till after the decision of issues Nos. 1 to 11; but with regard to issue No. 13, which arises out of an altogether different cause of action, namely, breach of trust and is based on facts wholly inconsistent with those material to issues Nos. 1 to 11, it is contended that the plaintiffs should not be allowed to proceed to trial and that they should be called upon to elect so that the defendant may know what case he has to meet.

It is true that a plaintiff may join as many causes of action as he pleases subject to (1) the provisions of O. 2 r. 4 of the Civil Procedure Code and (2) the general rule that though he may base his claim on alternative and even inconsistent titles, he should not in any event be allowed to claim on alternative titles which arise out of inconsistent facts. Although the Judicature Act in England has widened the rules af pleading and now enables partics to claim relief in the alternative upon setting out inconsistent facts, the trend of judicial decisions in India seems to limit the scope of the Code and to forbid a plaintiff, certainly where the facts are presumably within his knowledge, to plead inconsistent facts and to require him to elect, so that the defendant may know what cause he has to meet ; and similarly a defendant may not plead inconsistent facts unless he is a stranger to the transaction and the true state of facts is not within his personal knowledge. So it has been held by the Judicial Committee of the Privy Council in *Mahomad Buksh Khan* v. *Hossaini Bibi* (1) that a plaintiff could not be allowed to plead that a *hibanama* was forgery and also at the same time that it was executed under undue influence. In *Iyyappa* v. *Ramalakshmamma* (2) their Lordships of the Madras High Court held that it was not open to a plaintiff to plead that a deed of sale was a forgery and at the same time that it was void for want of consideration. So again in *Ningappa* v. *Shivappa* (3) the Bombay High Court held that inconsistent assertions of fact cannot be permitted in pleadings but on the same oasis of facts two distinct titles may be put forth. On the other hand, a dissenting note was struck in *Jino* v. *Manon* (4) where the decision of the Privy Council in *Mahomad Buksh Khan's* case (1) was sought to be distinguished and it was held that a plea that a bond was a forgery could be joined with a plea that it was null and void for want of actual consideration. But in *Abdul Ali Abdul Hussain* v. *Miakhan Abdul Hussain* (5) the earlier view was re-asserted and it was held that a Muhammadan plaintiff could not be allowed to plead that he was entitled to the property in suit as heir of his father to the exclusion of his mother and also at the same time that he had inherited it from his daughter who had acquired a good title from his mother.

I think, therefore, that the Subordinate Judge would have been well advised in this case not to have allowed a joinder of causes of action.

But the defendants not having taken any steps to move higher authority to have issue No. 13 struck out, what is the Subordinate Judge's proper course now ?

It is contended that by deciding to postpone the trial of issue No. 13 till the other issues have been finally decided, the Subordinate Judge subjects the plaintiffs to the risk of losing valuable testimony which it is highly desirable to perpetuate. It is suggested that the final disposal of the other issues may take 7 or 8 years and that by that time the trustees and material witnesses may be dead and much of the evidence of breach of trust may disappear. It is argued that when a Court postpones the trial of an issue indefinitely it is committing material irregularity in the exercise of jurisdiction and therefore S. 115 C. P. C. applies.

It is also contended that as there is likely to be a substantial denial of the right of fair trial S. 107 of the Government of India Act also applies.

(1) [1888] 15 Cal. 684=15 I. A. 81=5 Sar. 175 (P C.)
(2) [1890] 13 Mad. 549 (P. C.)
(3) [1894] 19 Bom. 323 (P. C.)
(4) [1895] 18 All. 125=16 A. W. N. 1 (P. C.)
(5) [1911] 35 All. 297=10 I. C. 890=13 Bom. L. R. 268.

I doubt whether S. 115 applies to the case, for the Court was competent to exercise his own discretion as to the order in which he would take up the issues and if he was satisfied that issue No. 13 would embarrass the trial of the other issues, he had jurisdiction to postpone its trial.

But I think that if the effect of his order is an almost certain loss of material evidence, then the apprehension of a denial of the right of fair trial arises and we are competent to interfere in the exercise of our powers of superintendence.

The Court is competent to postpone the trial of issues of fact if the case can be decided on isssues of law only. But there is no authority under the Code for postponing the trial of an issue of fact except on the ground of embarrassment. As already stated above, the issue should not have been allowed to be raised and there is reason for fearing that the trial will be greatly prolonged, if the facts as to the alleged breach of trust are investigated and accounts are to be taken; and it is pointed out by the defendants that the plaintiffs have waited nearly 12 years since the death of the Rani to bring this suit and that the trustees have been in possession without any objection during this period. In my opinion these objections come too late. Having regard to the time which has elapsed since the issues were framed, I think it is now too late to put the parties into the position which they would have been occupying if the Subordinate Judge had taken the proper course in the first instance by refusing to frame the issues. As the defendants have in effect assented to the trial of the issue, I think the Subordinate Judge must try it as soon as the trial of issues Nos. 1 to 11 has been concluded by him.

I would, therefore, allow the application with costs, hearing fee three gold mohurs.

Ross, J.—The plaintiffs claimed recovery of land with mesne profits from the defendants on the allegation that they were the heirs of the last owner who had no power to dispose of the property by Will or deed and that the deed of trust said to have been executed by her was invalid. In the alternative they prayed that if the trust was good the trustees should render accounts and should be removed for breach of trust.

Sixteen issues were framed, of which the thirteenth issue was: Are the trustees or any of them liable to removal for misappropriation and misconduct?" On the application of the defendants, the trustees, the learned Subordinate Judge has ordered that the thirteenth issue should be tried after the other issues have been disposed of. From the tenor of his order it would appear that the intention is that a separate judgment should be delivered on the other issue and that the trial of the thirteenth issue should be postponed until the earlier issues have been decided, if necessary, on appeal. In making this order the learned Subordinate Judge relies upon Or. 2, r. 6 of the Code of Civil Procedure and his order is virtually an order of the separate trial of the thirteenth issue.

Now Or. 14, r. 2 of the Code gives the Court power, where issues both of law and of fact arise in the same suit, to postpone the settlement of the issues of fact until after the issues of law have been determined, if the Court is of opinion that the case or any part of it may be disposed of on the issues of law first. There is no such power to separate the issues of fact. The plaintiff may rely on several different rights alternatively though they may be inconsistent. Or. 2, r. 4 requires that with certain exceptions, the leave of the Court should be given for joinder of other causes of action with a suit for recovery of immovable property. Assuming that the present case does not fall within these exceptions and that the leave of the Court was required and had not been obtained, yet I think that that was a mere irregularity which can be waived and must be taken to have been waived in the present case by reason of r. 7 of Or. 2. This view was taken by the Court of Appeal in *Lloyd* v. *Great Western Dairies Company* (6) where Fletcher Moulton, L. J., said: "The effect of Or. 18, r. 2, (which corresponds to Or. 2, r. 4 of the Civil Procedure Code) is that no cause of action, with certain strictly limited exceptions, can be joined with an action for the recovery of land, unless by leave of the Court or a Judge. This provision appears to have been made for the protection of defendants, and a defendant can therefore, by his conduct waive the performance of the condition because it is a condition imposed for his benefit. In the present case it is

(6) [1907] 2 K. B. 727=76 L. J. K. B. 924=97 L. T. 384=23 T. L. R. 570=51 S. J. 580.

not contested that the acquiescence in the proceedings for some months by the defendants would amount to a waiver, if it were possible for them to waive the objection. I am of opinion that it was possible to waive the objections, and that the defendants did do so." This initial irregularity has therefore ceased to have any effect and the case must be treated as if it was a case in which leave to join these causes of action had been given. It is therefore unreasonable and indeed illegal that the trial of one of the causes of action should be postponed indefinitely. A plaintiff is entitled to a trial of the issues of fact which he raises, and the Court has no authority to refuse to try these issues if the suit is properly framed. And in any case, the consideration that if the litigation arising out of the earlier issue is prolonged by appeal, as it must be, the plaintiffs as well as the defendants will lose testimony which is now available for the decision of the thirteenth issue, must be decisive.

I, therefore, agree that this application should be allowed with costs.

Application allowed.

1925 PATNA 677

MULLICK AND BUCKNILL, JJ.

Chamari Singh—Applicant.

v.

Public Prosecutor of Gaya—Opp. Party.

Criminal Appeal No. 222 of 1924, Decided on 26th January 1925.

Criminal P. C., S. 476—Extent of preliminary enquiry is in Court's discretion—Grant of right of appeal does not extend the scope of the enquiry.

The nature of the preliminary inquiry mentioned in S. 476 (1) is a matter in the discretion of the Court; the law does not compel a detailed inquiry. The grant of a right of appeal has not conferred any new right upon the accused and the extent of the preliminary inquiry is still left to the discretion of the Court. [P. 677, C. 2, P. 678, C. 1]

Manohar Lal—for Applicant.

H. L. Nandkeolyar—for the Crown.

Facts.—The appellants 1 to 15 were alleged to have filed a petition together with two documents before the Subordinate Judge of Gaya asking for certain reliefs under S. 83 of the Transfer of Property Act. These documents were alleged to be forgeries and the appellants were alleged to have dishonestly used these documents as genuine.

It was alleged that in 1923 these appellants who claimed as *mukarraridars* under one of the forged documents of 1811 executed a *dar-mukarrari* in favour of the appellant No. 16, a *purdanashin* lady, and, her husband and two sons were alleged to have assisted her in getting the *dar-mukarrari* registered. When the application under S. 83 came on for hearing, the alleged mortgagee, the proprietress of the 7-anna Tikari Raj, stated that there was no *mukarrari* or *dar-mukarrari* or usufructuary mortgage encumbering the estate, and the Subordinate Judge accordingly declined to order the redemption.

Thereupon one of the servants of the proprietress applied to the Subordinate Judge for the prosecution of the 37 persons who were parties to the 1st petition and also of the lady's husband and her two sons, with the result that the District Judge, upon an application made by the Public Prosecutor of Gaya, ordered the prosecution of the 37 persons as well as of the lady's husband and two sons for offences under Ss. 471 and 467, Indian Penal Code. On an appeal to the High Court, [*Chamari Singh* v. *Public Prosecutor of Gaya* (1),] a Division Bench, on the 18th June 1924, set aside the order of the District Judge and directed further inquiry, under which the learned Judge revised his former order and discharged all but the present appellants 1 to 19.

Mullick, J.—[After standing the facts as set out above, his Lordship proceeded:-]

There is certainly a *prima facie* case that the documents are forgeries: for the former Raja of Tikari, who is alleged to have given the *mukarrari* and also the Raja in favour of whom the usufructuary mortgage is alleged to have been executed, were not alive on the dates on which the documents were executed. As regards the adult *mukarraridars*, *i. e.*, appellants 1 to 14, it is clear that the District Judge was of opinion that they knew that they had not a shadow of a title and that they filed or instigated the filing of the documents knowing that they were forged. In the circumstances he was justified in taking proceedings against them under S. 476, Criminal Procedure Code. The law does not compel him to make a detailed inquiry, and as he has considered the case of each of these appellants he has, in my opinion, complied with the orders of the Division Bench. The grant of a right of appeal has, in my opinion, not conferred any new right upon the

(1) 1924 Patna 330=4 Pat. 24=6 P. L. T. 225=3 Pat. L. R. Cr. 51=26 Cr. L. J. 170.

accused and the extent of the preliminary inquiry is still left to the discretion of the Court. If a *prima facie* case has been made out the appeal Court ought not to interfere. In this case the Court has made an inquiry as regards these 14 accused and has made a complaint to a 1st Class Magistrate in order that the Magistrate may follow the procedure of S. 202 or proceed otherwise according to law. The learned Judge evidently intended that the Magistrate, if satisfied that process should issue, should call upon the Public Prosecutor to produce his evidence before him and then either dispose of the case himself or commit it for trial.

We think, however, that some revision of the learned Judge's order is required as regards appellants Nos. 15, 16, 17, 18 and 19. *Mt.* Nageshwar Kuer, appellant No. 16, being a *pardanashin* lady, cannot be expected to have had any knowledge of the nature of the documents or to have taken any part in filing them in Court, and therefore we do not think that there is at this stage a sufficient *prima facie* case against her.

It also appears that appellant No. 15 is a minor and his name also should be excluded.

With regard to the appellant No. 17, who is the husband of *Mt.* Nageshwar Kuer, and appellants Nos. 18 and 19, who are her two sons, the learned Judge does not state what evidence there is of their complicity. The learned Assistant Government Advocate has informed us that it is proposed to lay a charge of conspiracy against them under S. 120B of the Indian Penal Code and also of abetment; but there is nothing on the record to indicate whether there is any *prima facie* evidence against them. An application has been shown to us, which was made by the Public Prosecutor in the Court of the District Judge on the 11th of February 1924, asking the District Judge to examine certain witnesses and documents in order to connect appellants Nos. 17, 18 and 19 with the other accused. The learned Judge declined to take that evidence. The decision was unfortunate, and as there has been also no further inquiry in regard to these accused since the Division Bench remanded the case, we direct that the inquiry before the Magistrate be confined for the present to petitioners Nos. 1 to 14. If the Public Prosecutor considers it necessary to proceed against appellants Nos. 17, 18 and 19, he is at liberty to meke a fresh application to the District Judge, who, after making such further inquiry as he may consider necessary, will decide whether or not their case also should be referred under S. 476 to the Magistrate for trial along with the other petitioners.

Bucknill, J.—I agree.

★ 1925 PATNA 678

MULLICK AND BUCKNILL, JJ.

Parmeshwar Lall—Appellant.

v.

King Emperor—Respondent.

Criminal Appeal No. 227 of 1924, Decided on 20th January 1925.

★ *Penal Code, S. 211—Giving false information to police is 'instituting criminal proceedings' within S. 211.*

A false information given to the Police is a proceeding instituted on a false charge within the meaning of S. 211 as a charge laid before the police is a criminal proceeding. 17 *Cal.* 574 *(F.B.) Foll.* [P. 680, C. 2]

K. P. Jayaswal and *Kailashpati*—for Appellant.

Assist. Govt. Advocate—for the Crown.

Facts.—On the 22nd of May 1924 the appellant Parmeshwar Lal laid an information before the Sub-Inspector of Police at Daltonganj, charging one Munsaf Ram with having set fire to a hut belonging to the appellant's master Gajadhar Prasad with the intention of causing wrongful loss. The case was investigated and was found to be false. A complaint was then lodged by the Sub-Inspector in the Court of the Magistrate of Daltonganj against the appellant for an offence under S. 211, I. P. C., with the result that the appellant was committed to the Court of Session and was convicted by the Sessions Judge of an offence under the latter part of S. 211, I. P. C., and sentenced to rigorous imprisonment for four years. One of the assessors returned a verdict of guilty while the other three were of opinion that the case was doubtful.

The appellant lived in the Gaya District and his master Gajadhar Prasad, who also resided in that District, appeared to have assisted the Rani of Deo who was the niece of one Thakurai Jagat Prasad Singh mauza Burhibir in the Palamau District, in a litigation with her husband, the Raja of Deo. That litigation was eventually settled by the Raja's making over a property worth Rs. 5,000 per annum to the Rani and paying a sum of Rs. 10,000 in cash to Gajadhar Prasad. Subsequently

Gajadhar Prasad lent money to Thakurai Jagat Prasad in a litigation with his brother Ramsunder and took from Jagat Prasad a zerpeshgi of a two annas eight pies share in certain mauzas of which Burhibir was one. In consequence of Gajadhar Prasad's realising the rent of a five annas four pies share of the villages instead of two annas eight pies share disputes arose between him and Jagat Prasad in or about September 1923 and Ramsunder having by this time settled his dispute with Jagat Prasad and joined Jagat Prasad in resisting Gajadhar a complaint was lodged by one of the servants of Gajadhar against Ramsunder and his servants alleging that they were threatening a breach of the peace and requesting that action should be taken to bind them down. Munsaf Ram was one of the persons thus complained against. In consequence of that complaint the Sub-Inspector of Police at Daltonganj which is eight miles from Burhibir, stationed constable Ramgulam Tiwari at Burhibir to see that no breach of the peace took place between Gajadhar's men and Ramsunder's men. The constable who had taken up his residence in the village about ten days earlier stated that on the day of the fire he cooked his food at an open chulha (fireplace) near the hut in question and after pouring some water on the fire he went to rest in a Thakurbari (temple) of Jagat Prasad. About 3 p. m. a dust storm arose and immediately afterwards he saw the hut in flames; among others Munsaf Ram came to the place, but the appellant Parmeshwar Lal was not in the village at all that day.

Mullick, J.—[After stating facts as set out above the judgment proceeded to the discussion of evidence as follows:]

Prosecution witness Ram Lall Singh, a peon in the service of the Rani of Deo, who was at the time residing with her uncle Jagat Prasad, had been sleeping in the hut after his midday meal. He says that about 4 p. m. he got up and went to wash his face. Then came the dust storm and immediately afterwards he found that the hut was on fire. He suggests that the fire came from the embers in the open fireplace where he had cooked his food and near which there was a quantity of jute sticks. He says that Munsaf Ram arrived after the hut was completely burnt out or about five minutes after the fire began, and that he assisted in extinguishing the fire in a neighbouring house, namely that of Nanki Dusadin, to which the fire had spread.

Ram Lal is corroborated by Jawadhan whose house is immediately east of the hut.

Surajnath Pathak, who is Jagat Prasad's priest and was in the Thakurbari about 30 paces to the west, Ramdhari Lohar, Jamaluddin, the grandson of Jawadhan, and Mt. Nanki also corroborate Ram Lal.

All these witnesses prove that Munsaf Ram did not set fire to the hut, that he came after the fire began and that he assisted in putting it out.

The witness Lalji proves that at the time of the fire Munsaf Ram was working with other coolies at a wall which was being built for his master Ram Sunder Singh to the west of the hut, and that on hearing shouts of "Fire" Munsaf ran to the place, and that he returned about half an hour later. This witness states that the hut is some distance from where he was working and he did not go to it.

In my opinion the learned Sessions Judge was right in holding that Munsaf did not set fire to the hut and that the appellant's information to the Police was maliciously false.

With regard to ownership of the hut, the evidence is that it was built by the Rani's men with wood, straw and leaves taken from Jagat Prasad's jungle. At that time the Rani had already given Gajadhar Prasad the managership of her properties in the Gaya District and the prosecution witnesses seem to have looked upon the Rani's servants as Gajadhar's servants. It appears that after Gajadhar obtained the zerpishgi from Jagat Prasad he appointed one Audh Behari as his Dewan at Burhibir for making collections. About 8 days before the fire the appellant Parmeshwar succeeded Audh Behari. The hut in question was built about two months before the fire. Gajadhar's own servants used at first to live in a tent, but after the hut was built Ram Lal Singh and Bulaki Singh, two peons of the Rani, and Jhari Singh, the Tahsildar of Gajadhar, used to sleep in it. Ram Lal says that he used at first to sleep in a room in Jagat Prasad's house which is to the west, but owing to shortness of accommodation he came over to the newly built hut. He was paid by the Rani through her Manager Gajadhar Prasad, and it is clear

from the evidence of the chaukidar Faujdar that the villagers made no distinction between the servants of Gajadhar and the servants of the Rani.

I think, therfore, that it is established that the hut was not the property of Gajadhar and in the circumstances it is difficult to see why Munsaf Ram, the servant of Ramsunder, should set fire to it.

In the first information it is stated that the value of the hut was Rs. 25 and that the articles destroyed consisted of rice, dal, salt, clothes and aluminium pots worth Rs. 21. It is not stated to whom these properties belonged, but the evidence is that some of them belonged to Ram Lal Singh and the constable Ram Tewari. Jhari Singh, the Tahsildar, was at Daltonganj that day with his master Gajadhar Prasad who had come there from Gaya. Bulaki was also away and it does not appear that any property belonging to Gajadhar's own servants was in the hut. Parmeswar certainly had nothing there. That this should have been so is natural for Parmeshwar was only appointed 8 days before the fire and he had only paid one visit to Burhibir. I accept the statement of Ram Lal when he says that Parmeshwar came to Burhibir on Sunday the 30th Baisakh, and went away on the next day, and that the fire took place the following Wednesday. Parmeshwar Lal's statement that he was in the hut at the time of the fire is in my opinion, wholly and intentionally false. I cannot accept his explanation that he could not leave the village immediately after the fire because there was nobody else to look after his master's interest. I do not think it is likely that he would have stayed in the village alone that night if this had been a real case of arson. Next, if Parmeshwar had himself seen Munsaf setting fire to the hut, I do not understand why on the following morning Ram Lal should have been ordered by Audh Behari to go to Daltonganj to inform Gajadhar Prasad. There would have been no necessity for Audh Behari to interfere. I am satisfied that Ram Lal was sent by Audh Behari and the chaukidar Faujdar by the constable and that at Daltonganj they had an interview with Gajadhar and Parmeshwar and that under Gajadhar's orders Parmeshwar went afterwards to thana to lodge an information against Munsaf Ram.

It has been contended that the first information contains details which it would not have been possible for Parmeshwar to give if he had not himself seen Munsaf in the act. I am not impressed by this argument. The statement that Munsaf was running away and that Jagat Prasad was standing near the Thakurbari might easily have been invented by one who was not at the place of occurrence at all.

It is next contended that most of the information is a mistake of fact and does not amount to a false information within the meaning of S. 211 I. P. C. If the appellant had said to the Police that he suspected Munsaf Ram and if he had not deliberately charged Munsaf Ram with having set fire to the hut there might have been some substance in this plea, but here it is clear that the appellant's intention was not merely that the Police should follow up a clue but that the Police should put Munsaf Ram on his trial. It was clearly the appellant's intention to set the criminal law in motion against Munsaf Ram and to injure Ramsunder and Jagat Prasad.

Next it is contended that the case does not come within the latter part of S. 211. It is urged that a false information given to the Police is not a proceeding instituted on a false charge within the meaning of the second part of the section. In my opinion a charge laid before the police is a criminal proceeding, and not withstanding the authority of *Queen Empress* v. *Bisheshar* (1) I think that the decision of Full Bench of the Calcutta High Court in *Karim Buksh* v. *Queen Empress* (2) contains a correct statement of the law.

Finally there remains the question of sentence. Having regard to the fact that the hut was a very flimsy and temporary structure, and that it was worth only Rs. 25-0-0 and that the total value of property destroyed was less than Rs. 50–0–0 a sentence of four years' rigorous imprisonment seems to be unduly severe. There might have been a suspicion in the the mind of Parmeshwar that Ram Sunder's men had had a hand in causing the fire and the false charge does not bear any indication of any deep laid plot. In the circumstances I think that a sentence of two years' rigorous imprisonment will meet the ends of justice. The sentence is accordingly reduced.

Bucknill, J.—I agree.

(1) [1894] 16 All. 124=1894 A. W. N. 10.
(2) [1890] 17 Cal. 574 (F.B.).

1925 PATNA 681

DASS AND ROSS, JJ.

Madan Mohan Lal—Defendant—Appellant.

v.

Abdul Razaque Khan and others—Plaintiffs and Defendants—Respondents.

Appeals Nos. 127, 128 and 137 of 1921, and 139 to 145 of 1922, Decided on 27th May 1924, from a decision of the Sub.-J., Gaya, from original decree, D/- 7th May 1921.

(a) *Bengal Land Revenue Sales Act, (XI of 1859), S. 12—Non-raising of objection on the ground of existence of arrears does not prevent party from subsequently objecting on that ground.*

The three kinds of objections specified in S. 12 are the only objections that could be made to the only statements that the application is to contain. It would seem to follow from this that if no such objection is made, the Collector is bound to open a separate account whether the share from which the separate account is to be opened is in arrears or not at the time. No inference, therefore, unfavourable to the party attacking the opening of separate accounts on the ground of the existence of arrears can be drawn from the fact that when the separate accounts were opened no objection was raised on the ground of the existence of arrears. [P 684 C 1]

(b) *Bengal Land Revenue Sales Act, (XI of 1859), Ss. 10 and 11—Statute does not authorise apportionment of arrears of revenue when separate account is opened—But such apportionment so far as it is a matter of accounts, cannot affect collector's jurisdiction to sell share in arrears.*

There is no authority in the statute for apportioning, when a separate account is opened, the arrears of revenue, whether after taking an account or merely according to the ratio between the Government revenue assessed on the separate account and that remaining to be assessed on the residuary share. But so far as such an apportionment is a matter of accounts, it would be merely an irregularity which at the most might give ground for impugning a sale under S. 33 of the Act. But the defect in the method of dealing with the arrears cannot affect the jurisdiction of the Collector to sell a share which admittedly was in arrears and was liable to sale. [P 684 C 1, 2]

(c) *Bengal Land Revenue Sales Act, (XI of 1859), S. 13—Separate accounts—Collector cannot sell any share from which separate accounts do not show any arrears as due—Date when estate is in general arrear determines extent of residuary share liable to be sold.*

All that the Collector has to do is to look at the separate accounts as they stand and if he finds that any separate account is not in arrear, he is not entitled to sell that share; he can only sell the share from which according to the separate accounts an arrear of revenue is due. The Collector is not permitted to sell a share merely because that share is in arrears; but he can only sell if the estate is in general arrear. It must be shown therefore that the estate as a whole is in arrears and liable to sale: and the date on which this liability to sale arose must be the date which will fix the extent of the residuary share of the estate to be put up for sale, if it is that share which is in arrears. It may be that the arrears shown at that date as due by the residuary share had in fact come down from an earlier period when the residuary share was larger in extent, that is a matter which may give rise to a claim for contribution, but the Collector is bound by what his accounts show as they stand. [P 685 C 1, 2]

(d) *Bengal Land Revenue Sales Act, (XI of 1859), S. 13—Residuary share sold after opening of separate accounts—Onus of showing that at date of opening of separate accounts latter also were liable to sale is on party alleging so.*

The sale law contemplates that an estate in arrears should be sold as soon as possible after the liability to sale has arisen by failure to pay the arrears on the latest day of payment. Therefore where, after opening of separate accounts the balance of the residuary share is sold for arrears of revenue, the *onus* of showing that the entire estate (*i. e.*, including the separated accounts) was liable to sale at the date of the opening of the separate accounts is on the party alleging the same. [P 685 C 2]

(e) *Bengal Land Revenue Sales Act, (XI of 1859), S. 13—Suit contesting sale or residuary share as covering separate accounts—Some old accounts shown—Their continued existence should be proved by plaintiff.*

In a suit impugning a sale of a residuary share for arrears, where plaintiff alleges that the sale covers also some separate accounts and where some old separate accounts are shown, it is not for the defendants or the Collector to show what became of the separate accounts. The burden is on those who challenged the sale to show that the separate accounts still exist. [P 687 C 2]

(f) *Bengal Land Revenue Sales Act, (XI of 1859), Ss. 10 and 11—Separate account—Share whether pokhta or kham—Proportion between total jama sadr and jama sadr assigned to the share in application for separate account determines question.*

When an application for opening a separate account is made, the relation between the total jama sadr and jama sadr assigned in the application to the share in respect of which the application is made is the determining factor as to whether the share is pokta or kham and the Collector, in opening the separate account, ought to interpret the share according to this proportion. [P 688 C 2]

P. C. Manuk, Kailashpati, Sarjoo Prasad and *Raghunandan Prasad*—for Appellant.

Sultan Ahmad, Hasan Jan, Syed Ali Khan, T. N. Sahay and *Sultanuddin Hussain*—for Respondents.

Ross, J.—This is an appeal by defendant No. 3 against a decree passed by the Subordinate Judge of Gaya in favour of the plaintiffs.

The facts are these. Mahal Pankardih Malehari, Tauji No. 4687, consists of 213 villages owned by a large number of proprietors many of whom have had separate accounts opened from time to time. In 1918 the residuary share comprised shares in 96 villages. This share had been in arrears since before 1908, but separate accounts continued to be opened until 1917. In 1916 the arrears were Rs. 4,019-6-7, and in that year, the Collector apportioned Rs. 780-12-0 out of these arrears to the separate accounts that had been opened during the period in which the residuary share had been in arrears. On the 8th of June 1917 and on the 17th of January 1918 the residuary share was sold for arrears of Government revenue. Both the sales were set aside. Eventually on the 23rd of September 1918, when the arrears were Rs. 4,961-11-7, the share was sold and purchased by defendant No. 1, a servant and *benamidar* of defendant No. 3, for Rs. 9,500. Three appeals were preferred to the Commissioner of Revenue against the sale by certain of the plaintiffs in the present suits. These appeals were dismissed. A sale certificate was granted and delivery of possession was given in 1919. Thereafter ten suits, out of which these ten appeals have arisen, were instituted by some of the proprietors of the residuary share, covering some 40 villages out of the 96.

The plaintiffs in their plaints impugned the revenue sale on various grounds. Some of these grounds they have failed to establish and there is no cross-appeal. I am therefore concerned only with the grounds on which they have succeeded in getting the sale set aside. These grounds are two, one of which covers all the cases while the other affects three cases only.

The first ground is that separate accounts were opened illegally by the Collector, while the residuary share was in arrears, without realisation of the arrears but after deduction of what is described in the plaint as an imaginary portion of the arrears, and the Collector was not legally authorized to sell by auction only those ijmali shares which were found existing subsequent to the default in place of those which existed at the time of the default. At the trial the answer of the defendant was that the proprietors who got separate accounts opened paid their portion of the arrears due, but even if they did not do so, the sale cannot be challenged on this ground. The plaintiffs' case was that the Collector had no power to apportion the arrears between the separate accounts and the residuary share, that even if he had this power the arrears had not been apportioned correctly, that the residuary share had been sold for an arrear greater than was due from it, and that what ought to have been sold was the residuary share as it stood when the share fell into arrears, and not the residuary share as it stood at the time of the sale. In suit No. 33 of 1919 (First Appeal No. 139 of 1921), Suit No. 282 of 1919 (First Appeal No. 140 of 1921), and Suit No. 54 of 1919 (First Appeal No. 144 of 1921), the plaintiffs' case was that the residuary share which was sold included shares belonging to these plaintiffs which were protected by separate accounts.

The learned Subordinate Judge, in dealing with the main ground on which the suits were brought, examined the accounts of the estate from the June kist of 1913 when the Government revenue of the residuary share was, Rs. 2,273-8-0 and the arrears were Rs. 2086-13-11. He continued the examination down to the time of the sale when the Government revenue had been reduced to Rs. 852-13-0 and the arrears had increased to Rs. 4,961-10-7. As a result of his examination he found that whereas Rs. 1,383-13-0 ought to have been apportioned out of the arrears to the separate accounts, the Collector had apportioned only Rs. 780-12-0. The arrears for which the residuary share was sold therefore exceeded the true arrears by Rs. 603-1-0. He held therefore that the sale was without jurisdiction. He further held, however, that the procedure by way of apportionment of arrears between the separate accounts and the residuary share was unwarranted by law and that if separate account was to be opened while the residuary account was in arrears, this could only be properly done if an account of the payments made by the co-proprietors had first been taken, and that the shares which were separated by opening of separate accounts were also liable to be sold jointly with the residuary share.

On the second ground, which was confined to three cases only, the learned Subordinate Judge found that the shares of the plaintiffs in Suit No. 33 of 1919 in

villages Lawabar, Karangarh and Kothi Khas were protected by separate accounts Nos. 34 and 50, and that in Suits Nos. 282 and 54 of 1919 the plaintiffs owned certain pokhta shares in villages Simri, Karhani and Amnabad amounting to 1 anna 12 dams or 4 annas 18 dams and 13 kowris Kham which were protected by separate accounts whereas in the Collector's registers these shares were shown as 1 anna 12 dams kham with the result that a portion was included in the residuary estate which ought to have been fully protected by the separate accounts. In the result, the learned Subordinate Judge passed a decree declaring that the sale of the properties of the plaintiffs held on the 23rd December 1918 was null and void and beyond the jurisdiction of the Collector to hold and that the auction-purchasers-defendants acquired no title by their purchase. He passed a decree for recovery of possession in favour of the plaintiffs.

On behalf of the appellant it is contended in the first place that it is not the function of the Civil Court to check the accounts of the Collector on what must be imperfect materials, and that these accounts must be presumed to be correct except perhaps in a case where it can be shown that in fact there were no arrears due. It is true that the learned Subordinate Judge has gone into the question whether the arrears were correctly apportioned between the new separate accounts and the remaining residuary share, but this was in reality a subsidiary matter, because the main position taken up by the learned Subordinate Judge was that apportionment could not be made at all and that if a separate account is to be opened while the residuary share is in arrears this can only be done after an account has been taken of the payments made by the different co-proprietors since the time when the residuary share fell into arrears. The respondents further contend that the opening of a separate account while the residuary share is in arrears affords no protection at all, and that the share which ought to be sold is the share as it stood when the share fell into arrears. The learned Counsel for the appellant on the other hand argues that although there is no legal obligation on the Collector to apportion the arrears, this is an equitable and just procedure sanctioned by revenue practice, and that the Civil Court has no right to go behind the apportionment as made.

In order to deal with this argument it is necessary to consider the relevant sections of the Revenue Sale Law and of the Bengal Land Registration Act. The sections relating to the opening of separate accounts are Ss. 10 and 11 of Act XI of 1859 and S. 70 of the Bengal Land Registration Act (Bengal Act VII of 1876) Without going into the details which differentiate these sections, what they require generally is that "When a recorded sharer of a joint estate desires to pay his share of the Government revenue separately, he may submit to the Collector a written application to that effect 'which' must contain a specification of the share held in the estate by the applicant" and in the case where "the share consists of a specific portion of the land of the estate" . . . . "specification of the land and of the boundaries and extent thereof, together with a statement of the amount of sadr jama heretofore paid on account of it." The Collector is then required to publish in certain places a copy of the application, and, if within six weeks from the date of the publication of these notices, no objection is made by any other recorded sharer, the Collector shall open a separate account with the applicant, and shall credit separately to his share all payments made by him on account of it. The date on which the Collector recorded his sanction to the opening of a separate account shall be held to be that from which the separate liabilities of the share of the applicant commence." S. 12 provides that "if any recorded proprietor of the estate. . . .object that the applicant has no right to the share claimed by him, or that his interest in the estate is less or other than that claimed by him, or, if the application be in respect of a specific portion of the land of an estate, that the amount of sadr jama stated by the applicant to have been heretofore paid on account of such portion of the land, is not the amount which has been recognized by the other sharers as the jama thereof, the Collector shall refer the parties to the Civil Court and shall suspend proceedings until the question at issue is judicially determined." S. 74 of Act VII of 1876 contains a similar provision. Now at this point a question arises whether the Collector has any discretion to refuse to open

a separate account when the residuary share is in arrears. On behalf of the appellant it is contended that if S. 12 was not there, it could not be said that the Collector could not deal with objections, that the fact that S. 12 provides for the disposal of three particular kinds of objection by the Civil Court, must not be taken to imply that the legislature contemplated no other kind of objection and that any proprietor may raise the objection that the residuary account is in arrears, and if the objection is not raised, it must be taken that the parties acquiesce and the Collector is entitled to open a separate account. For the respondents it is argued that the Collector has no power to deal with objections; that they are for the Civil Court and that the question of arrears does not concern the Collector as the law gives ample security for the revenue. It is not perhaps necessary to decide the question, but it may be pointed out that the three kinds of objections specified in S. 12 are the only objections that could be made to the only statements that the application is to contain. It would seem to follow from this that if no such objection is made, the Collector is bound to open a separate account whether the share from which the separate account is to be opened is in arrears or not at the time. No inference, therefore, unfavourable to the respondents, can in my opinion be drawn from the fact that when the separate accounts were opened no objection was raised on the ground of the existence of arrears.

The next question is whether the Collector's procedure in dealing with the arrears was correct, and, if not, whether this in itself affects his jurisdiction to sell the residuary share.

There is no special procedure appointed by the Act for dealing with the case where the residuary share is in arrears, possibly because it was not contemplated that there should be arrears, or because the security of the revenue is not affected by the opening of a separate account. There is no authority in the statute for apportioning the arrears, whether after taking an account, as the learned Subordinate Judge has suggested, should be done, or merely according to the ratio between the Government revenue assessed on the separate account and that remaining to be assessed on the residuary share. It is true that this latter method appear to be authorized by the practice of the Revenue Courts; see the letter from the Commissioner of the Patna Division to the Collector of Gaya (Ex. GG at page 89 of the paper book). The justice of such a method may be open to question, because it may be that the proprietor who is applying for a separate account has been punctual in his payments; and normally it would be the proprietor who was punctual in his payments who would seek protection against the less punctual proprietors by opening a separate account (see the preamble to Act XI of 1859). But so far as this is a matter of accounts, it would be merely an irregularity which at the most might give ground for impugning a sale under S. 33 of the Act. But I do not see how the defect in the method of dealing with the arrears can affect the jurisdiction of the Collector to sell a share which admittedly was in arrears and was liable to sale.

But there is another aspect of this matter and it is upon this aspect that the respondents especially insist. They contend that there is no means of dealing with arrears and that no means is necessary because the opening of a separate account when the residuary share is in arrears has no effect at all; the share which is to be sold when it eventually becomes liable to sale is the share as it stood when it fell into arrears. The consequence is that the Collector has in effect split up the revenue unit which he ought to have sold and which was liable for the arrears and has sold a part of it for an arrear for which it was only partially responsible; this, it is contended, he had no jurisdiction to do and the sale is bad on this ground apart from S. 33 altogether. On the first part of this argument it is contended that if the share of *A*, *B*, *C* and *D* is liable for a debt, that debt cannot be thrown upon the share of *B*, *C* and *D* while the share of *A* is saved from liability by being separated out after the debt had been incurred. It seems clear on general grounds that the residuary share, as it stood when the debt was incurred, would be charged as a whole with that debt and that no part of it could escape from the charge by subsequent separation. The question is whether the Sale Law prevents the application of this principle. The section relevant to this question is S. 13 which provides that

"Whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, if the estate shall become liable to sale for arrears of revenue, the Collector in the first place shall put up to sale only that share or those shares of the estate from which according to the separate accounts, an arrear of revenue may be due." S. 14 then further provides for the contingency that the highest offer for the share may not equal the amount of the arrear, and for the liability of the whole estate to be sold in such a case It is argued for the respondents that S. 13 contemplates the case of an estate becoming liable to sale for arrears of revenue after the separate account has been opened ; that it deals with the case where the Collector shall have ordered a separate account to be opened and that in such a case, if the estate shall become liable to sale, then certain consequences follow ; and that there is nothing in this section to protect a separate account which has been opened after the liability to sale arose, because the section does not deal with such a case. But the section does lay down a general rule, and it must be construed so as to express a general rule. The learned counsel for the appellant contends that all that the Collector has to do is to look at the separate accounts as they stand, and if he finds that any separate account is not in arrear, he is not entitled to sell that share, he can only sell the share from which, according to the separate accounts, an arrear of revenue is due. He points out that the Collector is not permitted to sell a share merely because that share is in arrears; but he can only sell if the estate is in general arrear. It must be shown, therefore, that the estate as a whole is in arrears and liable to sale ; and it is contended that the date on which this liability to sale arose must be the date which will fix the extent of the residuary share of the estate to be put up for sale, if it is that share which is in arrears, as in the present case. This contention appears to be sound. The argument accepts the main position of the other side, but seeks to escape from the effects of that concession by throwing the date after the period when the separate accounts in question were opened. It is contended in short that although the residuary share may have been in arrears, and in considerable arrears, since 1908, there is nothing in this record to show that the estate as a whole became liable to sale for arrears before June 1917 when it was actually put up for sale. The Sale Law contemplates that an estate in arrears should be sold as soon as possible after the liability to sale has arisen by failure to pay the arrears on the latest day of payment ; and it must be presumed that inasmuch as the estate was not put up for sale until June 1917, it did not become liable to sale before that date. In any case it is for the plaintiffs to show that the estate became liable for sale before the separate accounts in question were opened. They have not shown that the estate became liable to sale before June 1917 or that any separate account was opened after March 1917, and they must therefore accept what the separate accounts show at that date and consequently the sale was properly held according to the provisions of S. 13. The apportionment of arrears was made in 1916 and therefore cannot affect the question. S. 13 lays down what the Collector has to do at the time when he takes action under that section, and he is bound by what the separate accounts show at that point of time. The co-sharers may have rights of contribution *inter se*, but that is not a matter with which the Collector is concerned. The point of time which determined the action of the Collector in the present case was June 1917 and no separate account was opened after that date and therefore the residuary shares, as it stood at that time, was properly put up for sale. It may be that the arrears shown at that date as due by the residuary share had in fact come down from an earlier period when the residuary share was larger in extent ; that is a matter which may give rise to a claim for contribution, but the Collector is bound by what his accounts show as they stand. The argument for the respondents is that the residuary share which was sold in 1918 was not the share from which the arrears were due. Between September 1913 and September 1915 at least eighteen separate accounts were opened, *viz.*, separate accounts 368, 370, 372, 374, 379, 380, 381, 382, 383, 386, 388

to 395. These all formed part of the residuary share and were opened out of it and were responsible in part for the arrears for which the sale took place. Therefore, the sale of the residuary share, as it stood in 1918 for these arrears, was without jurisdiction. Now it is admitted that when the estate became liable to sale, the share, which, according to the separate accounts was liable to sale for an arrear of revenue, was the share that had to be put up for sale. The phrase "according to the separate accounts" is construed by the respondents as requiring the Collector to trace the arrear back to its origin, taking into consideration all the separate accounts which had been opened since the arrear began and to determine what the share then was and to put that up for sale. This does not seem to me to be the natural force of the words, but a strained and artificial sense. It is pointed out that this is the view which has been adopted by the Board of Revenue in the rule relating to Wards' Estates quoted by the learned Subordinate Judge, framed under Ss. 23 to 26 of Act IX (B. C) of 1879. That rule, however, is not binding on the Civil Court in construing S. 13 of the Revenue Sale Law. It leads to obvious difficulties. Thus, in the present case, in 1913, when the arrears were Rs. 2,205-1-6, separate accounts 368, 370, 372 and 374 were opened and separate accounts 16, 17, 22, 56, 66, 89, 163, 182 and 191 were closed. In January 1914 separate account 363 was closed. In March 1914, when the arrears were Rs. 2,493-12-9, separate accounts 377 and 378 were opened, and in June 1914, when the arrears were Rs. 2,782 9-9 separate accounts 379, 380, 381, 382 and 383 were opened. In September 1914 separate account 276 was closed. In January 1915 separate accounts 386 and 388 were opened, the arrears being then Rs. 2,680-9-5. In March 1915 separate accounts 389 and 390 were opened when the arrears were Rs. 3,057-1-11. In June 1915, when the arrears were Rs. 3,326-2-8, separate account 391 was opened, and in September 1915 separate accounts 392 to 395 were opened when the arrears were Rs. 3,356-0-6. It is difficult to see on what principle these separate accounts, which have had a separate existence which sets them free from the burden of the accumulating arrears can be held liable to sale for an arrear much greater than any arrear for which they could be held responsible. Again, for aught we know, the separate accounts which have been opened may have been formed partly out of the residuary share and partly by amalgamation with other separate accounts. On what principles are they to be desintegrated? It seems therefore that the construction for which the respondents contend is not practicable. The explanation must be this: that the Collector is concerned with the collection of the revenue, and sales take place with this object in view, the co-sharers being left to the ordinary remedies for enforcing their rights *inter se*. I hold, therefore, that the Collector was entitled to put up for sale in June 1918 the residuary share as it stood at that date for the arrears then shown against it in the Collector's books.

The second part of the argument is equally without force. It is admitted that the estate was in general arrears and that the share in arrears, according to the separate accounts, was liable to sale. The Collector therefore had jurisdiction to sell. If there was any irregularity in the exercise of the jurisdiction the remedy was provided by S. 33. But where there is jurisdiction, an irregularity in its exercise cannot take the sale outside the Act. The respondents rely on the decision in *Mahant Krishna Dayal Gir* v. *Syed Abdul Gaffar* (1). But the facts of that case were entirely different from the facts of the present case, and the question was one of the construction of the notice under S. 6 of the Act, *viz.*, whether the dominant description of the property sold was the word 'ijmal' or the detailed list of the villages annexed thereto. The decision on that question cannot throw any light on the present case.

I hold, therefore, that the Collector had jurisdiction to sell the property, and as the sale is not attacked on any of the grounds stated in S. 33 it must stand.

I now turn to the second ground which concerns three of the cases. The contention of the plaintiffs in Suit No. 33 of 1919 was that the shares in Lawabar, Karangarh and Kothi Khas were protected by separate accounts Nos. 34 and 50. Now Register D does not show

(1) [1917] 2 Pat. L. J. 402=40 I. C. 13=2 Pat. L. W. 229.

these separate accounts for any of these three villages. A Rubakar of 1871 (Ex. 57 d) shows that a separate account was opened for certain shares in certain villages in this estate, including Lawabar and Karangarh for a share of 1a. 16d. 19k.17b. 10ph. and Kothi for a share of 18d. 9k. 18b. 15ph. The revenue assessed on this separate account is Rs. 650 ; and as this is the amount shown against the separate account No. 34 in the tauzi roll (Ex. Z) it may be taken that this separate account which is shown in Ex. Z to have been opened on the 21st March 1871, the date of Ex. 57d, is that separate account. Similarly by a Rubakar, Ex. 57 c, dated the 14th of September 1874, a separate account was opened for shares in Lawabar and Karangarh of 1 anna 4 dams and 1 krant which by reference to the tauzi roll Ex. Z, is seen to be separate account No. 50. The tauzi roll shows that numerous separate accounts have been opened out of accounts Nos. 34 and 50 although these accounts still exist ; because Ex. Z shows that a revenue of Rs. 347-1-0 and Rupees 37-13-0 is still assessed on separate accounts, Nos. 34 and 50, respectively. But the question is whether, after the subsequent dealings with these separate accounts, what remains contains the three villages in question. The register of separate accounts, Register No. 12 A. (Exs. 44 to 44b) does not show any separate account, No. 34, so far as Lawabar is concerned. Moreover, the total of separate accounts Nos. 249, 317, 318 and 320, which the tauzi roll shows to have been opened out of separate accounts Nos. 34 and 50, covers a greater share in Lawabar than was covered by the original separate accounts Nos. 34 and 50.

With regard to Karangarh, separate account No. 50 does not appear. Separate account No. 395 which has been opened out of both separate accounts Nos. 50 and 34 (see Ex. Z) is shown, as well as the separate accounts Nos. 317, 318 and 320 which were opened out of separate account No. 34. It is true that separate account No. 34 is also shown as covering a share of 1 anna 8 gandas ; but it is contended that this is an error due to the omission to strike out this old account from the register when new accounts were opened out of it. This may be so because the total of the shares in Karangarh opened out of separate account No. 34 comes to more than the share originally represented by that account. In Kothi Khas separate account No. 34 is still shown for a share of 18 gandas and odd. Three separate accounts Nos. 317, 318 and 320 opened out of separate account No. 34 total more than the share in Kothi Khas originally represented by separate account No. 34. Probably, therefore, the continued appearance of separate account 34 in Register 12 A is a mistake.

It is contended on behalf of the respondents that the continuity of the separate account must be presumed and that the defendant must show that it went back to the ijmali account or became part of some other account; and that it is enough for the plaintiffs to show that a separate account once existed. In my opinion this argument throws the burden of proof wrongly. It is not for the defendants or the Collector to show what became of these separate accounts. The burden is on those who challenge the sale to show that these separate accounts which were opened so far back as 1871 and 1874 still exist. The evidence shows that they do not exist in their original form any longer. Register 12 A is inaccurate as is admitted by both sides and the traces of one or other of these accounts in the register cannot be relied upon. Register D does not show their existence and this in my opinion is the best evidence in the case. I hold that the plaintiffs have failed to establish their case on this head.

In Suit No. 282 of 1919 (First Appeal No. 140 of 1922) the plaintiffs claim that their shares in mauzas Simri and Kurhani are protected by separate account No. 152. Their case is that these villages fall in three mahals, namely, Pankhardih-Malihari, Garua and Khaira (see Mahalwar Register, Pargana Sherghati, Ex. 45). Kurhani appears as No. 62 in the register to the extent of 5 annas 6 dams and 2 kowris, and Simri as No. 184 with a similar share in Mahal Pankhardih-Malihari, that is to say, one-third of each of these villages belongs to that Mahal, and is treated for the purposes of that Mahal as being 16 annas. The documents show that the plaintiffs purchased 1 anna 12 dams 17 kowris 13 bowris and 6 phouris in these villages out of 5 annas 6 dams and 2 kowris.

Separate account No. 152 was opened in respect of this share in March 1889. According to the plaintiff's case this separate account ought to have been shown in the Collector's register as being opened in respect of 4 annas 18 dams and 13 kowris, treating the share of these villages in mahal Pankhardih-Malihari as 16 annas; whereas, in fact, it was opened in respect of only 1 anna 12 dams 17 kowris 13 bowris and 6 phouris, with the result that the difference was left unprotected by the separate account and went into the ijmali share which was sold for arrears of Government revenue. The application for the opening of separate account is Ex. 38-A. That application was made under S. 70 of the Land Registration Act. In accordance with the requirements of that section it specified the share of the petitioner as 1 a. 12 d. 17 k. 13 b. 6 ph. It also specified the jama sadr of the 16 annas as Rs. 12-4-3 and the proportionate revenue on the share of the petitioner as Rs. 3-12-9. Consequently it is clear from the Government revenue stated to be due on the share in respect of which the application was made that the share referred to in the application was a pokhta share and that the separate account ought to have been opened for 4 annas 18 dams and 13 kowris. The Government revenue on that share has all along been paid and it was only by mistake that in the Collector's register the share was entered as a kham share and not pokhta with the result that the greater portion of it was left unprotected.

In Suit No. 54 of 1920 (First Appeal No. 144 of 1922) the plaintiff's case is similar and relates to a similar share in mauza Amnabad which is one of the constituent villages of Mahal Pankhardih-Malihari and which appertains also to two other Mahals, the shares in the three Mahals being equal. The plaintiff purchased 1 anna 12 dams 17 kowris 13 bowris and 6 phouris out of 5 annas 4 pies share in this village and made an application for the opening of a separate account (Ex. 38), and separate account No. 158 was opened under S. 70 of the Land Registration Act. The petition is not as clear as it might have been. It describes the share as 1 anna 12 dams 17 kowris 13 bowris and 6 phouris out of 16 annas ; but it states the previous jama sadr to be Rs. 5-13-10 and the proportionate revenue Re. 1-13-0. The relation between the total jama sadr and the jama sadr proportionate to the applicant's share clearly shows that the application was made in respect of a pokhta share. The separate account, therefore, ought to have been opened for 4 annas 18 dams 13 kowris kham share ; but, in fact, it was opened in respect of 1 anna 12 dams 17 kowris 13 bowris and 6 phouris kham share. The plaintiff has all along been paying Government revenue on full extent of her interest ; but, owing to the mistake in the Collector's register, that interest has not been fully protected by the separate account which was opened. The contention on behalf of the appellants is that it is not the duty of the Collector to ascertain whether the share specified in the petition is pokhta or kham ; but, in my opinion, the relation between the total jama sadr and the jama sadr assigned in the application to the share in respect of which the application was made is the determining factor ; and the Collector, in opening the separate account, ought to have interpreted the share according to this proportion.

I think, therefore, that the entire shares of the plaintiffs in these suits were protected, and as it is not disputed that the Government revenue had been fully paid in respect of the entire shares, the sale of these shares was without jurisdiction. Moreover, the shares sold were in fact no part of the residuary share and did not pass by the sale of the same. The plaintiffs are therefore entitled to succeed in these two suits and Appeals Nos. 140 and 144 of 1922 must be dismissed with costs. The other appeals are decreed with costs and the suits are dismissed with costs.

Appeals partly allowed.

★ 1925 PATNA 688

ROSS AND KULWANT SAHAY, JJ.

Ram Ghulam Singh and others—Appellants.

v.

Nand Kishore Prasad and others—Respondents.

Appeal No. 415 of 1922, Decided on 20th January 1925, from a decision of the Addl. D. J. of Patna, D/- 11th January 1922.

★ (a) *Hindu Law—Debts—Sons are not liable for father's simple money debt where partition has occurred before suit.*

While the pious duty attaches to the son' even during the life-time of the father, where partition has taken place before the suit is brought, the property of the sons cannot be proceeded against in satisfaction of a simple money debt. 41 *Mad.* 136 *Foll.* [P. 689 C. 1]

K. P. Jayaswal and *Bimola Charan Sinha*—for Appellants.

Siveshwar Dayal—for Respondents.

Ross, J.—The first contention raised by the learned counsel for the appellants is that the learned District Judge was in error in holding :

" that the sons cannot be made liable on the ground that it is their pious duty to pay off their father's debt inasmuch as the father (defendant No. 1) is alive."

It is conceded by the learned vakil for the respondents that this is an error and that, so far as the pious obligation is concerned, it attaches during the lifetime of the father.

The second contention was that the enquiry was sufficient. The learned counsel referred to the passage of the judgment of the Additional District Judge dealing with this point and observed that two cousins of the defendants had given information to the plaintiffs. He contends that this evidence ought to have been acted upon by the Additional District Judge. In my opinion, it is not open to this Court in second appeal to question the finding on this part of the case which is a finding of fact.

On behalf of the respondents, while it is admitted that the pious duty attaches to the son even during the lifetime of the father, it is contended that as partition had taken place, and had taken place before the suit was brought, the property of the sons cannot be proceeded against in satisfaction of this simple money debt. This contention was supported by a reference to the decision in *Vinjamampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (1) and specially to the judgment of Kumaraswami Sastriyar, J. (at page 142, 41 Mad.). It is clear that in any case only the assets of the father in the hands of the sons could be followed. But, after partition has taken place, there are no assets of the father in the hands of the sons and there is nothing to follow. This is not a case of mortgage where the security attaches to the property and clings to it even after partition. In the case of a simple money debt, where there are no assets of the father in the hands of the sons, there is nothing for the creditor to proceed against so far as the sons are concerned.

Finally, it was argued by the learned counsel for the appellants that in equity defendants Nos. 2 to 4 are bound by this debt because they have obtained benefit from it. It is said that the money was borrowed in connection with the partition suit and that these defendants have obtained the benefit of this loan by the partition being effected. Now, this argument also is met by the findings of fact. The learned Additional District Judge has held :

" that it has not been shown how much, if anything, the defendant No. 1 had to pay as commissioner's fee ... ... and it has been stated above that no money was necessary to be borrowed to meet the family expenses. Necessity to borrow the money has not at all been proved."

It follows that if there was no necessity to borrow the money these defendants cannot be bound to make good the loan. The decision of the learned Additional District Judge is right and the appeal must therefore be dismissed with costs.

Kulwant Sahay, J.—I agree.

Appeal dismissed.

(1) [1918] 41 Mad. 136=33 M. L. J. 519=22 M. L. T. 334=6 L. W. 649=43 I. C. 225=(1918) M. W. N. 55.

1925 PATNA 689

JWALA PRASAD, J.

Rameshwar Singh—Applicant.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 715 of 1924, Decided on 15th of January 1925, from an order of Honorary Magistrate, Gaya, D/- 6th November 1924.

(a) *Criminal P. C., S. 522—House taken possession of by criminal trespass by accused threatening to use force—S. 522 applies.*

Where the accused succeeded in taking possession of the house by means of criminal trespass threatening to use force to the complainant and his men.

Held: that their act clearly came under S. 522. [P. 690 C 1]

(b) *Criminal P. C., S. 522 (3)—No time limit exists for order under S. 522 to be passed by Court of appeal, revision, etc.*

An order under the section may be passed by the Courts of appeal, confirmation, reference or revision at any time howsoever long after the conviction by the Magistrate. Thus, where a Magistrate passes an order under S. 522 beyond the prescribed one month, though the order by the Magistrate is illegal, yet it is competent to the High Court as Court of Revision to order the restoration of possession to the person dispossessed. [P, 690, C 2]

S. *Bashiruddin* and *S. N. Nooruddin*—for Appellant.

Jwala Prasad, J.—The Magistrate by his order of the 6th November 1924, directed the Sub-Inspector, Tikari Police, to see that possession of the house, for entering which the petitioners were in another case convicted under S. 448, Penal Code, was restored to the complainant. The order is objected to on two grounds: first, that the mere conviction under S. 448 does not justify an order for restoration under S. 522 of the Code of Criminal Procedure. The complainant's case under S. 448 was that the accused persons in large numbers came armed and forced themselves into the house in spite of the remonstrance made by the complainant. The accused succeeded in taking possession of the house by means of criminal trespass threatening to use force to the complainant and his men. Therefore, their act would clearly come under S. 522 which says:

"Whenever a person is convicted of an offence attended by criminal force (or show of force or by criminal intimidation), and it appears to the Court that by such force (or show of force or criminal intimidation) any person has been dispossessed of any immovable property, the Court may, if it thinks fit (when convicting such person or at any time within one month from the date of the conviction) order (the person dispossessed) to be restored to the possession of the same."

The case cited on behalf of the petitioners *Mahesh Sahu* v. *Emperor* (1), does not apply to the present case, and the amendment of S. 522, as it then stood, by adding the words "show of criminal force" puts an end to the present contention. S. 522, previous to the amendment of 1923, had only the words "by criminal force." By the amendment the words "or show of force or by criminal intimidation" have been added. In the present case the finding of the Magistrate is that the accused were members of an unlawful assembly under S. 143, Penal Code, and they have been convicted under that section though no separate sentence has been passed; so the conviction in the present case is not merely under S. 448, but under Ss. 448 and 143. The contention must, therefore, be overruled.

Next it is contended that the order of the Magistrate in the present case passed on the 6th of November, more than six weeks after the conviction of the accused by him on the 23rd September 1924, is illegal. In this connection also the recent amendment may be usefully looked into. Under the old section the Magistrate was required to pass an order of restoration immediately upon the conviction of an accused, and it was held that the order of restoration must have been passed simultaneously. In view of those decisions one month's time is now given to the Magistrate to pass an order of restoration after the conviction of an accused. The order in the present case is, no doubt, more than six weeks after the conviction of the accused. Strictly speaking, therefore, the order will be beyond the power of the Magistrate. But clause (3) of the section is a new provision added in 1923 whereby an order under the section may be made by any Court of appeal, confirmation, reference or revision.

Thus, the order may be passed by the Courts of appeal, confirmation, reference or revision at any time howsoever long after the conviction by the Magistrate. The matter has come to this Court in revision. This Court is, therefore, competent to pass an order restoring the property to the complainant of which he has been dispossessed by forcible criminal trespass committed by the accused. In the circumstances of the case I exercise my power to pass an order under S. 522 of the Code of Criminal Procedure, which virtually is confirmation of the order passed by the Magistrate.

Revision disallowed.

(1) [1919] 20 Cr. L. J. 270=50 I. C. 30.

1925 PATNA 691

ADAMI AND KULWANT SAHAY, JJ.

Hansraj Sangechi and others— Judgment-Debtors—Appellants.

v.

Jogeshar Prasad and another—Decree-holders—Respondents.

Miscellaneous Appeal No. 3 of 1925, Decided on 20th May 1925, against an order of the D. J. of Monghyr, D/- 26th September 1924.

Civil P. C., S. 148—Date of payment of decretal amount fixed by consent of parties—Sale to be cancelled on payment of money agreed—Time is essence of the compromise and cannot be extended by the Court—Contract Act, S. 55.

Time is of the essence of the agreement, when, in the course of proceedings by the judgment-debtor to set aside an execution sale, a compromise is made between the decree-holder and judgment-debtor that on payment of the judgment-debt within a prescribed period, the sale shall stand cancelled, while upon failure to make such payment the sale shall stand confirmed. In such a case the Court has no power to extend the time fixed for payment. 33 *C. L. J.* 244 *Foll.* [P. 692, C. 1]

Subal Chandra Mazumdar for Lal Mohan Ganguly—for Appellants.

Brij Kishore Prasad—for Respondents.

Facts.—On the 28th August 1924, while an appeal was pending before the District Judge of Monghyr, the parties came to terms, and it was agreed that if the present appellant, the judgment-debtor, deposited in Court in favour of the decree-holder, the present respondent, the full amount of the decree including the costs of the appeal within 15 days from that date, that is to say, by the 13th September 1923, the appeal would be allowed and the sale held in the connected execution case would be set aside. If the money was not deposited within the time allowed, then the appeal would be dismissed and the sale would stand confirmed.

Accounts had to be made up and were ready on the 4th September. On the 13th September, the date on which the sum should have been deposited by the judgment-debtor, the latter filed a petition asking for a short extension of time for the deposit of the amount. The order passed was that the petition should be put up on the 15th September, which was the date which had been fixed by the learned District Judge for dealing with the case. No deposit was made until the 19th September, when a petition was filed on behalf of the judgment-debtor praying that the sum of Rs. 823-1-9, which was brought to Court that day, should be ordered to be deposited with the *nazir*. The District Judge passed the order that the appellant might deposit the amount and produce a *chalan* by the 23rd September. On the 23rd September an order was passed that the case should be put up on the 25th. On this latter date an order was recorded that the amount had been deposited on the 22nd as shown by a *chalan*. On the 26th the learned District Judge heard the pleaders on both sides and held that as the judgment-debtors had failed to deposit the money within the time ordered by the Court, the appeal must be dismissed with costs, and the sale must stand confirmed as had been ordered. The judgment-debtor appealed to the High Court against this order.

Adami, J.— [After stating facts as set out above, his Lordship proceeded:—]

It is contended that the learned District Judge by his order of the 19th September, and also by his order of the 13th September, allowed an extension of the time and that he had power so to order an extension, and therefore, the depositing of the decretal amount on the 22nd September fulfilled all the requirements of the agreement and the sale should have been set aside. In the order sheet there is no order for extension of time; there are orders that an inquiry should be made whether the amount had been deposited or not, and, when the appellant brought the money into Court and asked leave to deposit it, the learned District Judge allowed the deposit, but he did not express that by that deposit the terms of the agreement would be held to have been fulfilled. The question is whether the learned District Judge would in any case have jurisdiction to allow an extension of time having in view the terms of the agreement reached between the parties and whether time was of the essence of the contract. Several cases have been put before us in which it has been held that, where there has been a consent between the parties, the Court has power to grant relief against forfeiture and to extend the time for this purpose. But the present case is not a case of relief against forfeiture. In the case of

Kandarpa Nag v. *Banwari Lal Nag* (1) Mookerjee, Acting C. J., laid down, after considering the case-law on the subject the principle which governs cases like the present one. From the cases he examined he laid down the principle that time is of the essence of the agreement, when, in the course of proceedings by the judgment-debtor to set aside an execution sale, a compromise is made among the decree-holder, judgment-debtor and execution purchaser that on payment of the judgment debt within a prescribed period, the sale shall stand cancelled, while upon failure to make such payment the sale shall stand confirmed. He said:

"in such cases as the parties intended in the first conception of the agreement to make time the essence of the contract, the Court would not be competent to extend the time except by consent of all the parties concerned."

That principle must be applied in the present case, and I am of opinion that the District Judge had not the power to extend the time which had been settled and agreed upon by the petitioners. As I have said before, the cases relied on by the learned vakil for the appellants are cases where the question was one of relief against forfeiture, and in the present case that question does not arise. I thus find that the learned District Judge was correct in finding that the appellants had not observed the terms of their agreement and therefore could not claim to set aside the sale.

Therefore, I would dismiss the appeal with costs.

Kulwant Sahay, J.—I agree.

Appeal dismissed.

(1) [1920] 33 C. L. J. 244=60 I. C. 864.

★ 1925 PATNA 692

ADAMI AND KULWANT SAHAY, JJ.

Gobind Prasad—Decree-holder—Appellant.

v.

Hriday Thakur and others—Judgment-debtors—Respondents.

Appeal No. 35 of 1925, Decided on 27th May 1925, from an order of the District Judge, Darbhanga, D/- 13th November 1924.

★ *Civil P. C., O. 21, R. 11—Pleader authorised to appear in suit is also deemed as authorized to appear in execution proceedings—Civil P. C., O. 3, R. 4.*

Proceedings in execution are proceedings in continuation of the suit and a fresh authority is not required for a pleader to appear, act and plead on behalf of the decree-holder in the execution proceedings if he was so authorized by a *vakalatnamah* in the suit itself. 16 *C. W. N.* 736 and 1925 *Patna* 369. *Foll.* [P 693 C 2]

T. N. Sahai and *Mahesh Ch. Dutt*—for Appellant.

Janak Kishore—for Respondents.

Kulwant Sahay, J.—This is an appeal on behalf of one Gobind Prasad who was the holder of a decree against the respondents. An application for execution was filed on his behalf which was signed and verified by his son Bhola Prasad and presented by his pleader who was duly appointed under a vakalatnamah by Gobind Prasad to appear for him in the original suit. The judgment-debtors objected to the execution on two grounds: first, that Bhola Prasad, the son, had no right and authority to sign and verify the application for execution and that one of the judgment-debtors Daro, Thakur, was a minor and he had been wrongly described in the application as an adult. The learned Munsif disallowed the objection; but on appeal the learned District Judge has set aside the order of the Munsif and has allowed the objection of the judgment-debtors and ordered the execution to be dismissed.

Against this order the present Second Apppeal has been filed in this Court.

The circumstances under which the objection as regards the authority of the son, Bhola Prasad, to sign and verify the application for execution was raised are these:

The decree-holder Gobind Prasad was an old man. On the 27th May 1922 he was coming from Barh to Patna in a train; he was seen at Barh getting into the train, but since then he has not been heard of and has disappeared. There is no evidence as to whether he is still alive or dead. The objection of the judgment-debtors is that as it is not proved that Gobind Prasad is dead it must be presumed that he is still alive; and as he is still alive his son Bhola Prasad, who holds no authority from him and is not a recognized agent with any power of attorney from Gobind Prasad, has no authority to sign and verify the application for

execution which under the provisions of O. 21, R. 11 (2) has to be signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

The learned Munsif held that the son, Bhola Prasad, was authorized to verify the execution petition under O. 21, R. 11 that the vakalatnamah showed that the decree-holder Gobind Prasad had authorized his pleaders Babu Abinash Chandra Nandi and Babu Bishun Chandra Sen to execute the decree ; and that the said pleaders had taken steps to execute the decree by filing the application for execution. He accordingly held that the application filed by the pleaders and signed and verified by Bhola Prasad could legally be entertained.

The learned District Judge, however, has held that although Bhola Prasad might have authority to verify the application under O. 21, R. 11, yet under the provisions of the said rule he was not authorized to sign the application. He further held that the pleader could not sign and present the application without being instructed by the decree-holder to do so. He has accordingly held that the application for execution could not be entertained under the law. In this view of the case he rejected the application for execution without deciding the other question as regards the minority of one of the judgment-debtors which had been decided in favour of the decree-holder by the Munsif.

Now, as regards the proper presentation of the application: the law requires that the application for execution of the decree should be in writing signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. There can be no doubt that the son Bhola Prasad, if he was proved to the satisfaction of the Court to be acquainted with the facts of the case, would be authorized to verify the application. It has, however, been contended that he was not authorized to sign the application under the provisions of O. 21, R. 11 (2). This question is not free from difficulty ; but, in my opinion, in the present case it is not necessary to decide as to whether an application for execution can be signed by any other person proved to the satisfaction of the Court to be acquainted with the facts of the case, although such person may have no authority from the decree-holder to sign it. I am of opinion that the pleaders who were authorized by their vakalatnamah filed in the suit to take out execution were authorized to present the application for execution without any fresh authority or instructions from the decree-holder himself. Proceedings in execution are proceedings in continuation of the suit and a fresh authority is not required for a pleader to appear, act and plead on behalf of the decree-holder in the execution proceedings if he was so authorized by a vakalatnamah in the suit itself. This view has been taken in a number of cases, and I may only refer to the observation of Mookerjee and Carduff JJ. in *Raghubar Doyal Sukul* v. *Jadunandan Misser* (1). In the case in which the present decree-holder Gobind Prasad was the decree-holder a similar question arose and a Division Bench of this Court held that the application for execution filed by the pleader on behalf of Gobind and verified by his son could be entertained in law (see *Lala Gobind Prasad* v. *Lala Jagdip Sahai* (2).) I am in agreement with the observations of the learned Judges made in that case and as the question raised in this case is exactly similar to that raised in the above case I would decide it in the same manner as that case was decided.

I, therefore, hold that the application for execution in the present case could be entertained by the Court below. The order of the District Judge dismissing the execution is therefore set aside. The learned District Judge, however, did not decide the objection of the judgment-debtors as regards the minority of Daro Thakur. He will proceed to decide that objection and dispose of the case according to law. Under the peculiar circumstances of the case there will be no order as to costs in the present appeal.

Adami, J.—I agree.

Appeal allowed.

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(1) [1912] 16 C. W. N. 736=13 I. C. 365=15 C. L. J. 89.

(2) 1925 Patna 369=4 Patna 378=(1925) P. H. C. C. 57=3 Pat. L. R. Civ. 43=6 P. L. T. 547.

1925 PATNA 694

DAWSON-MILLER, C. J., AND
MACPHERSON, J.

Raghu Nath Mahadeo--Petitioner.

v.

The Commissioner of Income-Tax, Behar and Orissa--Opposite Party.

M. J. C. No. 56 of 1925, Decided on 15th June 1925, against an order of the Commissioner of Income-Tax, Behar and Orissa.

(a) *Income-Tax Act* (1922), S. 23 (4)—*Assessee attending Income Tax office with his evidence in obedience to notice issued under S. 23 (2)—Income-Tax Officer's not accepting the evidence as conclusive does not bring the case under sub-Sec. 4.*

All that the notice under S. 23 (2) requires is that the assessee should attend at the Income Tax Officer's office and should produce such evidence as he himself (the assessee) relied upon in support of his case. If the assessee does so, the mere fact that the Income Tax Officer does not accept that evidence as conclusive of the matter does not bring the case within the provisions of S. 23, sub-Section (4).

[P 295 C 2]

K. P. Jayaswal—for Petitioner.

Dawson-Miller, C. J.—In this case it seems to me that the Commissioner of Income-Tax took a wrong view of the law. He treated the case as one in which no appeal lay under S. 30 of the Income-Tax Act, 1922 and, therefore, decided that the assessee was not entitled to ask him to state a case under the provisions of S. 66. What happened, shortly, was this: the assessee carries on a business in cloth, gold, silver, jute and groceries at Kishungunj and other places. With regard to his income at the other places we are not concerned and no question arises. With regard to his income from his business in groceries in Kishungunj, it is no longer contended that the assessee can seek any further relief under S. 66. But with regard to the cloth, gold, silver and jute business at Kishungunj, it is contended that the accounts were produced and that under S. 13 the Income-Tax Officer ought to have assessed the income in accordance with the regular method of accounting as shown by the assessee's books. What happened was that the assessee was called upon by the Income Tax Officer under S. 23, sub-S. (2) to attend at the Income-Tax Officer's office and produce any evidence on which he might rely in support of his return. The return, I may mention, had not been accepted by the Income-Tax Officer and, therefore, he wished the personal attendance of the assessee and the production of his books if he relied upon them. The assessee did attend and he produced his books relating to these four classes of business which I have just referred to. The Income-Tax Officer said that these books had not been balanced and therefore he could get no reliable information from them. He accordingly proceeded to assess the profits, apparently adopting the powers conferred by the proviso to S. 13 of the Act.

From that decision the assessee appealed to the Assistant Commissioner. His contention was, as it is to-day, that the books produced by him, although not balanced in the sense of the expenditure having been deducted from the profits, did show exactly what the expenditure was, and what the gross income was, and that the only thing which remained to be done was to deduct the aggregate of the expenditure from the aggregate of the gross profits and then you would get the net profits which is the taxable income. That is merely a simple question of subtraction, and because this had not been done he complains that the Income Tax Officer refused to regard his books as showing what the actual profits were. The Assistant Commissioner upheld the decision of the Income tax Officer.

The assessee then applied under S. 66 sub-S. (2) of the Act asking the Commissioner to state a case. The Commissioner took the view that the assessment had been made not under S. 23 (3), but under S. 23 (4), and consequently there was no appeal permissible from the Income-Tax Officer, and although the Assistant Commissioner had in fact heard and determined such an appeal still he considered that the Assistant Commissioner had no jurisdiction to do so, and, therefore, he must treat the case as one in which no appeal was permissible and as if no appeal had been preferred. If that were so, it would follow that no application under S. 66, sub-S. (2) could succeed.

The first question we have to determine in the present application is whether the Income-Tax Commissioner was right in arriving at the conclusion that the income in the present case was assessed under S. 23 (4), or whether it was not in fact assessed under S 23 (3). S. 23 provides in the first clause that if the Income Tax

Officer is satisfied that a return made under S. 22 is correct and complete, he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return. Then by clause (2) it is provided that if the Income-Tax Officer has reason to believe that a return made under S. 22 is incorrect or incomplete, he shall serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend at the Income Tax-Officer's office or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return. The assessee did attend and he did produce the evidence upon which he relied in support of his return, but that evidence, as I have said, was not treated by the Income-Tax Officer as conclusive of the matters which he had to determine. Nevertheless the assessee did attend at the office and he did produce the evidence upon which he relied. In other words he complied with the notice issued under S. 23, sub-section (2). The learned Commissioner seems to have thought that because the books were not relied upon by the Income Tax-Officer therefore, the assessee had not complied with the notice served upon him under S. 23 (2). I cannot however take this view. Sub-S. (3) of the same section provides that on the day specified in the notice issued under sub-S. (2), the Income Tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income Tax Officer may require on specified points (and there is nothing in this case to show that he required any further evidence) shall, by an order in writing, assess the total income of the assessee and determine the sum payable by him on the basis of such assessment. It seems to me that the assessment in the present case was carried out under that sub-section. He saw the witness, he considered the evidence produced by him and upon which he relied, and he thereupon made his assessment and, in fact, when the assessment was made and the demand sent to the assessee for payment of the amount assessed, it was stated therein that it was made under S. 23 sub S.-(3) and that he might appeal to the Assistant Commissioner, if he wished, within 30 days. So there can be no doubt whatever that the opinion of the Income-Tax Officer was that he was acting under sub-S. (3) of the section.

The fourth sub-section and the one under which the Commissioner considered that the assessment in this case had been made provides in effect as follows : That if the assessee fails to make a return or fails to comply with all the terms of the notice issued under sub-S. 4 of S. 22 or, having made a return fails to comply with all the terms of a notice issued under sub-S. (2) of S. 23, the Income-Tax Officer shall make the assessment to the best of his judgment. The Commissioner seems to imagine that the assessee in this case had failed to comply with the terms of the notice issued under the sub-section. In my opinion he did nothing of the sort. All that the notice required and could require was that the assessee should attend at the Income-Tax Officer's office and should produce such evidence as he himself (the assessee) relied upon in support of his case. That he did, and the mere fact that the Income-Tax Officer did not accept that evidence as conclusive of the matter does not appear to me to bring the case within the provisions of S. 23 sub-S. (4). The reason, therefore, given by the Commissioner for refusing to state a case, in my opinion, cannot stand.

The next question we must consider is whether there is any substance in the present application that the Commissioner shouldbe ordered to state a case. The facts as set out in the petition and as stated by Mr. Jayaswal on behalf of the assessee are that the accounts produced in support of the cloth, gold, silver and jute businesses although not balanced or not closed in the sense I have already referred to, do undoubtedly show by taking very slight trouble and carrying out a very simple sum in arithmetic what the actual profits made for the year in question were. If that is so it seems to me quite clear that the Income-Tax Officer was negligent in his duty in failing to carry out that simple matter himself and so ascertain what was the effect of the books. He cannot shirk his duty by merely stating that the account is not balanced if the result of that balance can be ascertained by taking a small amount of trouble. The books were there but he apparently refused to accept them merely upon that ground. In my opinion he was not entitled to act in

that way. The question seems to me to be one of importance but before we can actually decide the question we must ask the Commissioner to state a case detailing what the actual facts are. It may be that when the books are examined, the case, as I have stated it, is put a little too broadly, but one cannot at the present moment say because we have not got the books before us. The Commissioner will draw up a case stating precisely what the facts are with regard to the evidence before the Income-Tax Officer, what the effect of the books is and then having done that and forwarded the case to the Court we will decide what is the law applicable to such circumstances. The assessee I understand has now got the custody of the books which were relied upon before the Income-Tax Officer. These books will have to be returned to the Income-Tax Commissioner to enable him by personal inspection thereof to ascertain what the actual facts are.

Macpherson, J.—I agree.

Order accordingly.

1925 PATNA 696

BUCKNILL AND MACPHERSON, JJ.

Ajo Mian and others—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 97 of 1925, Decided on 15th April 1925, from the decision of the S. J., Bhagalpur.

(a) *Criminal P. C., S. 257—Prosecution witnesses called under S. 257 can be cross-examined—Court is not bound to summon them merely because of absence of previous cross-examination.*

The accused are entitled to cross-examine prosecution witnesses called to the Court under S. 257. The section itself however gives the Magistrate certain powers to refuse an application for the summoning of witnesses under S. 257 whether it is the case of a witness who is desired to be called for the defence or whether it is one whom it is desired only to cross-examine. The mere fact that an accused's lawyers declined to cross-examine such witnesses or the mere fact that such witnesses were not cross-examined does not compel Court to summon them. [P 697 C 2, P 698 C 2]

(b) *Criminal P. C., S. 257—Unreasonable and improper refusal can be revised.*

If a good case was made out that the Magistrate's refusal was outside the limits of reasonable discretion, the High Court should and would interfere. The fact that it might perhaps have been possible from a cross-examination of those witnesses to have extracted from them something which might have been of advantage to the accused is not sufficient, but it must appear in fact that there was matter to be obtained from the witnesses sought to be called for cross-examination which would have materially affected the result of the trial. [P 698 C 2]

Ali Imam and *S. A. Sami*—for Petitioners.

Assistant Govt. Advocate — for the Crown.

Bucknill, J.—This was an application in Criminal Revisional Jurisdiction made on behalf of six Muhammadans. The first was found guilty by a Magistrate of the first class at Bhagalpur on the 23rd December last of an offence punishable under S. 326, I. P. C. (causing grievous hurt with a dangerous weapon); he was sentenced to one year's rigorous imprisonment. He was also found guilty of an offence punishable under S. 148 I. P. C. (rioting armed with a deadly weapon). For this offence he was again sentenced to one year's rigorous imprisonment; the sentences were to run consecutively. The other five applicants were all found guilty firstly, of an offence punishable under S. 147 I. P. C. (riot) and secondly of an offence punishable under the combined provisions of Ss. 326 and 149 I. P. C. that is to say of causing grievous hurt with deadly weapons whilst members of an unlawful assembly. The object of the unlawful assembly was stated to be to assault Hindus. The second applicant was in respect of each of these offences sentenced to undergo rigorous imprisonment for one year; but the sentences have been ordered in his case to run concurrently. The other applicants were sentenced to six months' rigorous imprisonment in respect of each offence and in their cases also their sentences were ordered to be concurrent.

On appeal to the Sessions Judge of Bhagalpur the conviction of the first applicant was set aside in so far as the charge against him under S. 326 was concerned. His conviction and sentence however, under S. 148 was upheld. The convictions and sentences of the other applicants under S. 147 were also upheld but although the convictions under the combined provisions of Ss. 326 and 149 were upheld, the sentences were set aside in view of the fact that double sentences in respect of such cognate offences were

not regarded hy the Sessions Judge as being permissible.

The circumstances which gave rise to the prosecution were very unfortunate and were the result of some communal disturbance at Bhagalpur between the Muhammadans and Hindus. It is said that the Hindus were celebrating a festival with considerable ceremony and that the passing of their procession with music and song close to a Moslem Mosque gave some umbrage to the Muhammadans. It is alleged that the Muhammadans attacked some Hindus and injured some of them considerably. We are informed that more than one set of charges has arisen from this affair. It is, however, with the facts of this prosecution, which is the subject matter of the present application, that we are at the moment concerned.

The learned counsel who has appeared for the applicants has urged three points before us; the first is that his clients have been the victims of certain illegalities in procedure at the hands of the trying Magistrate. The second is that there was no common object as alleged in the charge, *viz.*, assault of Hindus, but merely an isolated series of encounters for which perhaps individuals might properly be found guilty of specific offences if they were brought home to them. Thirdly, that in the peculiar conditions exemplified in the evidence the sentences imposed are unnecessarily severe.

With regard to the first point it seems clear that after the prosecution case had proceeded for some time, the counsel who was appearing for some of the applicants fell ill ; he was assisted by some pleaders who asked for a postponement of the trial on the ground that they were not in a position to undertake the cross-examination of the remaining few prosecution witnesses. The Magistrate, however, who had, from the commencement, intimated his intention to the parties of continuing if possible to hear the case *de die in diem* refused the application. The result was that some five of the prosecution witnesses including both members of the police force and private persons were not cross-examined. It is not seriously contended that the Magistrate acted either illegally or really unreasonably in what he did ; one can only agree with the learned counsel for the applicants that the attitude of the pleaders who were appearing for the applicants cannot be the subject of commendation. It is obvious that under the circumstances they should have done their best to help their clients, and it would seem that they were not doing so by the attitude which they thought fit to adopt. However, when the accused filed their list of witnesses and applied to the Magistrate under S. 257 of the Cr. P. Code, they asked that these five witnesses should be ordered to attend for the purpose of cross-examination. It is quite clear that it is contemplated under the provisions of that section that they had a right to make this application, and indeed it has been laid down in the Calcutta High Court in the case of *Sheo Prakash Singh* v. *Rawlins* (1), that if the Magistrate in fact does accede to such a request the accused are entitled to cross-examine such witnesses so called to the Court. The section itself, however, gives the Magistrate certain powers to refuse such an application whether it is the case of a witness who is desired to be called for the defence or whether it is one whom it is desired only to cross-examine. These grounds are either that the application has in the Magistrate's view been made for the purposes of vexation, or delay or for defeating the ends of justice ; and he has to record in writing his decision for his refusal. In this case the Magistrate refused to grant the application for the order that these prosecution witnesses, who had not been cross-examined, should attend for that purpose. In rejecting the application the Magistrate in his order sheet has written, "I have already rejected the prayer to adjourn on that account and see no reason to revise my opinion and grant it now". Had the section rested there, it is possible that the Magistrate could have been rightly said not to have given in writing any ground for his decision which is contemplated by the section as a good ground for his refusal : but there is a proviso to the section which alters the complexion of his action. The proviso to the section is to the effect that, when an accused has cross-examined or had the opportunity of cross-examining any witness after the charge has been framed, the attendance of such witness shall not be compelled under the section's provisions, unless the

(1) [1901] 28 Cal. 594.

Magistrate is satisfied that it is necessary for the purposes of justice

I think that it is quite clear in this case that the Magistrate was not satisfied that it was necessary for the purposes of justice to compel the attendance of these witnesses ; but it is contended that the Magistrate cannot unreasonably say or assume the position that he is not so satisfied. In other words, if, where there exist cogent reasons why the Magistrate should have been satisfied, it is illegal for him to say that he is not : his non-satisfaction must be based on reasonable grounds. It is argued that in this case there were very good reasons for thinking that it was necessary in the interests of justice that these witnesses should be directed to attend for cross-examination.

There can be no doubt that in this case an opportunity was in fact afforded to the accused to cross-examine these witnesses at the proper time : it may not have been possible for the accused's leading counsel to conduct the cross-examination, but the accused were represented, it is admitted, by other lawyers.

The learned counsel for the applicants does not contend that the mere fact that an accused's lawyers declined to cross-examine such witnesses, or that the mere fact that such witnesses were not cross-examined, constitute factors which would justify an argument that a Magistrate's opinion of satisfaction that under such circumstances it was not necessary for him to order the attendance of such witnesses under S. 257 could be attacked ; for to do so would of course be to contend that the proviso to the section was meaningless and that whenever for any reason prosecution witnesses were not cross-examined they must be ordered to attend if application for their cross-examination is made by an accused under S 257.

What, however, he does, urge is that this Court should scrutinize the reasons why the Magistrate was satisfied that the attendance of the witnesses was not necessary and that if it be shown to this Court that there were existing reasons why their attendance was necessary for cross-examination for the purposes of justice, this Court should interfere in its Revisional Jurisdiction and hold that the Magistrate's refusal was unreasonable and inequitable. I am ready to agree that if a good case was made out that the magistrate's refusal was outside the limits of reasonable discretion this Court should and would interfere, but I am sure that that position must be most clearly established (*i. e.* that the Magistrate's decision was unreasonable and improper) before the interference of this Court can properly be invoked or expected.

I do not, however, think that in this case any such position has been established. The point was argued at some length before the Sessions Judge who deals with it in his judgment thus:—

"There remains to be considered the matter of prejudice raised by the appellants. On 15th November 1924, after the framing of the charges, and while the cross-examination of the prosecution witnesses was in progress, a petition was put in on behalf of some of the accused stating that Mr. Hassan the defending counsel had fallen ill and asking for an adjournment. This was refused. On that date some witnesses were cross-examined on behalf of two of the accused, namely Sachidanand Singh, Sub-Inspector, Upendra Mohan Ghose, Inspector Rajendra Prasad, Deputy Superintendent, Muhammad Ahsan, Sub Inspector, and some others. The pleaders appearing on behalf of the other accused, that is to say, accused whom Mr. Hassan was defending, refused to cross-examine at all. On 19th November. after the prosecution had closed their case, a petition was put in on behalf of these accused to recall the four witnesses mentioned above for cross-examination under S. 257 of the Cr. P. C. This was rejected by the Magistrate. Consequently these four persons were not cross-examined on behalf of the accused for whom Mr. Hassan appeared."

"Section 257 lays down clearly that the Magistrate need not recall witnesses whom the defence have had an opportunity for cross-examining unless he is satisfied that it is necessary for the purposes of justice. The order of the Magistrate accordingly was perfectly legal, nor do I consider that he exercised his discretion wrongly. It is not suggested that the pleaders appearing for the other accused were insufficiently instructed or particularly incompetent, and if it was considered that the counsel appearing for the other accused had not covered the whole ground in his cross-examination;

their conduct in refusing to put any questions at all is deserving of reproof. In any case these four officers did not fully implicate any of the appellants except Ajo, Hafiz, Gafoor and Abdul Latif. The rest of the evidence is sufficiently strong against the two former, and Abdul Latif was one of the two men on behalf of whom cross-examination was actually made."

These observations seem substantially to show that the Magistrate's decision could not have been regarded as unreasonable. Nor has the learned Counsel for the applicants in the course of his able and interesting argument been able to prove to us in what way with certainty his clients' position was prejudiced or could have been improved by cross-examination of these witnesses: all that he can urge is that it might perhaps have been possible from a cross-examination of these witnesses to have extracted from them something which might have been of advantage to the accused. But this is not, I think, enough in order to justify this Court's interference in a case such as this, and on a decision based on the proviso to S. 257 Cr. P. C., it must be shown to this Court not that there possibly, by some chance might have been, but that in fact there *was* matter to be obtained from the witnesses sought to be called for cross-examination which would have materially affected the result of the trial: as the Assistant Government Advocate has aptly expressed it, the onus is clearly on the applicants to establish that position and I do not consider that in this case they have succeeded in so doing.

With regard to the second point urged by the learned counsel for the applicants, namely, that there was really no common object as laid in the charge (that is to say of assault on Hindus), he bases his argument upon a close and detailed examination of the somewhat confused phases of what took place on the day of occurrence. He shows that there were a series of not very closely-if at all-connected events on that day: but they had for some little time before been preceded by happenings which had given rise to a good deal of Muhammadan misgivings and chagrin. In the opening words of the applicants' petition: For some time past the relations between the owt communities *viz.*, the Hindu and the Muhammadan of Bhagalpur had become strained and the feelings were running very high." The Hindus had, it is said, issued notices to their co-religionists on 21st August 1924 to the effect that it was contemplated celebrating shortly their Janmasthami festival with considerable splendour; and on the 22nd they issued another notice asking that they (the Hindus) should on the following day keep their shops shut and stop business and join the Dadhikado procession which was to take place on the 23rd.

The Moslems seem to have been afraid that they would be insulted in some fashion and went so far as to apply to the Sudder Sub-divisional Officer at Bhagalpur asking for police arrangements to be made in order to prevent a breach of the peace and that the Sub-divisional Officer should take some preventive measures: the Sub-divisional Officer was a Moslem gentleman; he did not take any measures to prevent the procession taking place, but apparently took some police precautions which seem indeed unhappily to have been needed.

On the 23rd, the procession took place: it seems that a large number of Moslem were gathered in and around a large mosque which the procession passed. The procession was guided and shepherded by the police: it was carrying an image of Sri Krishna to the Ganges: some of the processionists carried bamboos with flags. Apparently trouble was only averted as the procession passed the mosque by the police; for some stones were thrown at the tail of the procession by several Muhammadans. Some of the processionists (the procession is said to have been about 5,000 strong) were beginning to throw stones back and some of them began to jump over the rails at the side of the road and to run back towards the Muhammadans: but the police managed to stop any fracas. The procession went on to the Ganges and then was apparently returning: but it was diverted by another route: some (perhaps 60) Hindus, partly processionists and partly perhaps spectators, were retracing their steps by the route by which the procession had come and drawing towards the mosque; at this stage a number of Moslems, said to be armed with swords, axes and lathis, raised shouts and ran out: the police tried to prevent any outbreak and so also did

some very respectable Moslems : they seem to have prevented the Moslems from attacking this party : but some of the Muhammadans (amongst them being, it is said, the applicants) turning back began to knock about any Hindus whom they met, several of whom were witnesses in this case. The applicant No. 1, Ajo Mian, is well identified as being the leader or one of the leaders of this party of Moslems to which the accused (and no doubt others) belonged ; he is said to have carried both a sword and a lathi: and I regret to say to have used the former vigorously. Applicant No. 2, Hafiz Gafoor, is shown to have carried and used a Mirzapur danta which is a heavy stick. Applicant No 3, Sheikh Janglu, is said to have carried a lathi. Applicant No. 4, Sheik Bado, is said to have been armed either with what is described as a meat-cutting instrument or a small lathi and to have been throwing stones. Appellant No 5, Abdul Latif, is said to have been armed with a sword *or* a lathi whilst a lathi only is said to have been carried by applicant No. 6, Abdul Razak.

I have at the commencement of my observations stated what sentences were imposed : 1 year on Ajo Mian ; 1 year on Hafiz Gafoor; and 6 months on each of the rest. I cannot see any good reason for justifying the attack which the applicants made, although I am quite prepared to think that they felt a good deal vexed at the Hindu religious demonstration. I have, however, very little sypmpathy with people who use swords unnecessarily in an *emeute*.

I think, however, that taking all the circumstances into consideration, the sentence on Ajo Mian may be reduced to 6 months and on the others to two months rigorous imprisonment and I should like it actually drawn to their attention in thus taking a lenient view of what might have been, had it not been for the police and the more sober-minded members of their own community, a most serious matter, that I most earnestly trust that in future they will endeavour to keep on good terms with their neighbours whatever differences of creed may separate their religious and social lives. They have got to live side by side and the many ties which would bind them together are really stronger than the forces which sometimes seem to tend to separate them.

Macpherson .—I agree to the order proposed.

On behalf of Ajo Hafiz, Ghafur, Jenghi and Bado the the first four petitioners, chief reliance is placed on the first argument. Now while a Magistrate is bound under S. 257 (1) to issue process on the application of an accused who has entered on his defence for compelling the attendance of a witness for the purpose of examination or cross-examination (save in certain stated circumstances which he must find and must set forth in writing), the proviso to that enactment on the other hand definitely *prohibits* the Magistrate from issuing such process, if the accused has cross-examined or had the opportunity of cross-examining the witness after the charge was framed, unless the Magistrate is satisfied that such attendance is necessary for the purpose of justice, that is to say, unless he is convinced of the existence of the strongest possible grounds for disregarding the prohibition. The exception to the prohibition must not be read as swallowing up the prohibition or the whole proviso as enjoining that the Magistrate shall issue process if he is not satisfied that the attendance of the witness is unnecessary for the ends of justice or if he is not satisfied that (as in the case of the witnesses not covered by the proviso) the application is made for the purpose of vexation or delay of or for defeating the ends of justice. On the contrary the prohibition may not be disregarded unless in the opinion of the Magistrate the purposes of justice not merely warrant but demand such disregard. It is also clear that it is not incumbent upon him (though it is often expedient) to record in writing the reason for not being satisfied—the natural course would be to require a record of reasons for disregarding (not for not disregarding) a statutory prohibition.

Though there may be exceptional cases where the Court can see at once that the attendance of a witness referred to in the proviso should be compelled, it is ordinarily for the applicant to satisfy the Magistrate that it is necessary for the purposes of justice that his application for compelling the attendance of such a witness should be granted. In the present instance the first four petitioners had had an opportunity of cross-examining certain witnesses through pleaders who represented them throughout the trial but they

had not availed themselves of it. They sought to bring themselves within the proviso by merely pointing out that their Counsel, who would have cross-examined, was ill. But much more than the mere statement of that fact was necessary in the circumstances of the case to show that the attendance of the witnesses who had not been cross-examined on the petitioner's behalf, was necessary for the purposes of justice; for instance, that there were definite matters of importance on which the witnesses ought to be cross-examined on behalf of the petitioners. Only general considerations, however, were advanced and no real attempt was made to satisfy the Court that the application came within the exception to the statutory prohibition. Manifestly those considerations failed to satisfy the Magistrate. Now, the burden of showing in appeal or revision that the Magistrate ought to have been satisfied lies very heavily on the appellant or petitioner. The discretion is committed to the Magistrate and if valid reasons for exercising it in favour of the accused are not advanced in his Court or do not clearly appear from the record as it stood at the time, it is impossible for the superior Court to hold that he was wrong in failing to disregard the statutory prohibition in favour of the accused. Little weight is to be accorded to considerations which did not occur to the applicant at the time and are of the nature of after-thought. It is clear therefore that even if attention is restricted to the considerations in favour of the argument, there is no ground for interfering in revision with the order of the Magistrate.

There are, however, special considerations in the present case which militate against interference in revision. Not only is it not shown that there were materials before the Magistrate on which he was satisfied or which ought to have satisfied him that process to compel the attendance of the witnesses who had not been cross-examined, was necessary for the purposes of justice, but it is obvious that he was not so satisfied and that he was even satisfied to the contrary. The parties had been warned that the trial would proceed from day to day, and the pleaders of petitioners 1 to 4 ought to have been ready. Mr. Naim, an experienced Counsel cross-examined at length the witnesses present on that date on behalf of Latif and Razak, petitioners Nos. 5 and 6, and on the case generally *prima facie* covering the whole ground. Several of the numerous pleaders appearing on behalf of the first four petitioners were also retained on behalf of Latif and Razak and two of them at least were present in Court. There were sixteen accused on trial, and when Mr. Naim concluded not only petitioners 1 to 4 but also all the other ten accused declined to cross-examine. It was thus even possible for the Magistrate on consideration of all matters before him actually to be satisfied that it was not necessary for the ends of justice to compel the attendance of the four prosecution witnesses for further cross-examination.

It is not unusual for the defence to take advantage of a *contre temps* of the nature indicated in order to make capital out of it in appeal or revision, especially where, as in this instance, the risk involved is negligible. In circumstances such as have been detailed the trying Magistrate alone is in a position to gauge the situation and to appreciate whether the refusal to cross-examine and the subsequent application for process against the same witnesses has been merely "tactical," and thus it behoves superior Courts to be on their guard against suggestions as to the conduct of the trial.

Finally reference may be made to the specific finding of the learned Sessions Judge that the elimination of the depositions of the witnesses not cross-examined on behalf of petitioners 1 to 4 would not improve the position of these petitioners, since those witnesses do not advance the prosecution case against petitioners 3 and 4 and the other evidence on record is adequate to establish the charges against the petititioners Ajo and Hafiz Ghafur.

The first ground is therefore without merit.

The second plea on behalf of appellants fails since the common object set out in the charge of assaulting Hindus—not the processionists only but also any members of the community met with—has been found to be established, while as to the sentences I would join in the hope that the reduction may have a beneficial effect on the relations between the two communities at Bhagalpur.

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★ 1925 PATNA 702

MULLICK AND Ross, JJ.

Sham Narayan Singh—Appellant.

v.

Basdeo Prasad Singh—Respondent.

Appeals No. 125 and 118 of 1924, Decided on 5th March 1925, from an order of the Sub.-J., First Court, Saran, D/- 10th May 1924.

★ *Civil P. C., O. 21, R. 91—Adjustment after sale—Decree-holder applying to have sale set aside on the ground of adjustment—Court will not set aside sale at decree-holder's request.*

The only ground upon which a decree-holder can set aside the sale is that the judgment-debtor has no saleable interest in the property. There is no provision in the Code for allowing adjustments between the parties after the sale has been held. The sale is a solemn act and the Court is not competent to review it merely at the request of the parties. [P 702 C 2]

S. K. Mitra—for Appellant.

N. N. Sinha, B. P. Sinha, S. S. P. Singh and U. N. Singh—for Respondent.

Mullick, J.—These two appeals arise out of the execution of two decrees for Rs. 7,161-2-0 and Rs. 1,070 obtained by the respondent Basdeo Prasad Singh against the appellant Sham Narain Singh. In execution of the former decree the properties of the judgment-debtor and his sons, who with him were members of a joint Mitakshara family were attached and sold and purchased by the decree-holder on the 15th March 1924. On the 31st March the decree-holder is alleged to have filed a petition stating that he had made a compromise with the judgment-debtor and praying that the sale should be set aside. On the 10th May 1924, the application was disallowed and the sale was confirmed. This order was made in the Execution Case No. 221 of 1923. The other execution case, namely, No. 3 of 1924, which was for the other decree, was disposed of by transferring a sum of Rs. 237 from the sale-proceeds in Case No. 221 of 1923 to the credit of Basdeo Narain for the satisfaction of the other decree.

Appeal No. 118 of 1924 is preferred against the final order in Execution Case No. 221 of 1923 and Appeal No. 125 of 1924 is preferred against the final order in Execution Case No. 3 of 1924.

It is contended before us that the Subordinate Judge should be directed to set aside the sale in Execution Case No. 221 and his final order in Execution Case No. 3 and refund to the decree-holder the deposit made by him on account of part of the purchase-money, or, at any rate, he should be directed to make further inquiry into the question whether the decree-holder had, in fact, filed the application of the 31st March 1924. It appears that on the 2nd April 1924 the decree-holder appeared in Court and repudiated the petition that had been made on the 31st March. He said that he had not compromised with the judgment-debtor and that he had never filed any petition to set aside the sale. The learned Judge held that the C. P. Code, did not authorise him to entertain any application to set aside the sale by arrangement between the decree-holder and the judgment-debtor and he dismissed the application. In my opinion this decision was correct. The only ground upon which a decree-holder can set aside his own sale is that the judgment-debtor has no saleable interest in the property. There is no provision in the Code for allowing adjustments between the parties after the sale has been held. The sale is a solemn act and the Court is not competent to review it merely at the request of the parties. The Subordinate Judge was, therefore, right in confirming the sale.

There were allegations made by the decree-holder that he had been wrongfully confined and had been coerced by the judgment-debtor Sham Narayan into signing certain documents and that the application of the 31st March had been made by some one who had falsely impersonated him (the decree-holder). The Subordinate Judge declined to go into this allegation as a criminal case was pending in regard to that matter. We understand that since then Sham Narayan after conviction by the Court of first instance has been acquitted in appeal.

In Appeal No. 118 of 1924 nothing further remains to be done except to affirm the Subordinate Judge's order and to dismiss the appeal with costs.

In Appeal No. 125 the same result follows. The Subordinate Judge's final order in Execution Case No. 3 of 1924 will be affirmed and the appeal dismissed. There will be no separate costs in this case.

Ross, J.—I agree.

Appeals dismissed.

1925 PATNA 703

ADAMI AND MACPHERSON, JJ.

Kanhaiya Lal—Defendant—Petitioner.

v.

Baldeo Lal and others — Plaintiffs—Opposite Party.

Civil Revision No. 196 of 1924, Decided on 7th August 1924, from an order of the Sub-J., Gaya, D/- 16th April 1924.

(a) *Court-fees Act, 2nd Sch., Art.* 17 (6)—*Partition suit—Declaration of title and possession sought*—Ad valorem *fee is payable.*

Where the plaint clearly asked for a declaration of title and possession as well as partition.

Held: that *advalorem* Court-fee was payable: 1923 *Pat.* 113 *Foll.* [P. 704, C. 1]

(b) *Civil P. C., S.* 115—*Order that Court-fee paid is sufficient—Neither revision nor appeal lies.* [P. 704, C. 1]

An order directing that the Court-fee paid by the plaintiff on a plaint is sufficient is open neither to appeal nor to revision.

Nawal Kishore Prasad II — for Petitioner.

Rai Guru Saran Prasad—for Opposite Party.

Adami, J.—The petitioner and the plaintiffs Nos. 1—4, opposite party, are brothers, being the sons of Babu Garib Chand, deceased, who had a brother, Babu Saheb Lal, a pleader. The latter died on the 25th December 1911, leaving a will dated the 19th December 1911, by which he bequeathed all his property to the petitioner, who took out probate of the will on the 17th May 1922. Subsequently during the survey settlement proceedings the petitioner's name was entered in the record of rights and in the municipal register with respect to all the properties which he took under the will of Babu Saheb Lal. It appears that the opposite party did not contest either the grant of probate to the petitioner or the record of his name in the record of rights. This year, however, they have instituted the suit out of which this application arises, seeking partition of the properties coming down both from their father and from Saheb Lal.

In their plaint they asserted that Garib Chand and Saheb Lal were joint in mess and property, and that Saheb Lal died while still joint with his brother. They claimed that all the said properties were ancestral and that they were in joint possession of them all; and that Saheb Lal had been educated to become a pleader out of the joint funds. The plaint, while not denying that Saheb Lal had made a will in favour of the petitioner and that probate had been granted to him or that the petitioner's name was recorded in respect of Saheb Lal's properties in the record of rights, alleged that the petitioner had obtained Probate of Saheb Lal's will by fraud, and had procured the entry of his name in the Survey and Settlement Record and in the municipal register while he was *karta* of the family, without the knowledge of his brothers and in collusion with others. The plaintiffs in the suit stated in the plaint that they did not admit the genuineness of the will and they denied Saheb Lal's right to execute the will bequeathing property which they claimed to be joint property. The reliefs claimed in the plaint were a declaration that all the properties, including those covered by Saheb Lal's will were joint family properties and that they were entitled to a four-fifths share on partition of all this property and the delivery to them of their partitioned share and costs.

They valued their four-fifths shares at Rs. 15 107 for the purpose of jurisdiction and paid Rs. 15 as Court-fees claiming that the suit was a partition suit, pure and simple.

The petitioner, as defendant to the suit at once put in an objection that the Court-fee of Rs. 15 was insufficient and that an *ad valorem* fee must be paid before the plaint could be accepted seeing that the plaintiffs sought for a declaration of title, and for partition and possession.

The learned Subordinate Judge in his order on the objection admitted that the suit is for a declaration of title and possession as well as for partition and that the decision of Dawson-Miller, C. J., and Coutts, J., in the case of *Rachhya Raut* v. *Chando* (1) to the effect that if in a partition suit in the forefront of their prayer in the plaint the plaintiffs ask for a declaration of title and possession they are claiming under the guise of a partition suit a declaration of their title and they must pay an *ad valorem* Court-fee applies in the present case. But giving it as his reason that some of the properties in suit were admitredly joint, and the fact that the plaintiff's pleader took

(1) 1923 Pat a 113=3 P. L. T. 293=1922 P. H. C C. 65.

upon himself the responsibility of having the suit dismissed respecting the other properties which are the subject-matter of dispute as having been held adversely by the defendant if complete ouster were established as well as the fact that the plaintiffs were not in a position to pay the *ad valorem* fee, the learned Subordinate Judge held that under the peculiar circumstances of the case the Court-fees Act had to be construed leniently and that the decision in *Rachhya Raut* v. *Chando* (1) did not entirely apply. He, therefore, held that the Court-fee of Rs. 15 was sufficient and overruled the objection.

It is against this order that the present application is made. If an appeal lay against this interlocutory order there is no doubt what the result would be. The plaint clearly asks for a declaration of title and possession as well as for partition, and the learned Subordinate Judge was bound by the decision in *Rachhya Raut* v. *Chando* (1). The mere facts that a pleader gives an undertaking or that no declaration is necessary with regard to a partition of some of the property or that the petitioner is too poor to pay Court-fees give no good ground for neglecting an express decision of the High Court, and the provisions of the Court-fees Act or for depriving of its dues the Government revenue in the interest of which the Court fees Act was passed.

No appeal, however, lies and we have to consider whether this Court can interfere in revision. I think it is clear that it cannot. No question of jurisdiction arises; for the Subordinate Judge had jurisdiction to decide whether the suit was one in which an *ad valorem* fee should be paid; he may have decided the question wrongly, but jurisdiction is not affected. Order 7, R. 11 (*c*) cannot be invoked by the petitioner; for that rule requires the rejection of a plaint where "the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so."

In the present case the Subordinate Judge accepted the Court-fee of Rs. 15 as sufficient and, therefore, there was no direction to the plaintiffs which was disobeyed. This is not a case either in which the decision of the category within which a suit lies affects the jurisdiction and competence of the Court to try the case.

It must be decided, I think, that this Court cannot interfere at the present stage. At the same time I think it should be made clear to the learned Subordinate Judge that, as he has by his order circumscribed the scope of the plaintiff's suit the plaintiff should not be allowed to again extend its scope unless he consents to pay the further Court-fee required by law.

Subject to this remark, I would reject the application,

Macpherson, J.—I agree.

Application rejected.

1925 PATNA 704

BUCKNILL AND ROSS, JJ.

Dukhiram Raut—Accused—Petitioner.

v.

Jamuna Kuer and another — Opposite Parties.

Criminal Revision No. 626 of 1924, Decided on the 17th December 1924, from a decision of the Dt. Magistrate, Palamau, D/- 14th August 1924.

Criminal P. C., Ss. 203 and 202—Dismissal of complaint — Investigation under S. 202 is not necesary.

S. 203 is not dependent on the provisions for the postponement of the issue of process, contained in S. 202. The use of the word "any" clearly implies that an investigation or enquiry under S. 202 may or may not be made. [P. 705, C. 2]

P. C. Rai—for Petitioner.

The Assistant Govenment Advoacte — for Opposite Parties.

Ross, J.—The petitioner, a servant of one Babu Sham Behari Singh, lodged a complaint before the Deputy Magistrate of Daltonganj to the effect that his master had advanced Rs. 14,500 to Dulhin-Jamuna Kuer on a *zerpeshgi* bond and had obtained possession of the mortgaged properties which included a store-room and culturable lands. Possession was taken, but on the 10th July 1924 the opposite party, that is, Dulhin Jamuna Kuer and Bindni Debi accompanied by a large number of men who were armed with various arms, committed trespass in the said store-room and forcibly dispossessed the petitioner and his master. The case was instituted

under Ss. 147, 379 and 448 of the Indian Penal Code. The Magistrate examined the complainant and dismissed the complaint under S. 203 of the Cr. P. C., recording the following order :

"The facts stated by the complainant show that he left the *bhandar* at Saraidih when asked by the accused and their men. Beyond this nothing appears to have happened. No case is made out."

The petitioner then applied before the District Magistrate who also refused to interfere. His order was in the following terms :

"The complainant left the *bhandar* when requested. Presumably he was rebuked for doing so by his master and then tried to get out of his trouble by saying he did it under threats. That two *pardanashin* ladies of very high rank would deliberately place themselves in a position where they might be involved in a brawl or disturbance is simply incredible. I cannot believe the complainant's story and consider the lower Court was quite right to summarily dismiss the case."

Two points have been urged in support of this application in revision. It is contended in the first place that the orders of the Courts below show that some occurrence took place and that there was some show of force and that at all events offences under Ss. 448 and 506 of the Indian Penal Code have been committed. The facts of the alleged occurrence have not been disbelieved. In my opinion this is not a correct reading of the orders which have been passed. The order of the Deputy Magistrate does not show that the complainant submitted to any show of force, while the District Magistrate expressly states that the allegation, involving as it does, two *pardanashin* ladies of very high rank in situation where a brawl or a disturbance might have taken place, was incredible. The view expressed by the District Magistrate appears to be sound, and on the merits I see no ground to interfere with his order.

In the second place it is contended that under the amended Cr. P. C., it is not open to the Magistrate to dismiss a complaint in this way. The learned vakil referred to the change that has been made in the language of S. 203 of the Code. Under S. 202 of the Code a Magistrate, on receipt of a complaint of an offence, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process, and either inquire into the case himself or in certain circumstances direct an enquiry or investigation to be made by a Magistrate subordinate to him or by a police officer or by such other person as he thinks fit. That section deals with the postponement of the issue of process. S. 203 deals with the dismissal of a complaint. It enacts that the Magistrate may dismiss a complaint, if, after considering the statement on oath, if any, of the complainant, and the result of any investigation or enquiry under S. 202, there is in his judgment no sufficient ground for proceeding, and in such a case he should briefly record his reasons for so doing. The learned vakil contends that S. 203 is dependent upon S. 202. *Prima facie* I see no reason why the dismissal of a complaint should be necessarily dependent on the provisions for the postponement of the issue of process. But the argument is that whereas in the old Code the words were "the result of the investigation, if any, made under S. 202" the words in the present Code are "the result of any investigation or enquiry under S. 202," and the inference is that an investigation or enquiry under S. 202 is now obligatory. There is, in my opinion, no substance in this argument. If the investigation or enquiry under S. 202 was obligatory then the words would have been "the investigation or enquiry under S. 202;" but the words are : "any investigation or enquiry under S. 202." The use of the word "any" clearly implies that an investigation or enquiry under S. 202 may or may not be made. In other words the change is merely verbal and is not a change in substance.

The result is that the application must be dismissed.

Bucknill, J.—I agree.

Application dismissed.

1925 PATNA 706

SEN, J.

Bhabataran Mahto and others—Accused—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 110 of 1925, Decided on 1st June 1925, against an order of the S. J., Manbhum, Sambalpur, D/- 7th February 1925.

(a) *Penal Code, Ss.* 34, 149 *and* 325—*If conviction under Ss.* 149 *and* 325 *is not possible, conviction under Ss.* 34 *and* 325 *is less possible—A conviction under S.* 34 *is not sustainable without a clear finding as to the accused having acted in furtherance of a common intention.*

If it is not possible to bring home the guilt to the accused under S. 325 read with S. 149 of the I. P. C., *a fortiori*, it would be more difficult to bring home the guilt with the aid of S. 34 of the I. P. C. In order to bring the accused within the scope of S. 34, it is necessary to come to a definite finding that the accused were acting in furtherance of the common intention of all.

Where the common object charged was quite different, and where it was found that conviction would not follow under S. 325 read with S. 149 of the I P. C.

Held: that a conviction under S. 325 read with S. 34 would not be sustainable without a clear finding that the accused were acting in furtherance of a common intention.

[P. 707, C. 2]

Atul Krishna Roy—for Petitioners.

H. L. Nand Keolyar—for the Crown.

Judgment.—This is an application in revision by 11 accused who were tried and convicted under S. 147 of the Indian Penal Code. In addition to the order of conviction under S. 147 passed against all the 11 Petitioners, Petitioner No. 11 has also been convicted under S. 325 of the Indian Penal Code and Petitioners Nos. 1, 4, 5 and 6 under S. 325 read with S. 34 of the Indian Penal Code. The following are the undisputed facts of the case: In July 1914 two brothers, Dinu and Panu Bagal, executed a simple mortgage of their three-annas share in Chitabdih *chak* in favour of Bishto, father of Petitioner No. 1. In 1918 Dinu and Panu gave *darmokarrari* lease of certain plots of land in the village to four brothers, Sujan, Nitai, Jadu and Ghanu, of the prosecution party; while some other plots were given in *darmokarrari* to Narsingh, Benimadhab, Panchanan and Shama Charan. Bishto Charan sued on his mortgage aforesaid making Dinu and Panu, the lessees of 1918, parties to the suit. Usual mortgage decree was passed, and in execution of the decree the decree-holder purchased the property. On the 4th July 1913, the decree-holder-purchaser, the father of Petitioner No. 1, obtained delivery of possession of the property through Court under O. 21, R. 95 of the Code of Civil Procedure. The case of the prosecution was that on the 30th June 1924 the Petitioners with others went to the disputed land and ploughed it up and destroyed the paddy seedlings sowed by the four brothers Sujan, Nitai, Jadu and Ghanu; that a quarrel and a fight ensued in which the complainants were chased far out of the plot and Sujan up to a *jor* tree and they were there belaboured with the result that Ghanu sustained a fractured leg and Sujan a fractured forearm. The defence was that the petitioners were in possession of the land in dispute. It was the complainants' party that trespassed and upon that the petitioners remonstrated, upon which a quarrel arose and the petitioners felt bound in self-defence to resist the invasion of their rights by the prosecution party. The first Court held that the mortgage sale having passed the unascertained 3-annas share of the mortgagor did not affect the *raiyati* possession "in bhag dakhal" as they had occupancy rights therein. Hence the complainants had the right to be on the land, and they sowed paddy thinking that their possession was not affected. He also found that the story of chase was untrue and that it was subsequently introduced to avoid the consequence of law as to right of private defence of property arising from the fact of delivery of possession through the Court. The learned Deputy Magistrate convicted all the accused under S. 147 of the Indian Penal Code and sentenced them to six months' rigorous imprisonment except Nitai, Petitioner No. 8, who was fined Rs. 200. He also convicted Petitioners Nos. 1, 4, 5 and 6 under S. 325 read with S. 149 and sentenced them to six months' rigorous imprisonment. He further convicted Iswar, Petitioner No. 11, under S. 325, for giving the lathi blow to Ghanu and sentenced him to six months' rigorous imprisonment, the sentences to run concurrently.

On appeal the learned Ssssions Judge of Purulia thought that the occupancy rights of the four brothers had not been established, and he came to the conclusion that the auction-purchaser obtained possession from the Court ; but the parties not being clear as to their rights, the Bagals continued to be in possession and they cultivated the land in 1923 and harvested the crop. He also found as a fact that the Bagals were the residents of the village; that they remained in actual possession in spite of the delivery of possession to the auction-purchaser upto the date of occurrence under consideration, and that in the circumstances set out by the prosecution, the appellants came in force in order to oust the Bagals from possession and themselves re-take possession. He also found that "the details of the prosecution story are hardly challenged at all and are abundantly proved." Upon this altered finding as to possession, the learned Sessions Judge then proceeded to reconsider the sentences. He reduced the sentence passed against the accused under S. 147 to a fine of Rs. 20 each, in default to one month's rigorous imrisonment, except against Jitu, Petitioner No. 4, who injured Bhiku Bagalin with lathi and who was therefore sentenced to one month's rigorous imprisonment. As regards Petitioners Nos. 1, 4, 5 and 6, Petitioner No. 1 was further fined Rs. 50 and Petitioners Nos. 4, 5 and 6 sentenced to two months' rigorous imprisonment, under S. 325 read with S. 34. Petitioner No. 11 was convicted under S. 325 for having fractured Ghanu's leg and sentenced to two months' rigorous imprisonment. So far as the conviction and sentence under S. 147 is concerned, I think that on the findings of the two Courts it is not possible for this Court to interfere in revision.

The learned vakil for the petitioners at first urged that the sentence of one month's rigorous imprisonment on Petitioner No. 4 should be set aside as there was no such person as Bhiku Bagalin ou the record, but it being pointed out to him that evidently it was a mistake for Bidhu Bagalin he did not press that point. As regards the conviction of Petitioner No. 11 under S. 325, I feel that this is concluded by findings of facts. With reference to the conviction and sentence under S. 325 read with S. 34, it is urged that the conviction under S. 325 read with S. 34 is illegal and *ultra vires* and the trial Court having convicted under S. 325 read with S. 149, the appeal Court was not entitled to convict the Petitioners Nos. 1, 4, 5 and 6 under S. 325 read with S. 34 without coming to a definite finding as to common intention and that in any event separate sentences passed under Ss. 147 and 325 read with S. 34 are illegal. Now it is not easy to make out under what circumstances the learned Sessions Judge convicted the Petitioners Nos. 1, 4, 5 and 6 under Ss. 325 read with S. 34 of the Indian Penal Code. If it is not possible to bring home the guilt to the accused under S. 325 read with S. 149 of the Indian Penal Code one would think that *a fortiori* it would be more difficult to bring home the guilt with the aid of S. 34 of the Indian Penal Code. I find from his judgment that he observes that "the appellants came prepared for a *marpit*. They became an unlawful assembly when they all started to chase the mildly protesting Bagals with the common object of assaulting them." Now, the common object suggested in the passage above quoted is different from the common object charged, *viz.*, that of committing mischief and by criminal force, or show of criminal force, to take possession of the land in dispute. It has been laid down in various judicial pronouncements that in order to bring the accused within the scope of S. 34, it is necessary to come to a definite finding that the accused were acting in furtherance of the common intention of all. The common object charged in this case being quite different, and it being found that conviction would not follow under S. 325 read with S. 149 of the Indian Penal Code, I think a conviction under S. 325 read with S. 34 would be scarcely sustainable without a clear finding that the accused Nos. 1, 4, 5 and 6 were acting in furtherance of a common intention.

In the circumstances, I set aside the order of the learned Sessions Judge so far as it relates to the conviction and sentence of Petitioners Nos. 1, 4, 5 and 6 under S. 325 of the Indian Penal Code read with S. 34.

Conviction partly set aside.

1925 PATNA 708

BUCKNILL AND ROSS, JJ.

Jadu Dhanuk—Accused--Petitioner.

v.

Emperor--Opposite Party.

Mis. Criminal Revision No. 101 of 1924, Decided on 16th December 1924, from a decision of the S. J. Monghyr, D/-19th September 1924.

Criminal P. C., S. 190—Prosecution for bringing a false charge—Accused should be given opportunity to substantiate his allegations.

A Magistrate who is considering whether he shall order an individual to be prosecuted upon a charge of bringing a false charge should definitely offer to the accused person an opportunity of saying whether he abandons his charge or whether he wishes to support it, and if he says the latter, shall give him an opportunity of putting forward what he wishes to say in support of his charge prior to ordering him to be prosecuted for having brought a false charge. 14 *Cal.* 707 (*F. B.*) *Foll.* [P 710, C 1]

Manohar Lal--for Petitioner.

Asst. Govt. Advocate -- for Opposite Party.

Bucknill, J.--This was an application in criminal revisional jurisdiction made by one Jadu Dhanuk. The circumstances are somewhat peculiar. The applicant on the 29th June last lodged a first information at the Police Station of Barbigha which related to the disappearance of his step-sister. The gist of the story which he stated to the Police was that about 13 days before the date upon which he had appeared at the *thana*, his step-sister Sonitra Rajputin, who is the daughter of his father, Kali Singh, was missing from their house. The applicant searched for the girl with his father and eventually some suspicion was cast upon Loknath Singh who was then resident of a place called Nanhausi. The applicant says that he and his father went in search of Loknath and found him at his maternal uncle's house. The applicant was making enquiries from this uncle of Loknath, whose name was Meghan Singh when suddenly his step-sister came out of Meghan's house and clung to the applicant with affection. A woman from inside the house then shouted out to Loknath and Meghan not to let the girl go. The applicant then states as follows: 'Then Meghan Singh, Bhaglu Singh and Loknath Singh beat me with slaps and fists and forcibly took away the girl ..... My claim is on Meghan Singh, Bhaglu Singh and Loknath Singh for having stolen my sister. I cannot say why they have done so. From the house of Meghan a woman, whose address and name I do not know, told in a loud voice: 'Do not let the girl go. Whatever money will be spent I shall bear.' At this being encouraged Meghan, Loknath and Bhaglu who were there beat me with fists and slaps and took away the girl." Now, on this First Information the Police apparently investigated the story. It would certainly appear that they directed their enquiries to the taking away of the girl from the house in which the applicant resided on the night when it was alleged she was missing. The final report which was submitted by the Police disclosed a somewhat curious state of affairs, namely, that it would seem that the father of the applicant went with his daughter and deliberately married her to the son of Meghan Singh. There seems no doubt that this was so. Loknath and Meghan, therefore, would appear to have had a right to receive and keep this girl. It is not indicated whether the applicant was present at the wedding but it would seem that a price of Rs. 400 was claimed by the father for giving his daughter to Loknath. Only Rs. 200, however, seem to have been handed over by Meghan Singh to Kali Singh the former setting off the remaining Rs. 200 against some old debts which he (Meghan) claimed that Kali owed to him. The result of the Police investigation seems to have been that they thought that the story told by Jadu that the girl had been taken away wrongfully from their house on the night when he said that the occurrence had taken place was unjustifiably false. But the Police do not say anything at all as to the truth or falsity of the occurrence which is said to have taken place between the applicant and the three other persons whom he charged with beating him and with having taken away his step-sister from his protection at the village where Loknath and Meghan resided. So far as I can understand the First Information, although the applicant may have been complaining that some one, (whom he did not know) had taken away his step-sister from their residence, what he appeared to have charged the three accused with was with having beaten him and having taken his step-sister

away forcibly from him when he had recovered her; whereas the Police, so far as I can understand their report, appear to have come to the conclusion that the girl had never been abducted wrongfully from the house where the applicant lived at all. They, however, did not direct their attention to the occurrence which is said to have taken place when the applicant found his step-sister. I think that the First Information report and the final report of the Police do not really strictly deal with the same matter. If may well be that for some reason or other some such occurrence, as is alleged to have taken place by the applicant, did actually take place where Meghan and Loknath resided. There is no investigation as to this and no report by the Police as to this. It also may well be that the girl was in fact given or sold by her father to the persons whom the applicant charged with having assaulted him and in consequence it may be that the applicant's allegation that the girl had been actually abducted or kidnapped was in fact incorrect. It also may be that he was aware of this and that whatever, if anything, took place on the date of the occurrence as alleged by him, was due to the dispute about the non-payment of a portion of the bridal price. I think that in these circumstances it is rather difficult to see how a prosecution could, as matters stood, properly have been ordered, and I think that on that ground alone it is sufficient to justify this Court in coming to the conclusion that this was not a matter which, as the record stood, could have been followed well by a prosecution.

There is, however, one other point which has been put forward by the learned Counsel who has appeared for the applicant which is no doubt of some slight importance. When the report had been brought to the notice of the Sub-Divisional Officer the Sub-Inspector of Police at the same time filed a petition of complaint in the Sub-Divisional Officer's Court asking that the Sub-Divisional Officer should take cognizance of the offence under the provisions of S. 190 (*b*) of the Cr. P. C. As the Sub-Inspector had filed a petition of complaint as well as a report in writing, it would seem that he might more properly have asked that cognizance should be taken by the Sub-Divisional Officer under the provisions of S. 190 (*a*) of the Cr.P.C. However, that question is not very material. What has been argued is that when this had been done the Sub-Divisional Officer should not have ordered, as he did the applicant then and there to be prosecuted under S. 211, Indian Penal Code. It is suggested that there is authority to the effect that where a Magistrate purports to act under S. 190 of the Cr. P. C., he should not, where the question is as to whether a false case has been brought by the person complained or reported against prosecute him without offering him an opportunity to state clearly whether he no longer supports his charge or whether he wishes to have an opportunity of supporting it definitely. This argument is based upon a Full Bench case in the Calcutta High Court, *Queen-Empress* v. *Sham Lal* (1). In that case, which was decided in 1887, it appears to have been laid down that a Magistrate may take cognizance, under what corresponded then to S. 190 of the Cr. P. C. of an offence brought to his notice by a police report which affords ground for suspicion that an offence has been committed. But that, as a matter of sound judicial discretion, a Magistrate should not so proceed and direct that the person suspected should be tried until some person aggrieved has complained or until he has before him a police report on the subject based on an investigation directed to the offence to be tried, (and this is the more important part so far as is here material) in cases of an alleged false charge until it is clear that the original charge has been either heard and dismissed or abandoned; and it was further laid down that before an order to prosecute for the false charge is made, the person who is alleged to have made the false charge should be offered by the Magistrate an opportunity of supporting it or abandoning it. The learned Assistant Government Advocate has pointed out that if this means that in every case under the provisions of S. 190, in which a false charge is the matter of complaint, an opportunity is to be offered by the Magistrate to the person against whom the charge is brought, of stating whether he abandons or substantiates his original charge, such decision would certainly appear to place some duty upon the Magistrate by way of exercise of judicial discretion which does not appear

(1) [1887] 14 Cal. 707 (F. B.)

in the language of the section itself. I think that this is true. The learned Assistant Government Advocate has endeavoured to argue that this decision only was intended to apply in cases in which the person, who was supposed to have made a false charge but after the police had reported it to be false, appeared before a Magistrate and asked that his case might be investigated and his witnesses summoned, and that the decision was not intended to apply in cases in which the person who was suspected of making a false charge did not apply to the Magistrate that his statement should be taken and witnesses summoned, or to cases in which he only made such an application after the investigating Magistrate had ordered that he should be prosecuted for making a false charge. In the present case it was not until after the applicant had been ordered to be prosecuted and had actually gone before the trying Magistrate for trial that he then requested that his story should be substantiated. Although it is true that in the case which I have quoted, the person suspected of making a false charge did apply to the investigating Magistrate that his statement should be taken and his witnesses summoned (his application being refused), yet the decision in the case does not appear, as I read it, to place any such limitation as is suggested by the Assistant Government-Advocate. On the contrary it seems to me to be wider, and if the decision of the Calcutta High Court Full Bench is correct it certainly does appear to me to contemplate that in any case a Magistrate who is considering whether he shall order an individual to be prosecuted upon a charge of bringing a false charge should definitely offer to the accused person an opportunity of saying whether he abandons his charge or whether he wishes to support it, and if he says the latter, shall give him an opportunity of putting forward what he wishes to say in support of his charge prior to ordering him to be prosecuted for having brought a false charge.

I think, however, that on the facts of the case, as I have dealt with the first point, this matter can clearly be decided. The whole affair of course is one considerably to be deprecated, and to try and put the Police into motion on an absolutely incorrect and misleading statement is an affair which may not be altogether passed over. At the same time there seems to have been no cohesion between the complaint of the applicant Jadu and the application on report of the Police for prosecution of the applicant, and in these circumstances I do not think a prosecution should have been ordered. In these circumstances all I think that is necessary in this case to do is to quash the order for prosecution of the applicant under S. 211 of the Indian Penal Code.

Ross, J.—I agree.

Order quashed.

1925 PATNA 710

DAS AND FOSTER, JJ.

Amir Kumar Mukherjee and others—Plaintiffs—Appellants.

v.

Mr. B. Coventry and others—Defendants—Respondents.

Mis. Civil Appeal No. 103 of 1924, Decided on 29th July 1924.

Injunction—Batwara proceedings—High Court can restrain parties from proceeding with batwara proceedings till determination of civil suit.

Though the High Court has no jurisdiction over the Batwara Court, it will always assert its right to act in personam and has complete jurisdiction to restrain the parties to a pending suit from proceeding with batwara proceedings until the determination of the suit. The High Court will not assume that the Batwara Court will take any steps unfair to the parties restrained from proceeding with the batwara proceedings or compel them to act in any way inconsistent with their duty of obedience to the High Court. 34 Cal. 101 *Foll.* [P 711 C 2]

S. N. Bose—for Appellant.

Baikuntha Nath Mitter and *Lachmi Narain Singh*—for Respondents.

Judgment.—By consent of the parties the order in this application will be treated as deciding the Miscellaneous Appeal No. 108 of 1924. The application itself is for an injunction upon the respondents third party restraining them from proceeding with certain batwara proceedings. The facts are these :—The appellants who are the plaintiffs in the suit now pending in the Court of the Subordinate Judge of Monghyr are ten-annas proprietors of Touzi No. 1002 which is under Collectorate partition. The defendants third party are the six-annas proprietors of

Touzi No. 1002. The defendant second party is the sixteen-annas proprietor of Touzi No. 1101 and we are informed that the lands of Touzi No. 1001 are mixed up with the lands of Touzi No 1002. The defendants first party are the thikadars of Touzi No. 1002 and the question between the plaintiffs-appellants and the defendants first party in the suit is in substance whether the disputed lands in the suit are the bakasht lands of the proprietors of Touzi No. 1002 or the tenancy lands of defendants first party. The defendants first party are not parties to the batwara, although they made an application for being added as parties thereto. The plaintiffs applied for an injunction in the Court below restraining the defendants third party from proceeding with the batwara proceedings. A petition was filed by most of the defendants who had been cited as defendants third party in this action submitting to the injunction prayed for ; it appears that defendants Nos. 15,22, 24 and 67, amongst some others did not join in that application. Mr. B. N. Mitter appears for the defendants first party who are the thikadars of Touzi No. 1002 and for defendants Nos. 15, 22, 24 and 67, who have been cited as defendants third party. As against the order of the learned Subordinate Judge refusing to grant an injunction the plaintiffs have presented an appeal to this Court which is Miscellaneous Appeal No. 108 of 1924. The present application has been made in Miscellaneous Appeal No. 108 of 1924 and the application in substance invites this Court to pass an order upon the defendants third party restraining them from proceeding with the batwara proceedings.

Mr. Lachmi Narain Singh appearing on behalf of the defendant second party says that he is only interested in the suit being disposed of as soon as possible as his lands are mixed up with Touzi No. 1002, and he contends that the batwara proceedings should be carried on with all convenient speed.

Mr. Baikuntha Nath Mitter appears on behalf of the defendants first party and defendants Nos. 15, 22, 24 and 67, who are in the category of defendants third party. So far as he represents the defendants first party, obviously he has nothing to do with the application, because his clients are not parties to the batwara proceedings. So far as he represents defendants Nos. 15, 22, 24 and 67 it is to be remembered that it is to the interest of the defendants third party as a whole that the question whether the disputed lands are the bakasht of the maliks or the tenancy of the defendant first party should be disposed of before the batwara proceedings are proceeded with. Mr. Baikuntha Nath Mitter on behalf of defendants Nos. 15, 22, 24 and 67, is prepared to admit the claim of the defendants first party, but we are not concerned with that in this appeal. The important point to be remembered is that most of the defendants constituting the defendants third party did file an application to the Court below, submitting to the injunction prayed for.

It is pointed out by Mr. S. N. Bose on behalf of the plaintiffs that his clients will suffer an irreparable injury if the batwara proceedings are proceeded with. It is doubtful whether the plaintiffs will have any remedy at all if they succeed in the suit which they have filed in the Court of the Subordinate Judge of Monghyr.

Mr. Baikuntha Nath Mitter points out that we have no jurisdiction over the Batwara Court : that is true enough ; but we have complete jurisdiction over the parties to the suit, and this Court will always assert its right to act in personam. It is contended by Mr. Baikuntha Nath Mitter that his clients will be placed in great difficulty if the Batwara Court should decide to proceed with the batwara proceedings. But we have no right to assume that the Batwara Court will, to quote the words of Sale, J., in *Mungle Chand* v. *Gopal Ram* (1), take any step unfair to those defendants or compel them to act in any way inconsistent with their duty of obedience to this Court. On the whole we are satisfied that the learned Subordinate Judge should have granted the injunction prayed for. That being our opinion we allow Miscellaneous Appeal No. 108 of 1924 and set aside the order passed in the Court below, and we restrain the defendants third party from proceeding with the batwara proceedings until the determination of the suit pending in the Court of the Subordinate Judge of Monghyr.

It is desirable that the suit pending in the Court of the Subordinate Judge of Monghyr should be disposed of with all convenient speed, and we direct the learn-

(1) [1907] 34 Cal. 101.

ed Subordinate Judge to proceed with the suit so that decision in the suit may be arrived at before the end of this year. The costs of this appeal will be costs in the suit itself and will be dealt with by the learned Subordinate Judge.

Order set aside.

1925 PATNA 712 (1)

DAS AND ADAMI, JJ.

(Srimatya) Gendamoni Debya—Appellant.

v.

Raghunandan Singh and others—Respondents.

Privy Council Appeal No. 14 of 1925, Decised on 21st July 1925.

Civil P. C., S. 109—Application for leave to appeal—Probate Proceedings — Opposite party recognizing applicant to be proper party—High Court will not enquire whether applicant has any locus standi *to appeal.*

The applicant filed a caveat in the Court of first instance and the opposite party did not apply to have that caveat discharged. In other words the opposite party recognized that the applicant was a proper party to the probate proceedings. The opposite party appealed to High Court and he made the applicant party respondent to the appeal. The opposite party succeeding in appeal the applicant applied for leave to appeal to Privy Council.

Held: the High Court was not competent to enter upon the question whether the applicant had any *locus standi* to maintain the application.

[P 712 C 2]

Subal Chandra Mazumdar—for Appellant.

S.M. Mullick, B.N. Mitter, L. Bannerji, S. N. Banerji, Nabadwip. Ch. Ghosh, L.N Singh, N.C. Ghosh–for Respondents.

Order.—This is an application for leave to appeal to His Majesty in Council.

The judgment of this Court reversed that of the Court below and the decree involves the claim or question to or respecting property of the value of over Rs. 10,000/-. The case therefore complies with the requirements of Ss. 109 and 110 of the Code and the applicant would ordinarily be entitled to leave as a matter of course.

But it is contended on behalf of the opposite party that the applicant has no locus standi to present the present application. The applicant is the widow of the predeceased son of the testator. The question at issue between the parties was whether probate could be granted of the alleged will of the testator. Various questions were raised in the proceedings between the parties and this Court, differing from the learned District Judge in the Court below, directed that probate should issue.

It is contended on behalf of the opposite party that Srimatya Gendamoni Debya, the applicant before us, has no locus standi since in no event is she entitled to succeed to the estate of the testator. In my opinion we are not competent in this Court to enter upon the question whether the applicant has any locus standi to maintain the application. She undoubtedly filed a caveat in the Court of first instance. The opposite party did not apply to have that caveat discharged. In other words the opposite party recognised that the applicant was a proper party to the probate proceedings. The opposite party was the appellant in this Court and he made Srimatya Gendamoni Debya a party respondent to the appeal. That being so, Srimatya Gendamoni Debya is, in our opinion, entitled to maintain the application for leave to appeal to His Majesty in Council.

The application succeeds. Issue the usual certificate.

The petitioner is entitled to the costs of this application. Hearing fee five gold mohurs.

1925 PATNA 712 (2)

BUCKNILL, J.

Sanahi Ram Kandhaya Lal—Plaintiff—Petitioner.

v.

Gulab Chand Kalu Ram and another—Defendants—Opposite Parties.

Civil Appeal No. 428 of 1924, Decided on 24th June 1925, from an order of the Small Cause Court Judge Patna, D/- 1st August, 1924.

Civil P. C. O. 9, R. 8,—Plaintiff present all along except on one date—Defendant admiting part of the claim—Case should not be dismissed for default.

Where the plaintiff was all along present in Court on all hearings except one, and the Court dismissed the suit for default on that date though the defendant had admitted a part of the claim.

Held: that the order of dismissal was not proper.

Janak Kishore—for Petitioner.

B. C. Sinha—for Opposite Parties.

Judgment.—This was an application in Civil Revisional Jursidiction. It is made under the following circumstances :

The applicant was the plaintiff in a suit which he brought against the defendant and his firm to recover the value of goods which the plaintiff had sold and delivered to the defendants from time to time. I do not know exactly what was the amount for which the suit was brought, but it was brought in the first Court of the Subordinate Judge of Patna acting as a Small Cause Court Judge. The defendant put in a long written statement in his defence, and in it he, after criticising the plaintiff's claim to some extent, admitted that he owed to the plaintiff, and was ready to pay him, the sum of Rs. 130 0-6. The case was proceeding in the usual manner ; it was apparently fixed for hearing on the 1st of August of last year. When, however, it came up for hearing the plaintiff was not present and no reason appears to have been given why he was not. It is urged, however, that it is perfectly clear that the plaintiff, ever since the institution of the suit, had on all days up to this date when the case was down for being proceeded with, attended with witnesses ; however, unfortunately, on this day he was not in fact present and his pleader was apparently unable to attend on his behalf as he was engaged in another matter. The defendant's pleader was, however, present. The Subordinate Judge thereupon dismissed the suit *in toto* in default.

At any rate this action of the Subordinate Judge appears to have been irregular because as the defendant had admitted that a portion of the claim was due, the Subordinate Judge should have passed a decree in favour of the plaintiff for the amount admitted to be due. This, however, he did not do. The order of the Subordinate Judge of the 1st of August 1924 must in any case be set aside.

There remains the question of whether, under the circumstances, it is desirable that the whole matter should be now gone into. On the whole, I think that it should be gone into. The matter has to go back as I am not quite satisfied as to why the plaintiff was absent on the day when the case was finally called upon or why his pleader could not attend. It is said that both the applicant and his pleader were regular in attendance up to this date and that by mistake or accident the former was not and the latter could not be present. Under these circumstances I think that the proper order in this case is to set aside the order of the Subordinate Judge sitting as a Small Cause Court Judge made on the 1st of August last and to direct that he should now in due course restore the case and hear it. There will be no order as to costs.

Case remanded.

★ 1925 PATNA 713

JWALA PRASAD, J.

Mohammad Nasiruddin — Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 699 of 1924, Decided on 20th January 1925, from an order of the S. J., Manbhum, D/- 21st November 1924.

★ (*a*) *Criminal P. C., S. 342—Detailed examination of accused is not essential in every case.*

What must be the nature of the questions put by the Court depends upon the circumstances of each case ; but it would be a sufficient compliance with the provision of the Code if the Court gives to the accused an opportunity by questioning him generally on the case to explain the circumstances appearing in the case against him. It is neither necessary nor desirable to examine the accused in great detail or to force him to disclose his defence so as to enable the prosecution to take advantage of it when the witnesses for the accused are examined. But it is impossible to lay down any hard and fast rule as to the nature of the examination of an accused under S. 342 of the Code. 1925 *Patna* 342 ; 1925 *Patna* 389, 29 *Cal. W. N.* 231 *Ref.* [P 716 C 1]

★ (*b*) *Penal Code, Ss. 441 and 456—Mere entry into another's house with intent to have sexual intercourse with any woman there is no offence—But where no pre-arrangement existed between accused and any woman in the house and where all the women in the house were startled by accused's conduct, accused was held guilty.*

In order to constitute criminal trespass under S. 441, the entry into the house or property in the possession of another must be with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property and in order to sustain a conviction under S. 456, it must be proved that there was in the first instance criminal trespass as defined in S. 441. Thus, a mere entry into a house occupied by another with intent to carry on an intrigue or to have sexual intercourse with a woman living in that house will not in itself be a criminal trespass. In such a case it is supposed that the entry has been with the consent or connivance of the woman living in the house. However if

she along with other inmates is in possession of the house, as in the case of a joint Hindu family, the trespass in the house must cause an insult and annoyance to the other members in the house. If the object is to force an intrigue upon a woman in the house and to have a forcible intercourse with her, the intention of the entry will necessarily be to insult and annoy that woman.

Where there was no pre-arrangement between the accused and any lady in the house and all the ladies in the house were startled at the bold attempt on the part of the accused to force himself into the house.

Held: that the intention of the accused was not to carry on a peaceful intrigue and intercourse with any of the ladies in the house and with the consent or connivance of any one of them, but the intention of the accused was to commit a criminal trespass into the house and an indecent and unjustifiable trespass upon the persons of the occupants of the house. 4 *C. L. J.* 169. 19 *Mad.* 240 and 41 *Mad.* 156 *F. B. Dist.* 22 *Cal.* 391 *Ref.* [P. 716, C 2 P. 717, C. 1]

C. M. Agarwala and *Manmotha Nath Pal*—for Applicant

H. L. Nandkeolyar—for the Crown.

Judgment.—The petitioner has been convicted under S. 456, Indian Penal Code, and sentenced to two months' rigorous imprisonment. The conviction has been upheld by the Sessions Judge of Manbhum.

The petitioner is a Ticket Collector at Jharsuguda Railway Station and takes his food in the kitchen of the Refreshment Room. Rammurti, a Madrasi gentleman, has recently gone to Jharsuguda as a Refreshment Room Clerk. He occupies a quarter in the Railway godown consisting of a room the door of which opens on to the closed lattice work verandah which itself has a door. Rammurti's household consists of his mother, a woman of about 50 years, and his nieces aged about 19 and 14, of whom the former is a widow and the latter a married woman. On the night of the occurrence the ladies slept in the house and Rammurti on the verandah of the Railway Mail Service Office just in front of his quarter and opposite to it. He locked the door of the verandah on the outside and kept the key with himself. About 1-30 A. M. on the night of the 13th July the mother of the complainant, Rammurti, called the elder Sundaramma, being aroused by the cackling of the fowls in the kitchen of the refreshment room, and heard stones thrown against the door of the room in which the ladies slept. Shortly afterwards she saw a man thrust hishead within the door of the room and throw small stones at her granddaughters. The junior Sundaramma woke up, nudged her grandmother and both of them recognized the petitioner and cried out to Rammurti. Rammurti ran up to the verandah and recognized the petitioner running away. The door of the verandah was found open and stones and cinders were found here and there in the room and some on the bed of the younger woman. Rammurti forthwith went to the Assistant Station Master on duty who went with the Yard Foreman and a constable to the complainant's quarters, found the brass lock with which Rammurti had closed the door of the verandah lying broken on the ground outside and the state of the apartments as described above. An information was lodged by Rammurti to the Police next morning, and after investigation the accused was sent up.

The Court below has found the prosecution story as stated above to be true and established by evidence in the case.

Mr. Agarwala, on behalf of the petitioner, takes an exception to the validity of the trial upon the ground that the Magistrate failed to comply with the provisions of S. 342 of the Code of Criminal Procedure. It is not denied that the accused was, as a matter of fact, examined by the Magistrate on the 25th August 1924, after the close of the prosecution case and before he was called upon to enter into his defence. The objection is as to the manner of the examination of the accused by the Magistrate. The accused was first examined on the 7th August, 1924. On the 25th August he was examined under the latter portion of S. 342 of the Code. The question put to him by the Magistrate was as follows:

"You have heard the further evidence given by the prosecution witnesses in your presence to-day. Have you got to say anything else?"

The answer of the accused was "No." In his earlier examination he was asked whether he entered the house of Rammurti by breaking the lock of the door and threw stones at his nieces who were sleeping in the room. His answer was "No." Then he was asked why this case was brought against him. He said that the case was brought against him out of grudge, and then he detailed this plea by giving facts and circumstances in his statement. It is said that on the 25th

August 1924, after the close of the prosecution case and before the accused was called upon to enter into defence, the Magistrate ought to have asked the accused questions upon the evidence in the case that showed the participation of the accused in the offence of which he was charged so as to give him an opportunity to explain those circumstances. The contention is that the Magistrate who heard the evidence of the prosecution must have told the accused on what points he considered the evidence sufficient against the accused for the purpose of enabling the accused to explain those circumstances. It is true that at that stage it is imperative upon a Magistrate: "to question the accused generally on the case" and the object of this examination is to "enable the accused to explain any circumstance appearing in the evidence against him."

This provision in the Code has been the subject of great divergence of opinion. Lately there has been a difference of opinion in this Court [vide *Durga Ram* v. *King-Emperor* (1), and *Banamali Kumar* v. *King Emperor* (2)]. Kulwant Sahay, J., held that the examination of an accused person under the latter part of S. 342 should be a detailed one and the Magistrate ought to let the accused know as to what are the circumstances indicated in the evidence against him for obtaining if possible an explanation of the accused and that the putting of a simple question as to whether the accused had anything to say is not a sufficient compliance with the provisions of the law. Foster, J., took a contrary view. The matter has recently been dealt with by the Calcutta High Court in the case of *King-Emperor* v. *Alimuddi Naskar* (3). Newbould, J., held that "a formal question in general terms to give the accused an opportunity of making a statement of his defence with his own lips is a sufficient compliance with the mandatory provision of S. 342 of the Code of Criminal Procedure, since it enables the accused to explain any circumstance appearing in the evidence against him. To what extent the Court when complying with the mandatory provision of the section should also exercise its discretionary power under the other provisions of the section is a different question. The exercise of this discretion must vary with and depends on the circumstances of each particular case but in the majority of cases it is neither necessary nor desirable that there should be any detailed questioning of the accused." Mukerji, J., held that "in questioning the accused under S. 342, Criminal Procedure Code, the Court must point out to the accused the salient points appearing in the evidence against him in a succinct form and he must be asked to explain them if he wishes to do so. If on a general question as to whether he wishes to say anything being put, the accused answers in the negative, it will be no use asking him any further questions."

I would invite attention to the difference in the wording of the first and the second portions of S. 342, the former being discretionary and the latter mandatory. As the prosecution case goes on the first portion gives power to the Court to put any question to the accused that he thinks necessary in order to obtain an explanation of any circumstance appearing in the evidence against the accused. The provision says that the Court may "put such questions to him (accused) as the Court considers necessary."

After the close of the prosecution case the mandatory portion of the section requires the Magistrate to "question him (the accused) generally on the case" the object being the same as in the case of an examination under the first portion of the section, namely, to enable the accused to explain any circumstance appearing in the evidence against him. It depends upon the circumstance of each case what must be the nature of the questions put by the Court, but it would be a sufficient compliance with the provision of the Code if the Court gives to the accused an opportunity by questioning him generally on the case to explain the circumstances appearing in the case against him. In this connection the examination of the accused, if any, under the first portion of the section, may usefully be looked into. In the present case the accused was in his earlier examination told the case against him as disclosed in the evidence of the prosecution and that case was that on the night of the 13th July, 1924, he entered into the house of

(1) 1925 Patna 342=6 P. L. T. 33=26 Cr. L. J. 716.
(2) 1925 Patna 339=6 P. L. T. 30=3 Pat. L. R. Cr. 25=26 Cr. L. J. 682.
(3) 1925 Cal. 361=52 Cal. 522=29 C. W. N. 231=41 C. L. J. 101=26 Cr. L. J. 631.

Ramamurti by breaking the lock attached to the door and threw stones at his nieces who were sleeping in the room. On the 7th of August he was asked whether he committed the act or not, and he denied it. He was then asked as to why the case was brought against him and he gave his reasons for it. After this, four prosecution witnesses were cross-examined and discharged, and then the accused was asked whether upon hearing the evidence given that day he had anything to say. The witnesses for the prosecution, as observed above, were cross-examined on behalf of the accused, and thus he was fully aware that he had to explain the circumstances brought out by the prosecution evidence against him. The Magistrate then gave him an opportunity, by putting questions generally upon the case under the latter portion of S. 342, to explain these circumstances against him and to disclose his own defence. His answer was in the negative. In the circumstances of the present, case I do not think the provision in the latter portion of S. 342 was not complied with. It is not necessary, nor is it desirable, to examine the accused in great detail or to force him to disclose his defence so as to enable the prosecution to take advantage of it when the witnesses for the accused are examined. It is impossible to lay down any hard and fast rule as to the nature of the examination of an accused under S. 342 of the Code. I, therefore, reject the contention of the learned counsel that the trial was vitiated by not properly complying with the requirements of S. 342 of the Code.

The next contention is that the conviction under S. 456, Penal Code, is bad, inasmuch as the intention of the accused has not been found to be to commit any offence or to intimidate, insult or annoy any person in possession of the house in question. Reference has been made to the case of *Ambika Charan Sarkar* v. *Emperor* (4). In that case the finding was that the intention of the accused in entering the house of the complainant was to carry on an intrigue with the complainant's widowed sister in-law. It was held that the entry was not an offence, nor was the intention to cause any annoyance to the occupants of the house: rather it was secretly to carry on an intrigue without the knowledge of the persons in the house. The conviction was set aside. The case of *Balmakund Ram* v. *Ghansamram* (5), was distinguished in that case upon the ground that the intention of the accused in that case was to commit adultery with the wife of the complainant which in itself was an offence punishable under the Code. In the case of *Queen-Empress* v. *Rayapadayachi* (6), the finding was that the accused entered the house to have sexual intercourse with the complainant's unmarried sister and it was held that the accused could not be convicted under S. 456. This case was followed in the Full Bench case of *S. Vullappa* v. *S. Bheema Row* (7), where it was held that an offence under S. 441, Penal Code, is committed only when the trespass is with one of the intents specified in that section and the proof that the trespass committed with some other object was known to the accused to be likely or was certain to cause insult, or annoyance, is insufficient to sustain a conviction under S. 448. Undoubtedly, in order to constitute criminal trespass under S. 441, the entry into the house or property in the possession of another must be with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, and in order to sustain a conviction under S. 456 it must be proved that there was in the first instance criminal trespass as defined in S. 441. Thus, a mere entry into a house occupied by another with intent to carry on an intrigue or to have sexual intercourse with a woman living in that house will not in itself be a criminal trespass. In such a case it is supposed that the entry has been with the consent or connivance of the woman living in the house. However, if she along with other inmates is in possession of the house, as in the case of a joint Hindu family, the trespass in the house must cause an insult and annoyance to the other members in the house. If the object is to force an intrigue upon a woman in the house and to have a forcible intercourse with her the intention of the entry will necessarily be to insult and annoy that woman. In the present case the finding of the Court

(4) [1906] 4 C. L. J. 169=4 Cr. L. J. 144.

(5) [1895] 22 Cal. 391.

(6) [1896] 19 Mad. 240.

(7) [1918] 41 Mad. 156=33 M. L. J. 729=6 L. W. 791=19 Cr. L. J. 162=43 I. C. 578=(1918) M. W. N. 81. (F. B.).

below is that there was no pre-arrangement between the accused and the junior Sundaramma, or for the matter of that with any other lady in the house. The case stated in the judgments of the Courts below, on the other hand, goes to show that all the ladies in the house, the grandmother, the widowed Sundaramma and the unmarried girl Raijo were startled at the bold attempt on the part of the accused to force himself into the house and to throw pebbles at them. The junior Sundaramma is stated to have, when she suddenly woke up at hearing the noise, nudged her grandmother. Therefore, in the present case the intention was not to carry on a peaceful intrigue and intercourse with any of the ladies in the house and with the consent or connivance of any one of them, but the intention of the accused was to commit a criminal trespass into the house and an indecent and unjustifiable trespass upon the persons of the occupants of the house. The concurrent finding of the Courts below in the present case makes the authorities cited by the learned counsel on behalf of the petitioner inapplicable to the present case. This contention must, therefore, also be held to be untenable.

The last submission of Mr. Agarwala is that the punishment in this case is excessive and that it should be reduced. The view taken by the Court below is that the punishment in this case is lenient and that the Magistrate has erred on the side of leniency. I do not think the accused has any grievance on account of the severity of the sentence. The act committed by him is most reprehensible. Rammurti happened to come to Jharsuguda only recently with several ladies of his family. The outrage attempted upon his household is a heinous offence, and the punishment in the present case is far from being severe.

The application is refused.

Application refused.

★ 1925 PATNA 717

MULLICK AND JWALA PRASAD, JJ.

Daroga Gope—Accused—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 143 of 1925, Decided on 15th June 1925, against an order of the S. J., Patna, D/- 13th March 1925.

★ (*a*) *Criminal P. C., S. 195—Section should be given wide interpretation—One offence may be committed 'in relation to another though the other may never be committed.*

The words of S. 195 (*b*) should be given as wide an application as possible. Some of the offences enumerated in the clause are capable of being committed in relation to a judicial proceeding which did not exist. False evidence, for instance, may be fabricated for a contemplated suit or property may be fraudulently concealed in contemplation of an execution proceeding. The clause applies if the judicial proceeding is in existence at the time when it is sought to prosecute the offender for the offence in question. If two offences are even remotely connected by the relationship of cause and effect, then the first may be said to have been committed in relation to the second. It may be that the commission of the latter offence may never have been intended, but if it is in fact the consequence of the former offence, then S. 195 applies. [P 718 C 1, 2]

(*b*) *Penal Code, S. 211—Complaint under S. 211 not entertainable for want of proper complaint under S. 195, Cr. P. C.—Court can investigate offence under S. 182, Penal Code — Criminal P. C., S. 195.*

Where a Magistrate has no jurisdiction to take cognizance of an offence under S. 211 for want of proper complaint he can investigate the complaint as regards S. 182. [P 719 C 2]

Nawadwipa Chandra Ghosh—for Petitioner.

H. L. Nandkeolyar—for the Crown.

Mullick, J.—On the 5th January 1925, the petitioner Daroga Gope laid an information before the police complaining that his landlord Bajrangi Singh and others had forcibly carried off 9 Mds. of paddy from his house because he had refused the landlord's request for the customary gift of milk and curds. Previous to this on the same day a counter-information had been lodged before the police by the landlord against the petitioner charging him and his brothers with wrongfully seizing and confining the landlord's ploughman while the latter was passing the petitioner's house. It was alleged that previously there had been a quarrel between the petitioner's party and the *zamindar's* servants about the sowing of some paddy and that the *zamindar's* servant was seized in order to annoy the *zamindar*.

The police investigated both cases and reported that the *zamindar's* complaint was true and the petitioner's complaint was false. The *zamindar's* information, which was numbered by the police as Case No. 1 of 1925, has ended in the conviction of the petitioner and is now under appeal.

On the 15th January, the officer, who investigated into the petitioner's information submitted his final report declaring it to be false and on the 3rd February under the orders of the Inspector, he submitted a formal complaint to the Sub-divisional Magistrate of Patna charging the petitioner with offences under Ss. 182 and 211, I. P. C. In the meantime on the 5th January, the petitioner, finding that the police had reported his case to be false, filed a formal complaint before the Sub-divisional Magistrate repeating the allegations made in his information to the police and on the 6th February 1925, the Sub-divisional Magistrate, after perusing the police report above referred to, dismissed the complaint under S. 203 Cr. P. C. On the same day he passed the following order on the Sub-Inspector's written complaint of the 3rd February : "Summon Daroga Gope under Ss. 211 and 182, I. P. C. for 24-2-25."

We are now asked in revision to set aside this order on the ground that the prosecution of the petitioner cannot proceed without the written complaint of the Magistrate who took cognizance of the petitioner's complaint of the 25th January.

Now clause (*b*) of S 195 of the Criminal Procedure Code directs that no Court shall take cognizance of any offence punishable under the following sections of the Code, namely, Ss. 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate. In the present case the recording of the complaint of the 25th January was a judicial proceeding, and the first question is whether laying a false information before the police on the 5th January was an offence committed in, or in relation to, the complaint which was lodged by the petitioner before the Sub-divisional Magistrate on the 25th January.

Admittedly the offence was not committed in the judicial proceeding. But was it committed "in relation" to it ? This raises a point upon which there has been some diversity of opinion but the tendency seems to be to give the words of S. 195 (*b*) as wide an application as possible. It is clear that some of the offences enumerated in the clause are capable of being committed in relation to a judicial proceeding which did not exist. False evidence, for instance, may be fabricated for a contemplated suit or property may be fraudulently concealed in contemplation of an execution proceeding. The clause applies if the judicial proceeding is in existence at the time when it is sought to prosecute the offender for the offence in question.

With regard to a false information to the police, it may be argued that the offence is a contempt which cannot possibly be said to have been committed "in relation to" any subsequent contempt, each repetition being a separate, independent and complete act. On the other hand, if two offences are even remotely connected by the relationship of cause and effect, then the first may be said to have been committed in relation to the second. It may be that the commission of the latter offence may never have been intended, but if it is in fact the consequence of the former offence, then S. 195 applies. Here it may be said that the laying of the false charge on the 5th January caused the police to submit a report against the petitioner which in its turn caused the petitioner to institute a judicial proceeding before the Sub-divisional Magistrate by lodging the complaint of the 25th January and that, therefore, the offence of the 5th January was committed in relation to a judicial proceeding. This was the line of reasoning in *Hardwar Pal* v. *Emperor* (1). On the other hand, in *Jagat Chandra Mazumdar* v. *Queen Empress* (2) the offence of fabrication of false evidence was said to have been committed by a police officer in the course of an investigation ; but it does not appear that any judicial proceeding followed as a result of that investigation and therefore it was held that no sanction under the Criminal Procedure Code of 1898 was required. In *F. A. Brown* v. *Ananda Lal Mullick* (3) a charge of theft was laid before the police and was followed up by a complaint in Court upon which process was issued and a trial held. After the discharge in this trial the accused sought to prosecute the

(1) [1912] 34 All. 522=10 A. L. J. 61=16 I. C. 510=13 Cr. L. J. 702.
(2) [1899] 26 Cal. 786=3 C. W. N. 191.
(3) [1916] 44 Cal. 650=20 C. W. N. 1347=18 Cr. L. J. 25=36 I. C. 857=25 C. L. J. 53.

complainant for laying a false charge before the police and it was held that this could not be done without a complaint under clause (*b*) of S. 195 Cr. P. C. from the Court which discharged the accused. *In Re K. Parmeswaran Nambudri* (4) the difference between clause (*c*) and clause (*b*) of S. 195 was pointed out and it was held that clause (*b*) was applicable in a case where the offence of fabricating false evidence was committed in respect of a promissory note before the institution of a civil suit for its enforcement, and where the application to prosecute the offender under S. 193 I. P. C. was made after the institution of such suit. In *Shaikh Muhammad Yassin* v. *King-Emperor* (5) a complaint was lodged before the Magistrate after the police had reported the information lodged by him to be false. It was sought to prosecute the complainant for laying a false charge before the police without a complaint in writing by the Magistrate who took cognizance of the complaint. It was held that S. 195 applied.

I think, therefore, that in the present case the order of the Sub-divisional Magistrate of the 3rd February summoning the petitioner under S. 211 I. P. C. was without jurisdiction on the ground that the offence was committed in relation to judicial proceeding instituted before the Sub-divisional Magistrate on the 25th January and that the complaint in writing of the Court was necessary under clause (*b*) of S. 195.

The next question is whether even if the proceedings in respect of S. 211 I.P.C. are bad, a prosecution under S. 182 I.P.C. can continue. On this point it is urged on behalf of the petitioner that if the offence of the 5th January was one falling under S. 211 I. P. C. the Magistrate cannot split up the offence so as to give himself jurisdiction.

It is true that the Bombay High Court has taken this view in *Empress* v. *Arjun* (6) but the Calcutta High Court in *Bhokteram* v. *Heera Kolita* (7) has held that it is open to the Court to convict under the minor offence under S. 182 I.P.C. even though the major offence under S. 211 I. P. C., has been committed. It is clear that an offence under S. 211, must always include an offence under S. 182 and I do not see why the Court should not convict of the minor offence if it so chooses. Reliance is placed by the learned Vakil for the petitioner on *Giridhari Naik* v. *Empress* (8). In that case it was held that a false charge of theft having been laid before the police there should be a prosecution under S. 211, and not under S. 182. The decision purports to have been based on *Karim Buksh* v. *The Queen-Empress* (9); but with the greatest respect it does not appear that the Full Bench in that case laid down any such proposition. What the Full Bench decided was that a person who sets the criminal law in motion by making a false charge to the police of a cognizable offence institutes criminal proceedings within the meaning of S. 211 of the Penal Code. The difference between an offence under S. 182 and an offence under S. 211 was noticed in *Raghavendra* v. *Kashinathbhat* (10). Every false charge made to the police is not necessarily an offence under S. 211. If the intention to injure is absent, then the offence falls under S. 182 and there is no reason why, if the prosecutor is unable or unwilling to prove intention, that is to say, malice, he should not be permitted to take a conviction under S. 182.

In the present case, therefore, although the Sub-divisional Magistrate will have no jurisdiction to take cognizance of the offence under S. 211, he will be competent to investigate the complaint as regards S. 182 which does not require the complaint in writing of the Magistrate who took cognizance of the complaint of the 25th January.

It appears, however, that the petitioner has already been convicted in the counter case and the necessity for prosecuting him for making a false charge is not clear. If the appeal Court maintains the sentence of imprisonment which we learn has been passed upon the petitioner there is little object in punishing him again for giving false information to the police.

The application in revision is dismissed.

Jwala Prasad, J.—I agree.

Rule discharged.

(4) [1914] 39 Mad. 677=18 M. L. T. 322=31 I. C. 161=16 Cr. L. J. 721.
(5) 1925 Patna 483=4 Pat. 323=6 P. L. T. 457=26 Cr. L. J. 889.
(6) [1882] 7 Bom. 184.
(7) [1879] 5 Cal. 184.
(8) [1901] 5 C. W. N. 727.
(9) [1888] 17 Cal. 574.
(10) [1894] 19 Bom. 717.

✱ 1925 PATNA 720

KULWANT SAHAY, J.

Lachman Machhua—Defendant—Petitioner.

v.

Moghal Mian — Plaintiff — Opposite Party.

Civil Revision No. 111 of 1924, Decided on 4th July 1924, from an order of the Sub-Judge, Second Court, Patna, D/- 28th February 1924.

✱ *Civil P. C., Sch. 2, Para. 3 (2)—Court has inherent power to cancel order under para. 3—C. P. C., S. 151.*

Although there is no specific provision in the second Schedule to the C. P. C., authorizing a Court to cancel an order made by it under para. 3 of the Schedule, yet in a proper case and for good cause the Court has inherent power to cancel that order. (*Case law discussed*). 10 *Bom.* 281 *Not Foll.* [P. 722, C. 2 & P 723, C. 1.]

Nooruddin—for Petitioner.

A. H. Fakhruddin—for Opposite Party.

Kulwant Sahay, J.—This is an application in revision on behalf of the defendant in a Small Cause Court suit against an order of the Small Cause Court Judge of Patna, dated the 28th February 1924, whereby he allowed the plaintiff to withdraw from a reference to arbitration.

The suit was for recovery of a sum of money from the defendant on the ground that the defendant had unlawfully caught fish from a portion of the river Ganges which runs from Sherpur Manopur to Dinapur alleging that the plaintiff had the exclusive right of fishing therein and the defendant had no right to do so. The defence was that the defendant had not fished in the portion of the river to which the plaintiff had the exclusive right, but in another portion to which the defendant had a right to fish. Upon an application of the parties, the Court by its order, dated the 15th February 1924, referred the matter in difference between the parties to the arbitration of one Munshi Abdul Ghani; the order was made under para. 3 of the second Schedule to the C. P. C. Before the order was communicated to the arbitrator, and before the records were sent to him, the plaintiff filed an application before the Court on the 19th February 1924, wherein he alleged that he had been to see the arbitrator and had informed him of the reference, but that the said arbitrator had demanded money from the plaintiff and had told him that unless he was paid, he would not decide the case in the plaintiff's favour; that the arbitrator seemed to be a dishonest man and wanted to make money by the litigation, and the petitioner, therefore, prayed that the order of reference be cancelled and the arbitrator be ordered not to decide the case and to return the reference if the same had been forwarded to him. On the same date the defendant filed a petition of objection traversing the allegations made by the plaintiff and objecting to the cancellation of that order of reference. The application came on for hearing on the 25th of February when it was postponed to the 28th of February 1924. On the 26th of February, the plaintiff filed an affidavit of a *karpardaz* to the effect that in his presence the arbitrator had demanded money from the plaintiff and had told him that the defendant was ready to pay him a sum of Rs. 75 in order that the award might be made in his favour and that if the plaintiff paid a sum of Rs. 100, the arbitrator would make the award in the plaintiff's favour. On the 28th of February the learned Judge considered the affidavit and made the order complained of, cancelling the order of reference and allowing the plaintiff to withdraw from reference.

Against this order the defendant has come up in revision to this Court and it has been contended on his behalf that once an order of reference had been made by the Court under para. 3 of the second Schedule to the C. P. C., the learned Judge had no jurisdiction to cancel that order and to proceed with the trial of the suit.

Reliance has been placed on the provisions of Cl. (2) of para. 3 which provides that where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Schedule, deal with such matter in the same suit: and to para. 5 of the Schedule which deals with cases in which the Court can make an order superseding the arbitration, and it is contended that the arbitration can be superseded only for one or other of the causes set out in para. 5 of the Schedule, and that the Court had no jurisdiction to supersede the arbitration and to cancel its order of reference on the ground stated in the plaintiff's petition, and the allegation of corruption contained in the petition could only be

considered after the award had been filed and the matter had come up before the Court under para. 15 of the Schedule.

On the other hand, it has been contended that although there is no specific provision in the second Schedule to the C. P. C. empowering the Court to supersede an arbitration on the ground set out in the plaintiff's application before the award is made by the arbitrator, yet the Court has an inherent power to cancel its order if good cause is shown as to why the arbitration should not proceed.

There has been a divergence of opinion on the point.

In the case of *Pestonjee Nussurwanjee* v. *Manockjee & Co.* (1), their Lordships of the Privy Council were of opinion that when persons have agreed to submit the matter in difference between them to the arbitration of one or more certain specified persons, no party to such an agreement can revoke the submission to the arbitration unless for good cause; and that a mere arbitrary revocation of the authority is not permitted. Their Lordships observed: "That the direction of recent legislation, both by the English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer, and the authority thereby conferred, which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration; and to put such agreement for arbitration on the same footing as all other lawful agreements by which the parties are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract." That was a reference to arbitration under S. 326 of Act VIII of 1859 which corresponds with para. 17 of the second Schedule to the present C. P. C., but the principles laid down by their Lordships are of universal application, and according to that principle, a submission to arbitration can be revoked for good cause, and the Court will be justified in superseding the arbitration if it is satisfied that some manifest injustice will be the consequence of binding the parties to the contract.

In *Nil Monee Bose* v. *Mohina Chunder Dutt* (2), it was held that a reference to arbitration made under an order of Court cannot be revoked at the instance of a party. That case arose out of a reference to arbitration in a pending suit by the order of the Court. The arbitrator filed his award in favour of the defendant; the plaintiff thereupon objected on the ground that the arbitrator had omitted to record the evidence of a material witness who was present and had not examined any witness on the point in issue; the Court thereupon remanded the case to the arbitrator under S. 323 of Act VIII of 1859. The plaintiff then filed a fresh petition to supersede the reference to arbitration. Upon that application the Small Cause Court Judge, before whom the suit was pending, referred the case to the High Court for opinion on the point as to whether, after once giving free consent to have his case decided, upon arbitration, the plaintiff could withdraw his consent and apply to have his case tried by the Court. Sir Richard Couch, C. J., in dealing with this point observed as follows: "With reference to the question which the Judge of the Small Cause Court puts as to the power of the plaintiff to revoke the reference to arbitration, we think that as this arbiration is under an order of the Court, the plaintiff cannot annul or revoke that order, he is bound by it, and the arbitration must proceed subject to the provisions of law." Now, it does not appear from the report of the case what reason, if any, the plaintiff gave for withdrawing from the reference and all that was held in that case was that the plaintiff could not annul or revoke the order of the Court. This case does not deal with the powers of the Court to cancel its own order on good cause being shown.

The case of *Halimbhai Karimbhai* v. *Shankersai* (3) is, however, a direct authority for the contention raised on behalf of the petitioner. In that case an application for reference to arbitration was made by both parties on the 19th June 1884 under S. 506 of the C. P. C. (1882) The plaintiff's pleader, however, was not on that date especially authorized in writing by his client to make the application, and the Court postponed making

(1) [1867-69] 12 M. I. A. 112=10 W. R. 51=2 Sar. 390=2 Suther. 164 (P. C.).

(2) 17 W. R. 516.

(3) [1886] 10 Bom. 381.

an order until 23rd June 1884. On the 23rd June, the 1st defendant was absent but the plaintiff's pleader produced his authority and the Court made the order of reference under S. 508 of the Code. On the 27th June, the 1st defendant applied to revoke the authority of the arbitrator and to appoint a new arbitrator on the ground that after signing the application of the 19th June he had come to know that the arbitrator was not worthy of confidence. No order was passed upon this application till after the submission of the award by the arbitrator when it was rejected by the Court. It was held by a Division Bench of the Bombay High Court in that case that the objection raised by the 1st defendant could only be considered after the submission of the award and then only to the extent permitted by S. 521 of the Code of 1882, and that when once a matter is referred to arbitration, it is not competent to the Court under the second paragraph of S. 508 of the C. P. C. (1882) to deal with the matter in difference between the parties, except as provided in Ch. 37 of the Code. It was held that there is no section in that chapter which authorizes the Court to revoke the authority conferred on an arbitrator and to appoint a new man, except in cases falling strictly within the purview of S. 510 of the Code where the scope and object of the reference cannot be executed ; and, it is only in these cases, apparently, that the authority conferred on arbitrators can be revoked for good cause, the cause being such as is contemplated in that section, as where an arbitrator refuses or neglects, or becomes incapable to act, or leaves British India under circumstances showing that he will probably not return to India at an early date. Now, this case is a direct authority for the proposition that an objection of the kind raised in the present case cannot be entertained by the Court before the submission of the award by the arbitrator. Their Lordships, however, did not consider the inherent power of a Court to cancel an order if it be shown that some manifest injustice will be the consequence of keeping the order in force. With very great respect to the learned Judges, I am of opinion that although there is no distinct provision in the chapter dealing with arbitration in the C. P. C. of 1882 as well as in the second Schedule of the present C. P. C., still the inherent power of a Court to make proper order for the ends of justice can always be invoked to prevent a miscarriage of justice.

In *O. R. Coley* v. *V. A. Dacoste* (4), it was taken for granted that an application to arbitration can be revoked on good grounds. In *Mahomed Wahiduddin* v. *Hakiman* (5), a party to reference to arbitration was held entitled to withdraw from the reference if it transpired after the reference had been made that the arbitrator has been acting *am mokhtar* of one of the parties without any remuneration. In this case also, it was taken for granted that for good cause a party can be allowed to withdraw from the reference before the award was made. In *Kunji Lal* v. *Banwari Lal* (6), a Division Bench of this Court held, where parties submit their difference to arbitration, they cannot be allowed to revoke or withdraw from the submission except for good cause. It was, therefore, conceded that if good cause is shown, a party can be allowed to revoke or withdraw from the submission. In *Chaturbhaj* v. *Raghubar Dayal* (7), although it was held that the intention of the second Schedule to the C. P. C. is that when once a reference to arbitration has been made under the orders of the Court, that reference should only be superseded for one of the reasons in the schedule itself, and that allegations of corruption against the arbitrator should be dealt with under para. 15, after the award has been received, yet the learned Judges appear to be in some doubt as to whether or not the Court has an inherent jurisdiction to supersede the arbitration proceedings under its orders, and they proceeded to lay it down that if the Court does possess such inherent jurisdiction then such jurisdiction should be cautiously and sparingly exercised and that an application invoking such jurisdiction should at least suggest grounds for supposing that the applicant will suffer some irreparable injury if prompt action is not taken.

Upon a review of the authorities, I am of opinion that although there is no specific provision in the second Schedule to the C. P. C., authorizing a Court to cancel an order made by it under para. 3 of

(4) [1890] 17 Cal. 200.
(5) [1902] 29 Cal. 278=6 C. W. N. 235.
(6) [1918] 4 P. L. J. 394=48 I. C. 711.
(7) [1914] 36 All. 354=23 I. C. 758=12 A. L. J. 529.

the Schedule, yet in a proper case and for good cause the Court has inherent power to cancel that order. The ground of misconduct of the arbitrator would be a sufficient ground for setting aside the award when made and I fail to see why the Court should allow the arbitration to proceed with the knowledge that the award must inevitably be set aside in the end ; and not invoke its inherent power and revoke the submission to arbitration before the award is made. I am, therefore, of opinion that the order passed by the learned Small Cause Court Judge is not without jurisdiction.

This was the only point taken by the learned vakil for the petitioner. It was not suggested in the present case that the cause shown was not a good cause to supersede the arbitration if it could under the law be superseded.

For the reasons given above, I am of opinion that the order passed by the learned Judge in the Court below was not without jurisdiction and cannot be disturbed.

This application is dismissed with costs.

Application dismissed.

1925 PATNA 723

JWALA PRASAD, J.

Rameshar Singh and others--Accused Petitioners.

v.

King-Emperor--Opposite Party.

Criminal Revision No. 714 of 1924, Decided on 15th January 1925, against an order of the Dt. Magistrate, Gaya, D/- 30th October 1924.

(a) *Criminal P. C., S. 342—Omission to examine accused at close of prosecution evidence vitiates trial-Object of examination is for the accused's benefit.*

The examination of the accused at the close of the evidence for the prosecution in the manner required by S. 342 is imperative, and the omission to examine vitiates the trial. 5 *P. L. J.* 430 and 1923 *Cal* 470, *Ref.*

The first portion of S. 342 is an enabling provision. It entitles the Court " at any stage of any enquiry or trial " to put such questions to him (the accused) as the Court considers necessary. " The second portion of the section which provides for questioning the accused " generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence, is imperative; it casts a duty upon the Court to question the accused generally on the case after the witnesses for the prosecution have been examined, that is, the whole case against the accused has been disclosed. The object of the examination is to enable the accused to explain any circumstances appearing in the evidence against him. [P. 724, C. 2]

(b) *Criminal P. C., S. 360—Depositions being read by witnesses themselves is not sufficient. They should be read over in accused's presence Recording of the fact of the deposition having been read over is not imperative but desirable.*

There is nothing in S. 360 to indicate that the Magistrate shall record that the deposition was read over in the presence of the accused though it is much better that he ought to do so in order that there might be no complaint as to his not having done so.

The law requires that the deposition of witnesses should be read over in the presence of the accused so that an opportunity may be given to him to challenge the correctness of the record. Therefore, merely reading of the evidence by the witnesses is not sufficient compliance with Cl. 1 of S. 360. (P. 725 C. 1,2)

Bashiruddin and *S. Nooruddin*—for —Petitioners.

Jwala Prasad J.—The petitioners, nine in number, were convicted by an Honorary Magistrate of Gaya of offences under Ss. 448, 380 and 143, Indian Penal Code. Separate sentences were passed under Ss. 448 and 380 but no separate sentence was passed under S. 143, Indian Penal Code. On appeal the conviction under S. 380 was set aside, and the sentence pased under S. 448 was reduced to a fine of Rs. 25 each. No separate sentence was passed under S. 143, Indian Penal Code, by the lower Appellate Court also.

The facts, briefly stated, are that one Rambalak Singh executed a trust deed dedicating his properties to Sri Thakurji and appointed himself manager thereof. After him, he appointed his mother, after her, his daughter *Musammat* Bidyamati, and in the event of her dying without a male issue, the management was to go to his sister's sons Raghunandan and Harnandan. Rameshar Singh, accused, is a distant *gotia* of Rambalak Singh. In due course the management of his trust properties devolved upon Rambalak's daughter *Musammat* Bidyamati Koer. She was married to the complainant Noonoo Singh, the resident of Sabdulpore, eight miles from Alipore. Raghunandan and Harnandan are residents of Gharnai, also eight miles from Alipore, the residence of Rambalak Singh. The prosecution case is that on or about the second week of March 1924, Bidyamati, who was pregnant, left Alipore for Sabdulpore. At

Subdalpore she was delivered of a male child on the 25th March 1924 and died on the 26th March 1924. The child is said to be still alive and was shown to the Sub-Inspector of Makhdumpore' (P. W. No. 8). When Bidyamati left Alipore she is said to have locked the house occupied by her, containing grain and certain utensils. On the 4th of April 1924, her husband Noonoo Singh got an information that the accused persons had forcibly broken open the lock of the house occupied by Bidyamati at Alipore, entered the same and removed the grain and utensils. That was the day fixed for performing the *sradh* of Bidyamati. Noonoo Singh came to Alipore and found that the information given to him was true. He also found the Tikari police on the spot and suspected them to be in collusion with the accused. Accused No. 9, *Musammat* Kauleshwar Koer, mother of Rameshwar Singh, was actually found inside the house and occupying it. On the 7th April 1924, Noonoo Singh lodged a complaint in the Magistrate's Court at Gaya. The accused were then summoned and put on their trial.

The case of the accused was that Bidyamati died on the 18th March 1924, and not on the 26th March, as urged by the prosecution, and that they obtained peaceful possession of the house inasmuch as at the time of her departure from Alipore, Bidyamati handed over the key of the house to Raghunandan and Harnandan, and that the accused thus became the managers of the trust property after the death of *Musammat* Bidyamati Koer on 18th March 1924 and transferred the property in dispute to Rameshwar Singh firstly, by an unregistered *vasika* and afterwards by a registered sale deed, dated the 22nd March 1924.

The Court below has indicated the evidence given by the parties as to the date of the death of *Mussammat* Bidyamati Koer and the birth of a male child to her. The Court has referred to the *hath chitha* of the village *chaukidar* and the birth register of Makhdumpore *Thana* filed by the prosecution to prove the aforesaid facts. It has also referred to a certified copy of a petition, dated the 25th March 1924, filed by the defence in which it was stated by one Bhajan Singh that Bidyamati died 8 or 7 days before the date of the petition. The Court has discredited this petition and the allegations made therein. From the criticisms offered by the lower appellate Court it would seem that the Court was inclined more to accept the version of the prosecution as to the date of the death of Bidyamati and the birth of a male child to her; but the District Magistrate, as well as the trying Magistrate, refrained from expressly deciding this question; for in their opinion it was not necessary to decide it in this case. Be that as it may, both the Courts below have concurrently accepted the version of the prosecution as to the forcible entry of the accused into the house which was occupied by Bidyamati up to the time of her death. They have disbelieved the story that the key was handed over by Bidyamati to Raghunandan at the time of her departure from Alipore. Upon the findings of the Courts below it is not possible to hold that the accused were not guilty of the offence of criminal trespass into the house which was occupied by Bidyamati Koer.

The learned counsel and the learned vakil appearing on behalf of the accused have pointed out certain defects in the procedure adopted by the Magistrate at the trial of the case. It has been urged that the Magistrate committed grave irregularity in omitting to examine the accused at the close of the evidence for the prosecution in the manner required by S. 342 of the Cr. P. C., and that the Magistrate further erred in not complying with the provisions of S. 360 in omitting to read over the depositions of the witnesses in the presence of the accused. It is now settled that the examination of an accused under S. 342, in the latter part of it, is imperative. The omission to do so vitiates the trial of the accused. The leading case of this Court upon the subject is *Raghu Bhumiji* v. *Emperor* (1). Since then the view has been followed throughout. Rankin. J., in his elaborate judgment lately delivered in the case of *Promotha Nath Mukhopadhya* v. *Emperor* (2) has come to the same conclusion. There has, however, been difference of opinion as to the nature of the examination of the accused and the questions put to him at such an examination. The difference of opinion is pre-eminently

(1) [1920] 1 P. L. T. 241=58 I. C. 49=5 P. L. J. 430.

(2) 1923 Cal. 470=50 Cal. 518=27 C. W. N. 389=24 Cr. L. J. 248.

illustrated by the two conflicting judgments of Kulwant Sahay, J., and Foster, J., in the case of *Durga Ram* v. *Emperor* (3) and *Banamali Kumar* v. *Emperor* (4) respectively. In the present case the accused were examined after the close of the prosecution case and before they were called upon to enter into their defence. It has not been shown that the examination is in any way defective or that the Magistrate omitted to put the questions which he ought to have put. Therefore, the contention urged must be overruled.

I would, however, point out the distinction in the provision contained in S. 342 as to the examination of an accused at two different stages. The first portion of S. 342 is an enabling provision. It entitles the Court "at any stage of any inquiry or trial" to "put such questions to him (the accused) as the Court considers necessary." The second portion of the section provides for questioning the accused "generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

This is imperative ; it casts a duty upon the Court to question the accused generally on the case after the witnesses for the prosecution have been examined, that is, when the whole case against the accused has been disclosed. The object of the examination is to enable the accused to explain any circumstances appearing in the evidence against him.

The next contention relates to the omission by the Magistrate to read over to the witnesses their depositions in the psesence of the accused under S. 360. The Magistrate's note at the end of the depositions shows that he explained to the accused the depositions as recorded and that the same were admitted by the witnesses to be correct. It does not appear whether or not the evidence was read over to the witnesses in the presence of the accused. We cannot say, one way or the other, whether or not the depositions were read over to the witnesses in the presence of the accused persons. There is nothing in the section to indicate that the Magistrate shall record that the deposition was read over in the presence of the accused though it is much better that he ought to do so in order that there might be no complaint as to his not having done so. It, however, appears that in the case of witnesses Nos. 5 and 8 the depositions were not read over to them, but the witnesses read their evidence themselves and certified that it was correctly recorded. This, no doubt, ensures the correctness of the record so far as the witnesses and the Court are concerned, but the law requires that it should be read over in the presence of the accused so that an opportunity be given to him to challenge the correctness of the record. Therefore, merely reading of the evidence by the witnesses is not a sufficient compliance with cl. (1) of S. 360. The evidence must be read over in the presence of the accused. The defect might necessitate a remand of the case. In the circumstances of this case the accused are naturally apprehensive that the remand will be harassing to them. Certainly it will be very expensive.

Considering the circumstances of the case and the findings of the Court below I would reduce the sentence of petitioners Nos. 2 to 9 to Rs. 5 each under S. 448, Indian Penal Code. The sentence of Rs. 25 passed upon petitioner No. 1 Rameshwar Singh is maintained.

Sentence reduced.

(3) 1925 Patna 342=6 P. L. T. 33=25 Cr. L. J. 716.

(4) 1925 Patna 389=6 P. L. T. 39=3 Pat. L. R. 25=25 Cr. L. J. 632.

1925 PATNA 725

MULLICK, AG. C. J. AND KULWANT SAHAY, J.

Bhupal Missir and others—Plaintiffs—Appellants.

v.

Sarban Lal—Defendant—Respondent.

Letters Patent Appeal No. 18 of 1925, Decided on 15th July, 1925, from a decision of Das, J., D/-18th December, 1924.

(a) *Landlord and tenant Right to trees—Landlord is entitled to timber but not to fruit unless there is special contract to that effect.*

The tenant has the right to cut but the landlord has the right to appropriate the timber. By the common law the landlord has no right at all in the fruit unless there is a special contract cutting down the landlord's right in the timber. [P 726, C 2]

(b) *Civil P. C., S.* 100—*Interference with a decision based on something which the Record-of-Rights does not contain, is justifiable even if the Record-of-Rights is merely a document of evidence.*

If the Record-of-Rights is a document of title obviously it is open to the Court in appeal to construe that document. But it is open to the High Court in second appeal to interfere with a decision based upon the Record-of-Rights if the decision is founded on something which the Record-of-Rights does not contain even if the Record-of-Rights is not a document of title but merely a document of evidence. [P 726 C 2]

S. N. Sahay—for Appellants.

L. N. Singh—for Respondent.

Mullick, Ag. C.J.—This is an appeal against a judgment of a learned Judge of this Court setting aside a decree made by the District Judge of Bhagalpur.

The suit out of which the appeal arises was one for the rent of the fruit of certain trees in a holding belonging to the defendant which had been held rent free for a considerable time.

The Munsif found that the land was not assessable with rent but that the tenant was liable to pay half the share of the produce of 3 mango trees, one bael, 10 palm, 1 mulberry, 1 guava, 1 plum and 1 lemon tree. He assessed the value of the fruit for the years 1324 to 1327 F. and gave the plaintiffs a decree.

In appeal the District Judge has come to the same conclusion.

In second appeal Mr. Justice Das found that there was no liability to pay the value of a half-share in the fruit and he dismissed the suit altogether.

In the present appeal under the Letters Patent, it is contended that the learned District Judge's judgment is conclusive because it is based on a finding of fact.

It is admitted that the land contains the homestead of the defendant and that he has been in occupation for many years. In his written statement the defendant pleaded that he had never paid rent. There is no clear finding upon this point in any of the Courts below but the learned Munsif meets the allegation by saying that even if rent has not been paid the defendant is not free from the liability to pay the rent claimed in the present suit.

The learned Munsif finds that as the defendant holds the land under the plaintiffs, the relationship of landlord and tenant arises and except for the special contract to the contrary, rent would be payable for the land. But as the special contract does not cover the trees he holds that the defendant is liable for the produce of the trees. He further finds that the Record-of-Rights records the liability of the defendant to pay half the price of the fruit.

The District Judge does not set out his reasons in detail for agreeing with the Munsif as to the relationship of landlord and tenant, but it would appear that he agrees with the Munsif's construction of the Record-of-Rights and that his decree is principally based upon this finding.

If the Record-of-Rights is a document of title obviously it was open to Mr. Justice Das in appeal to construe that document, and I cannot say that his construction is wrong. It is to be noticed that in regard to the mango, bael and palm trees it is stated that the raiyat and the malik have a half-share each. Then comes the entry that there is one mulberry, one guava, one palm and one lemon tree on the land. Against these trees there is no entry that the landlord has any title. I think it is a reasonable construction that the entry regarding title relates only to the timber and not to the produce of the trees. Moreover, the entry must be read with due regard to the existing law. The tenant has the right to cut, but the landlord has the right to appropriate the timber. By the common law the landlord has no right at all in the fruit unless it can be held that the object of the entry was clearly to record a special contract cutting down the landlord's rights in the timber. If it had intended to cut down the raiyat's rights in the fruit the entry would have said so.

If, however, it be held that the Record-of-Rights is not a document of title but merely a document of evidence, even then it was open to the learned Judge in second appeal to interfere with a decision based upon the Record-of-Rights, if the decision was founded on something which the Record-of-Rights did not contain. Now the Munsif with whom the learned District Judge agrees states that the Record-of-Rights declares that the plaintiffs are entitled to the fruit. There is no such declaration and therefore the learned District Judge's finding is based upon no evidence and is liable to be challenged in second appeal.

In either view of the case the Record-of-Rights cannot be called in aid by the plaintiffs to support their claim.

The Munsif rightly threw the onus upon the defendant to show that rent was not payable for the land. When the defendant proved that the holding was rent ree the onus was shifted upon the plaintiffs to show that there was a special contract by which the rent became payable for the fruit. The Record-of-Rights does not help them to discharge that onus.

There remains to be considered a reference in the learned District Judge's judgment to a document marked as Ex. 5. This was a judgment apparently not inter partes regarding another holding and it recites that rent was payable for the trees upon homestead lands held by the tenant in that suit. Whether that homestead land was rent free is not clear, and there is also nothing in the learned Judge's judgment which shows that this document was admissible in evidence in the present trial. The learned Judge's finding is that rent has been realised from the tenanls of the village in respect of fruit from trees standing on homestead land. That finding is of course conclusive in second appeal, but the finding does not go far enough and show that any inference can be drawn from it in favour of the plaintiffs for the purposes of the present suit.

The result, therefore, is that there were no materials before the District Judge upon which he could come to a decision in the plaintiff's favour, and the learned Judge of this Court was right in holding that the decree was wrong and that the suit should be dismissed.

We are asked to direct a remand if we find that the evidence is not sufficient to support the decree of the District Judge. But having regard to the fact that this case has reached the stage of a Letters Patent appeal we do not think that we should give the plaintiffs another opportunity of adducing evidence which they ought to have adduced in the trial Court.

The result, therefore, is that this appeal will be dismissed with costs throughout.

Kulwant Sahay, J.—I agree.

Appeal dismissed.

★ 1925 PATNA 727

MULLICK, Ag. C. J. AND KULWANT SAHAY, J.

Agent of the Bengal Nagpur Railway Co, Ltd.—Defendant—Appellant.

v.

Hamir Mull Chagan Mull and another—Plaintiffs—Respondents.

Second Appeal No. 287 of 1923, Decided on 1st July 1925, against a decision of the District Judge, Manbhum, D/- 2nd January 1923.

(a) *Lim. Act, Art.* 31—*Suit for non-delivery of goods—Art.* 31 *applies whether the suit is in contract or tort.*

Whether the suit for non-delivery of goods is laid in tort or contract, if compensation is claimed for non-delivery of goods entrusted to a carrier the period of limitation is one year as prescribed by Art 31. 44 *Cal.* 16 *not Foll.* [P. 728 C. 1]

(b) *Railways Act. S.* 77—*Notice is essential even in cases of non-delivery.*

Non-delivery constitutes 'loss' within the meaning of S. 77 and therefore the service of notice under the provisions of that section is essential even in cases of non-delivery. 3 *P. L. T.* 215 *not Foll.* [P 728 C 2]

A. B. Mukherji—for Appellant.

Parmeshwar Dayal—for Respondent.

Mullick, Ag. C. J.—The plaintiffs consigned 25 bales of cloth to themselves by the Bengal Nagpur Railway Company to be carried from Assansol to Barabhum. The goods were entrusted to the Railway on the 25th August, 1918. On the 10th September, 1918 only 24 bales were delivered and one bale was missing. On the 21st August, 1921 the plaintiffs brought a suit before the Subordinate Judge of Manbhum claiming compensation for non-delivery. The Subordinate Judge dismissed the suit.

An appeal was taken by the plaintiffs to the court of the District Judge and he on the 2nd January, 1923 reversed the decision of the Subordinate Judge and gave the plaintiffs a decree for Rs. 950 as compensation with costs.

The present second appeal is preferred by the Agent of the Bengal Nagpur Railway Company.

A preliminary point which was not taken in the memorandum of appeal to this Court has first to be noticed.

It appears that in the court of the Subordinate Judge the plaintiffs correctly

impleaded the Railway Company as the defendant but in the court of the District Judge the respondent named was the Agent of the Bengal Nagpur Railway. This was clearly an error, for having regard to the fact that it was the company that was sued in the trial court there can be no doubt that in the District Judge's Court the plaintiffs intended to implead the same party and that they misdescribed him as the Agent of the Railway. The present appeal is preferred by the Agent and in any view of the matter he cannot now be heard to say that the appeal cannot proceed merely because he was impleaded in his personal capacity in the lower appellate court.

The next two points are more substantial. The first of these is whether Art. 31 of the Indian Limitation Act or Art. 115 governs the suit. The learned District Judge relying on the case of *Radha Shyam Basak* v. *The Secretary of State for India* (1) held that where the cansignee is the plaintiff Art. 31 applies but if the consignor is the plaintiff then Art. 115 operates. Upon the authorities this view cannot be supported. The following decisions shew that whether the suit is laid in tort or contract, if compensation is claimed for non-delivery of goods entrusted to a carrier the period of limitation is one year as prescribed by Art. 31 and that the residuary Article has no application:— *The Indian General Navigation and Railway Company Ltd.* v. *Nanda Lal Banik* (2); *Jaldu Venkatasubba Rao* v. *The Asiatic Steam Navigation Company of Calcutta* (3), *Mutsadni Lal* v. *Bombay Baroda and Central India Railway Company* (4) ; *Vally Md. Haji Gunny* v. *Nederland S. Navigation Co.* (5) ; *Gobind Ram Marwari* v. *The East Indian Railway Company* (6). *The East Indian Railway Company Ltd.* v. *Sagar Mull* (7). Here the claim is for compensation for breach of contract on account of non-delivery and should have been made within one year from the date when the goods ought to have been delivered. The suit has, therefore, been brought long after the due date.

The other point is whether a notice under S. 77 of the Indian Railways Act was necessary in this case. It is found as a fact by the learned District Judge that no notice was served but the learned Judge holds that as the suit is brought for non-delivery and not for loss, S. 77 of the Indian Railways Act has no application. For this view he relies upon the case of the *East Indian Railway Company* v. *Messrs. Kali Charan Ram Prasad* (8). That judgment, however, has been dissented from in later cases in this Court and also in the Calcutta High Court, see *Great Indian Peninsula Railway Company* v. *Jitan Ram* (9) ; *East Indian Railway Company Ltd.* v. *Netram Ganesh Lal* (10) ; *The Assam Bengal Railway Company Ltd.* v. *Radhica Mohan Nath* (11) ; *East Indian Railway Company* v. *Sheo Prosad and Ram Prasad* (12). These authorities shew that non-delivery constitutes loss whin the meaning of S. 77 and therefore, the service of notice under the provisions of that section is essential.

On both these grounds, therefore, the plaintiffs must fail. The appeal is accordingly decreed with costs throughout, and the suit is dismissed.

Kulwant Sahay, J.—I agree.

Appeal decreed.

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(1) [1916] 44 Cal. 16=34 I. C. 130=23 C. L. J. 547.
(2) [1909] 13 C. W. N 851=3 I. C. 469.
(3) [1915] 39 Mad. 1=29 M. L. J. 342=1915 M. W. N. 644=2 L. W. 865=30 I. C. 840 =18 M. L. T. 236 (F. B.)
(4) [1920] 42 All. 390=58 I. C. 547=18 A. L. J. 377.
(5) 1924 Cal. 173=27 C. W. N. 806.
(6) 1923 S. A. No. 985 of 1921.
(7) 1925 Patna 611=6 P. L. T. 559.
(8) 1922 Patna 106=3 P. L. T. 215=1922 P. H. C. C. 145.
(9) 1923 Patna 285=2 Pat. 442=4 P. L. T. 173=(1923) P. H. C. C. 82=1 Pat. L. R. 169.
(10) 1924 Patna 812.
(11) 1923 Cal 397=28 C. W. N. 438.
(12) 1924 Civ. Rev. No. 118 of 1924.

1925 PATNA 729

JWALA PRASAD AND ADAMI, JJ.

Ramprashad Sahu and *another*—Applicants—Appellants.

v.

Mt. Basantia—Objector—Respondent.

Appeal No. 42 of 1923, Decided on 16th January 1925, from a decision of the District Judge, Patna, in original decree, D/- 10th March 1923.

(a) *Will—Construction—Rule is to interpret words in ordinary and grammatical sense.*

In the interpretation of deeds and written instruments the established rule of construction is to read the words in their ordinary and grammatical sense, and to give them effect unless such a construction would lead to some absurdity or inconvenience, or would be plainly repugnant to the intention of the parties to be collected from other parts of the deed. [P. 730, C. 2]

(b) *Will—Construction—Incidental statement in a sale deed revoking will will not necessarily revoke whole will.*

If the words "I having cancelled the said will and rendered it null and void" find place in a deed of which the primary and ostensible object is the alteration of a testamentary disposition, there could be no doubt that even if extrinsic evidence gave rise to the belief that the testator intended to revoke a part only of his will the words used would operate to revoke the will for the words are unambiguous and the meaning must be judged from the words employed in the deed.

Where these words found place in a deed which on the face of it was a deed of sale of two properties of which the executant was in the present possession and where the whole instrument related to those two properties only and the general scope and intent of the instrumeut was a transfer of those properties.

Held: that the entire will was not revoked. [P. 731, C. 1]

P. Dayal and *Bindechal Prasad*—for Appellants.

Ali Imam and *T. N. Sahay*—for Respondent.

Adami, J.—The only question which arises in this appeal is whether a will, executed by Hira Lal, was revoked by the terms of a deed of sale executed by him a little more than a month after the execution of the will.

Hira Lal married Mt. Basia in *sagai* form but had no issue by her; he used to pay Rs. 2 a month to his stepmother, Mt. Basantia, as maintenance. The present appellants are brothers of Mt. Basia. The two ladies Basantia and Basia, it appears, were not on good terms.

On the 7th August 1920 Hira Lal executed a Will whereby he gave a life-interest to Mt. Basia over all the properties, after his death, with remainder to her two brothers, the appellants, in equal shares. The Will directed that Mt. Basia should continue to pay the maintenance of Rs. 2 a month to Mt. Basantia, and that she should maintain one Antu Lal, whom the testator said he had maintained and brought up as his son. On Basia's death the appellants were directed to pay Rs. 5 a month to the said Antu Lal during his life. The last paragraph of the Will reserved to the testator the right to cancel or amend the Will wholly or in part.

It appears that, when she came to know of the terms of the Will, Mt. Basantia was displeased and there was a quarrel. On September 14th, 1920 Basantia filed a complaint to the effect that Hira Lal, Basia and Mt. Mirchaia, Basia's mother, had assaulted her because she complained to Hira that she was not being properly maintained while Mirchaia was being fed and kept by Hira Lal. The case never came on for trial for evidently, in order to avoid a scandal, Hira Lal came to a settlement with Basantia, the result of which was the execution by him of a deed of sale, (Ex. A) on the 17th of September 1920, whereby he transferred to his stepmother a house and the land appurtenant to it as also a gola for a consideration of Rs. 1,500, the payment of which he remitted. In consequence of the execution of this deed Basantia withdrew her complaint on the 20th September 1920.

Hira Lal died on the 3rd December 1920. Basia after obtaining mutation of her name for that of her husband in the Municipal and the Land Registration Records, applied for Probate of her husband's Will on 15th July 1922, but, before Probate was granted, died on the 9th August 1922. On the 14th of August the appellants made an application for Probate or Letters of Administration with the Will annexed.

Mt. Basantia objected to the grant on the ground that Basia and her brothers and mother had acted in collusion and had exerted urdue influence over Hira Lal and procured his execution of the Will. She denied that the Will was signed by Hira or that it was properly attested and further alleged that the

Will had been revoked by the registered sale-deed (Ex. A) of the 17th September 1920.

The learned District Judge has found that both the Will and the sale-deed were signed by Hira Lal in sound disposing mind and that they were duly attested according to law and were genuine. He has held that the entire Will was revoked by the deed of the 17th September 1920, and has, therefore, rejected the appellants' petition for grant of Letters of Administration.

There is no contest in this Court as to the genuineness of the Will propounded or of the deed of sale ; the sole question to be decided is whether certain words contained in the deed of sale amount to a revocation of the Will, and it is necessary to consider this deed carefully.

The deed of sale, after stating that the house, land and gola are transferred to Mt. Basantia for a consideration which is remitted, and renouncing all claim of these properties, proceeds :

"If at any time I, the declarant, and my heirs and representatives put forward any plea and objection and contention of any kind in any form and with any statement in respect of these matters, then any such act done by me, the declarant and my heirs and representatives shall be deemed to be null and void in face of this document and the same shall not be fit to be entertained by a competent Court, and I the declarant executed in favour of my wife Mt. Basia a deed of Will, dated the 7th August 1920, which was registered in the Sub-Registry Office at Patna on the 10th August 1920 and the properties entered in this deed of absolute sale have been entered in the said deed of Will. I having cancelled the said Will and rendered it null and void, have executed this deed of absolute sale in respect of the properties specified below and have made over to the said vendee the documents specified below relating to the said vended property: and I have had the contents of this document read over to me word by word by the scribe and have thoroughly understood them. They are true and correct and are accepted by me."

The respondent contends that the words " having cancelled the said Will and rendered it null aud void " amount to a revocation of the entire Will, specially as all the formalities required for the revocation of a Will by Ss. 57 and 50 of the Indian Succession Act (X of 1865) were observed in the execution of the document. The appellants, on the other hand, urge that these words revoke the Will only so far as it relates to the properties which are the subject of the deed of sale, and that the words must be construed according to the context in which they are found.

In the interpretation of deeds and written instruments the established rule of construction is "to read the words in their ordinary and grammatical sense, and to give them effect unless such a construction would lead to some absurdity or inconvenience, or would be plainly repugnant to the intention of the parties to be collected from other parts of the deed," *Bland* v. *Crowley* (1) and as Bramwell, B., has laid down in *Fowell* v. *Tranter* (2), "the golden rule of construction is, that words are to be construed according to their natural meaning, unless such a construction would either render them senseless, or would be opposed to the general scope and intent of the instrument, or unless there be some very cogent reason of convenience in favour of a different interpretation." The Court will not ordinarily introduce into a deed words which are not to be found there, nor strike out of a deed words which are there in order to make the sense different, *Whyte* v. *Burndy* (3). Words will be construed according to their strict and primary acceptation, unless from the immediate context or from the intention of the parties apparent on the face of the instrument, the words appear to have been used in a different sense, and they are incapable of being carried into effect, *Mallan* v. *May* (4). The intention of the testator must be collected from the words employed by himself in his Will and no surmise or conjecture of any object which the testator may be supposed to have had in view can be allowed to have any weight in the construction of his will unless such object can be collected from the plain language of the Will itself. In the *Earl of Hard-*

(1) [1851] 6 Ex. 522=6 Railw. Cas. 756=20 L. J. Ex. 218.
(2) [1864] 3 H. & C. 458=34 L. J. Ex. 6=13 W. R. 145=11 L. T. 317.
(3) [1847] 16 L. J. Q. B. 156.
(4) [1844] 13 M. & W. 511=14 L. J. Ex. 43=9 Jur. 19.

ivicke v. *Douglas* (5), Lord Cottenham laid it down that "if there be no ambiguity, however unfortunate it may be that the intention of the testator shall fail, there is no right in any Court of Justice to say those words shall not have their plain and unambiguous meaning." As in wills so in deeds of revocation. If words used are unambiguous, they cannot be departed from merely because they lead to consequences which may be considered capricious or even harsh : *Abbott* v. *Middleton* (6).

Now, in the present case, if the words "I having cancelled the said will and rendered it null and void" had found place in a deed of which the primary and ostensible objeet was the alteration of a testamentary disposition, I do not think that there could be any doubt that even if extrinsic evidence gave rise to the belief that the testator intended to revoke a part only of his will, the words used would operate to revoke the entire will ; for the words are unambiguous and the meaning must be judged from the words employed in the deed. In *Grover* v. *Burningham* (7), Rolfe, B., observed : "We are to ascertain by construing the will *non quod voluit sed quod dixit*, or rather, we are to ascertain *quod voluit* by interpreting *quod dixit*."

But here these words find place in a deed which, on the face of it, is a deed of sale of two properties of which the executant was in present possession ; the whole instrument relates to those two properties only and the general scope and intent of the instrument is a transfer of those two properties to Mt. Basantia. For the purpose of effecting the transfer and of giving a good title it was in fact not necessary to make any mention of the previously executed will or to revoke it in whole or in part, for this will could only have effect from the death of the testator and would cover only the properties which were in the testator's possession at the time of his death.

It is urged by Sir Imam on behalf of the respondent that the fact that revocation is mentioned where no revocation was necessary for the purposes of a valid transfer shows that the executant had the intention not only to transfer the property but to revoke the entire will; and the scope and object of the deed was not only sale of the property but also revocation of the will.

If the executant had stated in the document : "I do hereby cancel the said will and make it null and void," and made it plain that the scope of the deed in that part was to revoke the will, I would have no doubt that the intention was to revoke the entire will; but the words used are: "I having cancelled the said will and rendered it null and void have executed this deed, *us wasika wasiyatnama mazkur ko talaf o batil o mansukh karke yah wasika bailakalami haza jaidad muffasile zail ka tahrir o taslim kiya*. The word "*karke*" leaves us uncertain whether the executant is not referring to some deed of revocation previously executed. No such deed has been produced. The words do not show clearly an intention that the deed of sale should itself operate as a deed of revocation.

Considering that the words occur in a deed of sale of which the plain object is to transfer the two properties only, I do not think that either the general scope or intent of the instrument is to revoke the previous will in its entirety or that the context justifies the interpretation that the entire will was revoked.

Looking to the outside circumstances we know that Hira Lal had a desire to make a disposition of his properties on his death and did make a will ; we know too that the respondent Mt. Basantia filed a complaint owing to her dissatisfaction over the arrangements made for her maintenance and we know that the result was this deed of sale of two properties to her, which had clearly as its object the provision of some maintenance for her. It is evident, then, that Hira Lal had the *animus revocandi* in so far as Basantia was left insufficiently provided for by his will, but there is nothing to show an *animus revocandi* so far as Mt. Basia and the appellants and Anantu Lal were concerned. It is true that in the will Hira Lal declared his right to amend the will, a declaration which was unnecessary, and it is true that Lalji Sahay (Objector's Witness No. 1), the scribe of the deed of sale, says that, when he saw the words "*us wasika wasiyatnama, mazkur ko talaf o batil o mansukh karke*" he asked Hira Lal if he had power to revoke and he said he had, and thereupon the scribe

(5) [1840] 7 Cl. & F. 795.
(6) [1858] 7 H.L.C. 68=28 L.J. Ch. 110=5 Jur. (N. S.) 717=21 Beav. 143.
(7) [1850] 5 Ex. 184=155 E.R. 79.

added the word "*mansukh*" in the margin, and Hira Lal signed to attest the alteration ; but this does not help to show that revocation of the entire will was intended. If the will had been wholly revoked on Basia's death, the property would devolve on Mt. Basantia and there would be no necessity for the transfer of properties to her by the deed of sale. It is evident that the intention was to satisfy Mt. Basantia and get rid of her claim.

I would hold that the words "*us wasika wasiyatnama mazkur ko talaf o batil o mansukh karke*" in the deed of sale do not amount to a revocation of the entire will of Hira Lal, but only revoke it in respect of the properties conveyed by the deed. I would, therefore, allow the appeal and direct that Letters of Administration with the will annexed be granted to the appellants.

Each party will pay its own costs.

Jwala Prasad, J.—I entirely agree.

Appeal allowed.

1925 PATNA 732

DAS, J.

Domni—Defendant—Appellant.

v.

Mahadeo and *another*—Plaintiffs—Respondents.

Appeal No. 826 of 1922, Decided on 19th December 1924, from the decision of the Subordinate Judge, Patna, from appellate decree, D/- 8th July 1922.

T. P. Act, S. 54—Contract of sale passes no interest and is not compulsorily registrable.

A contract for sale does not of itself create any interest in, or charge on, such property, and does not require registration nor does it operate as a sale of the property. [P 732 C 2]

Muhammad Hasan Jan—for Appellant.

Siveswar Dyal—for Respondents.

Judgment.—This is an appeal on behalf of the defendant second party in a suit for specific performance of a contract to sell a certain property instituted by the plaintiff-respondent. Two questions fell to be considered in the Court below : first, whether the plaintiff's contract was prior in date to the conveyance in favour of the defendant second party ; and secondly, whether the defendant second party was a bona fide purchaser for value. The plaintiff's case is that the defendant first party entered into a contract to sell the property to him on the 26th July 1920. The conveyance in favour of the defendant second party is dated the 17th August 1920. The Courts below have come to the conclusion that the plaintiff's contract was in fact entered into on 26th July 1920. This disposes of the first question raised before me. But it was contended by Mr. Hasan Jan that the plaintiff's contract was not properly proved in the case. He says that the contract should have been registered in accordance with law and he relies upon the case of *Valaji Isaji* v. *Thomas* (1). The decision to which Mr. Hasan Jan refers was pronounced before the Transfer of Property Act came into operation. The basis of that decision is that a contract between the parties presently operates as a sale of the property. This no doubt is the law in England ; and before the Transfer of Property Act came into operation, the Courts in India very often followed the rules of English Law in deciding disputes between the parties. But S. 54 of the Transfer of Property Act expressly provides that a contract for sale does not of itself create any interest in, or charge on, such property. That being so, it can no longer be contended that a contract for sale operates as a sale of the property.

In my opinion, there is no ground for taking the view that the plaintiff's contract should have been registered in accordance with law.

The next question is whether the defendant second party, the appellant in this Court, is a bona fide purchaser for value.

The Courts below again have answered this question in favour of the plaintiff.

It appears that one of the attesting witnesses to the conveyance executed in favour of the defendant second party gave evidence in the case, and he stated that when he was asked to attest the document he informed the appellant that a contract had already been entered into between the plaintiff and defendant first party. In my opinion the Courts below were entitled to rely on this evidence and they did rely on it ; and the finding appears to be a finding of fact. But it was contended before me that the Courts below had no business to refer to this evidence inasmuch as the plaintiff in his

(1) [1875-77] 1 Bom. 190.

plaint gave all the facts in connexion with his case that the defendant second party had notice of his previous contract. It is contended that the plaintiff has stated in the plaint that actual notice was given to the appellant-defendant second party on the 17th August 1920 by a registered letter, and that it was not open to the Courts below to ignore the positive case made in the plaint and to go to the evidence of Gopi for deciding this point. In my opinion this is not a correct way of stating what was in fact alleged in the plaint. It is alleged in the sixth paragraph of the plaint that defendant knew fully that Defendant No. 1 had entered into a contract with the plaintiff to sell the land to him. It is no doubt not alleged that Gopi informed the defendant about it; but then it is not necessary to set out the evidence in the plaint. The paragraph proceeds to say as follows: "Accordingly before the execution of the sale deed the plaintiff sent a notice dated 17th August 1920 to Botal, son-in-law of Defendant No. 2, and Defendant No. 1 in registered cover. Botal lives along with Defendant No 2 and the plaintiff came to know that the deed of sale was to be executed in his favour."

In my opinion there is no merit whatever in this case, and I must dismiss it with costs in all the Courts.

Appeal dismissed.

1925 PATNA 733

DAWSON-MILLER, C. J., AND MACPHERSON, J.

Krittibash Mahton and *others*—Defendants—Appellants.

v.

Budhan Mahtani and *others*—Plaintiffs—Respondents.

Second Appeal No. 821 of 1922, Decided on 27th May 1925, against a decision of the D. J., Manbhum, Sambalpur, D/- 15th May 1922.

Hindu Law—Applicability—Manbhum district—Kurmi-Mahtos are presumably not governed by Hindu Law—Whether Dayabhaga School of Hindu Law applies to them or the Mitakshara depends on evidence where Customary Law has been discarded—Burden of proof of adoption of a particular School of Hindu Law lies on person so alleging.

Per Macpherson, J.—The term "aboriginal," at least in Chota Nagpur, denotes race only. It implies nothing as to religion which may be even within the same tribe Animism, a slight veneer of Hiduism, various intermediate stages of Hinduism or Christianity. On the other hand, the term "Hindu" has in Chota Nagpur reference only to religion. The Kurmi-Mahtos of the Manbhum district are racially an aboriginal tribe. [P. 735, C. 1]

It is far from settled law that the Dayabhaga system is the lex loci in the district of Manbhum, particularly the north and the western half, or indeed in any part of the district. Like the rest of Chota Nagpur and the Jungle Mahals the district of Manbhum was until comparatively recent times outside the Hindu pale. It was inhabited almost exclusively by aboriginal tribes who were not Hindus. The great landholders, most, if not all, of them converts to Hinduism from the tribes, are governed by the Mitakshara Law which, though it may differ in details, accords broadly with tribal custom in the matter of exclusion of females from inheritance. Other Hindus are either immigrants or converted tribes or tribesmen. The former retain the law of the locality from which they immigrated as it stood at the date of immigration: to ascertain whether a Hindu who is an immigrant or the descendant of an immigrant belongs to the Mitakshara or Dayabhaga School it is necessary and sufficient to learn whether he belongs to an up-country or a Bengal caste and in a few exceptional cases, where the caste name is the same in both areas, some slight further particulars, e. g., the name of a Brahmin and in the case of a functional caste, the part of India from which immigration took place. Language is no criterion; many immigrant Hindus from up-country now speak a form of Bengali and that is also the home-language of some of the great land-owning families who are unquestionably governed by the Mitakshara School. There is no lex loci as to the system of Hindu Law which prevails in Manbhum or in any area of it. It cannot be predicated of a Hindu of that district and particularly of a convert to Hinduism from the local tribes that he belongs by operation of law to any particular school of Hindu Law, whether Mitakshara, Dayabhaga or another. It is a matter of proof in each case whether they are governed by a particular school. The onus is upon the person who alleges that customary laws have been discarded and that the aboriginal convert adheres to a particular school of Hindu Law in the matter of inheritance. [P. 736, C. 1 & 2]

A. K. Ray—for Appellants.

A. B. Mukharji and *B. B. Mukharji*—for Respondents.

Dawson-Miller, C. J.—The only question raised in this appeal is whether the learned Judge was right in holding that the parties in this case were governed by the Dayabhaga School of Hindu Law. The plaintiffs sued for a declaration of their title to and recovery of possession over the estate of Charan Mahto who died childless in the year 1887. Upon his death some dispute appears to have

taken place between his two sisters and his mother and grandmother on the one hand and the descendants of a brother of his grandfather on the other. The matters in dispute appear to have been left to the decision of a neighbouring zamindar and he decided what he thought would be the proper solution of the dispute between the parties. He decided apparently that Charan Mahto's mother Fulmani Mahatani, and her mother-in-law Radhamani Mahatani, should remain in possession of the property in dispute for their lifetime as maintenance, but that after their death the property should go to the defendants' branch of the family. Fulmani Mahatani remained in possession of this property from that time up to the time of her death in 1919, the mother-in-law having predeceased her. It appears that she made a gift of the property in 1901 to her daughters, sisters of Charan Mahto, and two of the plaintiffs in the present suit. The main question in contention between the parties in this case was whether they were governed by the Hindu Law or whether they were governed by the laws and customs of the aboriginal tribe to which they originally belonged. If they were governed by the custom of the aboriginal tribes then undoubtedly the property would go to the defendants' branch of the family on the death of Charan Mahto. If they were governed by the Dayabhaga School of Hindu Law then it is equally clear that the property would go to the plaintiffs' branch of the family. This was the main question in dispute between the parties.

Both Courts found that they were governed by the Dayabhaga School of Hindu Law. We are asked to say in this appeal that the learned Judge was not justified in arriving at the conclusion that even if the parties were undoubtedly governed by Hindu Law they were still governed by the Dayabhaga School of Hindu Law, and it is contended that he has not properly considered that question, but has assumed that because the parties lived in Manbhum, where apparently there are a number of Bengalis, the Dayabhaga School of Hindu Law prevailed throughout that locality and therefore the parties in this case were governed by that School of Hindu Law. The only question really which the learned Judge had to decide was whether the parties were Hindus or not; for it appears from his judgment that it was not disputed by the learned vakil who argued the appeal that if the parties were Hindus the plaintiffs would succeed to the property left by Charan. There was an admission by the learned vakil who appeared on behalf of the defendants that if the parties were Hindus it was unnecessary to go into the question whether the Dayabhaga or the Mitakshara School of Hindu Law applied, because in that case he conceded that they could not succeed to this property. In these circumstances it seems to me that we cannot send the case back again to the learned Judge to determine the very question of fact which was conceded by the learned vakil who appeared on behalf of the defendants and that is the only question which was raised in this appeal.

It was suggested that the learned Judge was wrong in failing to consider the effect of what has been called family arrangement, which I have already referred to, made on the death of Charan Mahto. It does not appear to me that this was a family arrangement in the ordinary sense of the term. It was merely a dispute between the mother as to her maintenance and the other branch of the family who were claiming throughout that the property ought to go direct to them. The zamindar who settled that dispute for them considered that the mother ought to be entitled to remain in possession of the property during her lifetime and that afterwards it should go to the defendant's branch of the family. I do not think that anybody else was bound by that arrangement. This appeal must be dismissed with costs.

Macpherson, J.—I agree. As a result of the astonishing admissions made at the Bar in the Court of the District Judge this second appeal manifestly cannot succeed.

By way of supplement to the judgment which has just been delivered by my Lord the Chief Justice, it seems expedient to make some observations on cerain misconceptions which arose in the course of the litigation.

The parties are Kurmi-Mahtos of the Manbhum pargana of the Manbhum district. They are descendants of two brothers, the plaintiffs (respondents) being two granddaughters (son's daughters) of Dinu, the elder brother and their sons,

and the defendants (appellants) being a son and deceased sons' sons of Kinu, the younger brother. The property in controversy belonged to Charan, only son of the only son of Dinu, and brother of the first two plaintiffs and was held by Charan's mother Fulmani till her death in 1326. The plaintiffs alleged title by inheritance, on the ground (1) that they are Hindus governed by the Dayabhaga law and (2) by gift from Fulmani and denied the tribal custom in assertion of which the defendants took possession after Fulmani's death. The defence substantially was that only agnates succeed as the parties are not governed by the Hindu *shastras* at all, but the right of succession is determined by the tribal custom and usage of the Kurmi-Mahto tribe whereby the plaintiffs would not, but the defendants would inherit to Charan, but they also ill-advisedly added that they are not Hindus. They also put forward a mimansapatra of 1887 (found by the District Judge to be genuine which showed that the zamindar had decided that Fulmani and her mother-in-law should hold the property in dispute as maintenance for life, after which it should go to the eldest son of Kinu, who was the original Defendant No. 1.

The tribal custom alleged is really not open to doubt but the Courts below considered the main question to be :

Whether the parties are aborigines or Hindus.

There they misunderstood the position, the question set out being as meaningless as would be the issue,

'Are the parties English or Christians'

The term "aboriginal," at least in Chota Nagpur, denotes race only. It is in fact so used in S. 46 (6) of the Chota Nagpur Tenancy Act. It implies nothing as to religion which may be even within the same tribe Animism, a slight veneer of Hinduism, various intermediate stages of Hinduism, or Christianity. On the other hand, the term "Hindu" has in Chota Nagpur reference only to religion.

Now it does not admit of the faintest doubt that the Kurmi-Mahtos of the Mandhum District are racially an aboriginal tribe. They are the most numerous community (whether tribe or caste) of that district from which they have overflowed into the neighbouring districts. They have no concern whatever except in the accent of name with the Dravido-Aryan agricultural and menial caste of Bihar Proper.

This important and numerous aboriginal tribe of agriculturists has, however, moved substantially towards Hinduism and rather faster than the other great tribes of the district, such as the Santals and Bhumijs. There is of course, a good deal of variation in the stages that have been reached in different parts of the district and neighbouring districts in respect of the adoption or rather superimposition of Hindu practices, and some areas lag behind. Notification No. 550 of the 2nd May 1913, under S. 332 of the Indian Succession Act, 1865 which withdrew the Act with retrospective effect from, among other tribes, the tribe "known as Kurmis" (that is the Kurmi-Mahto tribe of Chota Nagpur, as distinguished from the entirely distinct Bihari caste of Kurmis) on the ground that they have customary rules of succession and inheritance incompatible with the provisions of that Act, indicates that the whole tribe at least had not then become Hindu : if all Kurmi-Mahtos were Hindus then the notification would have been unnecessary as the Act does not apply to Hindus.

The parties, though aboriginals, being found to be also Hindus, it was still for the plaintiffs to prove that succession was not agnatic as the defendants in possession contended that it was. It was for the plaintiffs to establish that the Dayabhaga applied. The agnates would inherit under the customary rules of succession and inheritance of all aboriginal tribes in Chota Nagpur which, though they sometimes allow the widow or mother of the deceased to remain in possession of the whole or part of the inheritance by way of maintenance, are adamant against succession by or through daughters or sisters. The exceptional case of the *ghar jamai* in backward areas may be left out of consideration. It is also never safe to infer that a tribe or a member of a tribe, merely because of the adoption or superimposition of some Hindu practices, or even when it is practically Hinduized, is Hindu so as to be affected by the Hindu shastras in matters of succession. On the contrary it is at least consistent with experience and probabilities that the tribal customs

as to succession should be carried on into and persist after the adoption of Hinduism. This is also the view of the late Hon'ble the Reverend Dr. Andrew Campbell, the highest authority on the aboriginals of Manbhum. Further the agnates would also inherit if on conversion to Hinduism, the parties had adopted the Mitakshara system. The Court did not consider this point. The trial Court presumed that inheritance was governed by the Dayabhaga system

"as it prevails in this part of the country."

It is not clear whether the reference is to the pargana or district. But in either case it is far from settled law that the Dayabhaga system is the lex loci in the district of Manbhum, particularly the north and the western half, or indeed in any part of the district. Like the rest of Chota Nagpur and the jungle mahals the district of Manbhum was until comparatively recent times, outside the Hindu pale. It was inhabited almost exclusively by aboriginal tribes who were not Hindus. The great landholders, most if not all of them converts to Hinduism from the tribes, are governed by the Mitakshara law which, though it may differ in details, accords broadly with tribal custom in the matter of exclusion of females from inheritance. Other Hindus are either immigrants or converted tribes or tribesmen. The former retain the law of the locality from which they immigrated as it stood at the date of immigration. To ascertain whether a Hindu who is an immigrant or the descendant of an immigrant belongs to the Mitakshara or Dayabhaga School it is necessary and sufficient to learn whether he belongs to an up-country or a Bengali caste and in a few exceptional cases, where the caste name is the same in both areas, some slight further particulars, *e. g.*, the name of a Brahmin and in the case of a functional caste, the part of India from which immigration took place. Language is no criterion : many immigrant Hindus from up-country now speak a form of Bengali and that is also the home-language of some of the great land-owning families who are unquestionably governed by the Mitakshara School. The fact is there is no lex loci as to the system of Hindu Law which prevails in Manbhum or in any area of it. It cannot be predicated of a Hindu of that district and particularly of a convert to Hinduism from the local tribes that he belongs by operation of law to any particular school of Hindu Law whether Mitakshara, Dayabhaga or another. It is a matter of proof in each case whether they are governed by a particular School. Thus in the present instance the terms of the mimansapatra and the fact that they have Pande Brahmins would go to show, that at least the Dayabhaga rules have not been adopted by the parties. In point of fact aboriginals, with few exceptions, move towards Hinduism as a tribe or large section of a tribe in a particular area, and they certainly do not contemplate any change in the customary laws of inheritance and succession of the tribe. The onus is clearly upon the person who alleges that these customary laws have been discarded and that the aboriginal convert adheres to a particular School of Hindu Law in the matter of inheritance. *Fanindra Deb Raikat* v. *Rajeswar Das* (1) is a case in point. That was a case of adoption in an aboriginal family which had become Hindu and their Lordships of the Judicial Committee held that looking to the origin and history of the family "the question is not whether the general Hindu Law was modified by a family custom forbidding adoption, but whether with respect to inheritance the family is governed by Hindu Law or by customs which do not allow an adopted son to inherit. The onus of proving that the adoption was lawful was on the defendant who relied upon it to defeat the title."

Their Lordships then held on the evidence that whatever Hindu customs had been introduced into the family, the custom of succession by adoption had not. Similarly in the present case the points for enquiry were first, whether the general Hindu Law was substituted for tribal custom in respect of inheritance as a part of the personal law of the parties, and if so, whether it was the Dayabhaga form of the Hindu Law on the point. On both points the onus would be on the plaintiffs; whereas if the parties had been persons unquestionably governed by ordinary Hindu Law, the onus in the first matter to prove a custom at variance with Hindu Law would be on the person who asserted its existence.

(1) [1885] 11 Cal. 463=12 I. A. 72=4 Sar. 610 (P. C.)

In cases relating to inheritance among aboriginals in Manbhum it is always necessary to enquire whether even if Hinduized (slightly, partially, or completely) they have abandoned the tribal custom as to inheritance (usually they have not, even where, as is unusual, Hinduization is complete) and then if they have abandoned the tribal custom what particular school of Hindu Law they have adhered to. Both points of enquiry are in Manbhum questions of fact to be determined on the evidence. Insufficiently considered decisions of subordinate Courts have in some measure been disturbing causes, but prima facie it would seem exceedingly improbable that a tribe when it establishes itself as a new caste, should discard a tribal custom of agnatic relationship as the criterion for inheritance, especially when the leading Hindu magnates of the district and a large section of the immigrant Hindus retain it, and other tribes of the district indisputably carry into Hinduism the custom of lineal primogeniture in the male line.

When I had concluded these observations Mr. A. B. Mukherji, appearing for the respondent, drew my attention to Trevelyan's Hindu Law, which speaks of the Bengal or Dayabhaga School as prevailing :

"where the Bengali language is spoken by the inhabitants of the country ;"

and in a footnote gives a list of the five Commissioners' Divisions of Bengal, Manbhum in Bihar and Orissa and certain districts in Assam as Bengali-speaking areas. There are two comments to make. In the first place, in 1913 shortly after the work was published and just after I had been Judge of the district for the first time, I discussed the point with the learned author and I understood him to accept the view which I have set out above and to admit that even if Manbhum be conceded to be a Begali-speaking area the implication was not justifiable that the Dayabhaga prevails there particularly among non-Bengali castes or tribes such as the Kurmi-Mahtos, Santals, Bhumijs and their congeners. The statement in the work referred to as to the Dayabhaga School is in fact only a rough generalization. The Dayabhaga School actually prevails among persons who are Bengalis rather than among persons who speak Bengali, and rather than territorially where a majority of the people speak Bengali. In the second place, as has already been indicated, language is not the criterion, least of all in a border tract where the persons concerned are converted aboriginal tribes. And indeed it is an unsolved problem what the language of Manbhum is. No doubt the late census shows Bengali as the language of two-thirds of the inhabitants, but this result was obtained by including many persons who speak Kurmali. Officially the language is Hindi or Bengali in the Dhanbad Sub-division were Hindi has a numerical preponderance over Bengali, and Bengali in the Sadar Sub-division. Then Kurmali, the tribal language of the aboriginal Kurmis, is recognized in the Linguistic Survey as a form of the Bihari (Hindi) language, and is classified as Hindi in the census reports. It was returned as the language of 2,11,000 persons in 1911, while the Kurmis (tribe and immigrant caste combined) in the district numbered 2,91,000. But as it is generally written in the Bengali character and to quote the Linguistic Survey, "it is looked at through Bengali spectacles" in Manbhum the language was in 1921, probably under a misconception, often entered by enumerators as Bengali though it was really Hindi. My considered view is that the Dayabhaga system is not a lex loci in Manbhum in the matter of inheritance, and that certainly neither that system nor any other system of Hindu Law can be applied to the indigenous aboriginal tribes of the Manbhum district or members of those tribes, except on proof that they have adopted it.

Appeal dismissed.

1925 PATNA 737

ADAMI AND SEN, JJ.

Deblal Jha—Defendant—Appellant.

v.

Kuman Das and *others*—Plaintiffs—Respondents.

Appeal No. 835 of 1922, Decided on 10th June 1925, against a decision of the Sub-J., Purneah, D/- 31st May 1922.

(a) *Bengal Tenancy Act* (8 *of* 1885), *S.* 160 (*b*)—*Sub-tenure ceasing on the annulment of tenure by sale for arrears — Owner of sub-tenure can apply to avoid sale.*

S. 160 (b) refers to a temporary revenue settlement. Where on the annulment of a tenure by sale for arrears, the sub-tenure would cease with it, the owner of sub-tenure would be interested in making the payment to avoid the sale.

[P. 739, C. 2]

(*b*) *Contract Act, S.* 69—*Sub-tenure holder making deposit to save tenure from being sold in execution—Right to contribution and incidental expenses arises, but not to interest on sums deposited.*

Where a decree was passed against one *M*, and on her death her heirs became bound to pay the decretal amount or lose the property, and when the property was about to be sold, the plaintiff a sub-tenure holder to save his sub-tenure paid the debt and saved the tenure.

Held: that the plaintiff was entitled to contribution from the heirs of *M*, but was not entitled to interest on the sum deposited, but that he was entitled to the incidental expenses only.

[P. 739, C. 2]

Sambhu Saran—for Appellant.

N. C. Sinha and *B. B. Ghose*—for Respondents.

Adami, J.—This second appeal arises out of a suit for contribution. One M. Madanwati Ojhain held an istemrari mokarrari tenure of an eight-annas share of village Dhusarpati Tikapati under the Maharajadhiraj of Darbhanga. Her son, Defendant No. 1, and her grandson obtained from her what is described as a patni, but is really a sub-tenure of the eight-annas share, and the plaintiff had a darpatni, or really an under-tenure, under Defendants Nos. 1 and 2. The landlord instituted a suit for arrears of rent against Mt. Madanwati Ojhain and obtained a decree for Rs. 660-6-8. He took out execution; but before issue of attachment and sale proclamation, Mt. Madanwati Ojhain died, and before notice issued on Defendants Nos. 1 and 2, as her heirs, the plaintiff, to save his sub-tenure, deposited, on 3rd February 1920, Rs. 660-6-8 in Court and thus avoided the sale. The plaintiff in the suit has claimed payment to him by the defendants of this sum together with Rs. 38-4-7 for interest and costs for making the deposit,

The Defendant No. 1 contested the case. He pleaded that his mother had sold her istemrari mokarrari interest to one Jayprakash Narayan on the 8th January 1913, so that the decree against her was of no force; that the Mussammat had died before attachment and sale proclamation, so that those processes were invalid and no sale could have been held in those execution proceedings; that the Defendants Nos. 1 and 2 had not been served with notice and substituted in the proceedings, and therefore they could not have been bound by the sale if held; and lastly, that the deposit made by the plaintiff was voluntary, and that the sale would not have caused loss to the plaintiff nor has the deposit conferred benefit on the defendants.

In the trial Court it was held that the sale in 1913 to Jayprakash Narayan was a benami transaction, and that Mt. Madanwati Ojhain was in possession of the istemrari right and the Defendants Nos. 1 and 2 are now in possession. The learned Munsif declined to find that the decree was invalid. He held that the deposit was made by the plaintiff, but that it was made unnecessarily since his interest was a "protected" interest, and the property would have passed to the purchaser subject to that protected interest under S. 159, Bengal Tenancy Act. He depended on S. 160 (b) for his finding that the sub-tenure was a "protected interest." As, therefore, the plaintiff was not interested in the avoidance of the sale S. 69 of the Indian Contract Act could not help him. The learned Munsif decided also that S. 70 of the Indian Contract Act would not apply, since the plaintiff did not intend to do anything in the interests of the defendants, and in fact the defendants opposed his making of the deposit. It was decided therefore that the plaintiff was not entitled to any contribution and the suit was dismissed.

On appeal the learned Subordinate Judge has decided that the sub-tenure of the plaintiff was not a protected interest within the meaning of S. 160 (b) of the Bengal Tenancy Act, and thus the plaintiff was interested. Also it was held that the defendants were benefited by the deposit, as, since they were the heirs of Mt. Madanwati Ojhain, they were bound to pay the decretal amount or lose the property. He declined to consider what would have been the effect of the sale, if held, since that question was not within the scope of the suit. As the sub-tenure was not a registered and notified encumbrance it was liable to be annulled by the sale and therefore the plaintiff was interested and the deposit was not voluntary or gratuitous or officious. The result

of the appeal was that the suit was decreed.

Mr. Sambhu Saran, on behalf of the defendant-appellant, argues, firstly, that the plaintiff was not interested to make the payment because his interest was a "protected interest" and would not be threatened by the sale. The learned Subordinate Judge has met this argument by pointing out that S. 160 (b) refers to a temporary revenue settlement; and there is nothing to show that the rent for the sub-tenure was fixed only for the period of any temporary settlement. S. 160 (b) will not help the appellants; on the annulment of the tenure by sale for arrears the sub-tenure would cease with it. The plaintiff was interested in avoiding the sale.

The next point taken is that the defendants were not bound to pay the decretal amount, since Mt. Madanwati Ojhain had sold the tenure in 1913 and was no longer in possession, and since in the execution proceedings the lady died before attachment and issue of sale proclamation, so that any sale held would have been invalid, the defendants not having been brought on to the record. No notice had been served on them under O. 21, R. 22.

Now, if the decree was bad because of the sale in 1913 which as a matter of fact the Munsif found to be a benami transaction, the proper course for the defendants to follow was to appeal against the decree: they cannot plead ignorance of it; for they were informed about the deposit. They were the heirs of the Mussammat and as such would be bound to pay the decretal debt. Until set aside the decree was good. Whether execution was taken out or not and whether. if taken out, the execution was bad, the defendants, as heirs, were bound to pay the decretal debt out of the assets of the Mussammat in their hands, and as heirs they held the istemrari mokarrari tenure from the Mussammat.

I cannot find the defendants have shown that they were not bound to pay the debt by reason of any defect in the decree or in the execution proceedings.

It is next contended that the conditions necessary for the application of S. 70 of the Indian Contract Act do not exist in this case, since the deposit was made in the interest of the plaintiff and not in that of the defendants. It is urged that the deposit was an officious act of the plaintiff which did not bind the defendants. There can be no doubt that the deposit benefited the defendants; for it enabled them to remain in possession of the tenure; but it is true that the deposit was made altogether in the interest of the plaintiff. However, it is unnecessary to consider S. 70 further: for clearly S. 69 applies.

The simple facts of the case are that a decree, which has not been appealed against, was passed against Mt. Madanwati, and on her death her heirs were bound to pay the decretal debt or lose the property. The property was about to be sold and the plaintiff being interested to save his sub-tenure, paid the debt and saved the istemrari mokarrari tenure for the defendants and his own sub-tenure. Under these circumstances the plaintiff was entitled to contribution from the defendants.

The last contention of Mr. Sambu Saran is that the plaintiff was not entitled to repayment of anything more than the sum deposited, and that the claim to interest cannot stand. There was no contract or agreement to pay interest, and I think the contention as to this must succeed. With regard to incidental expenses incurred in making the deposit, I think the plaintiff is entitled to them: they are quite paltry.

Accordingly the appeal will be dismissed except with regard to payment by the defendants of interest on the sum of Rs. 660-6-8, and the decree of the lower appellate Court will be modified by a deduction of the sum entered in the schedule to the plaint as payable for interest.

The respondents will get proportionate costs throughout.

Sen, J.—I agree.

Decree modified.

★ 1925 PATNA 739

MULLICK AND BUCKNILL, JJ.

(Sir) Rameshwar Singh Bahadur — Plaintiff—Appellant.

v.

Rit Lal Singh and *others*—Defendants —Respondents.

Second Appeal No. 328 of 1922, Decided on 28th January 1925, against the decision of the Sub-J., Monghyr, D/- 20th December, 1921.

★ (a) *Ejectment—Defendant pleading tenancy by contract but failing—Some title diminishing plaintiff's title must be proved by defendant to defeat plaintiff's suit.*

Where in an action for ejectment the defendant pleads tenancy by contract but fails to prove the same, the onus is upon the defendants to show some title which will either extinguish or diminish the extent of the plaintiff's title. If the defendants fail, then the plaintiff is entitled to a decree. If the defendants, plead adverse possession the onus is upon them and they must show what was the date from which such possession began to run. In such a case the plaintiff's suit cannot be dismissed till the precise title acquired by adverse possession has been determined. [P 740 C 2 ; P 741 C 1]

(b) *Adverse possession—Limited interest—Facts necessary to prove acquisition of such interest must be found.*

A limited interest can be acquired by adverse possession, but the facts necessary to prove such possession must be found. [P 740 C 2]

Murari Prasad and *Sambhu Sharan*—for Appellant.

S. N. Basu for *Shiveshwar Dayal*—for Respondents.

Mullick, J.—We think that the judgment and the decree of the learned Subordinate Judge must be set aside and the appeal re heard by him.

The plaintiff sued for recovery of possession of Plot No. 959 alleging that the defendant first party had been in permissive occupation of it while the land was in the possession of the plaintiff's thikadar. The defendant first party pleaded in his written statement that the land was not the khudkasht of the plaintiff, but was the jote of the defendants and that they had acquired an occupancy right in the same. The second party defendants were sued because they were the raiyats of Plot No. 932 and because they had mortgaged that land to the defendants first party and the defendants first party had by some arrangement with the thikadars exchanged Plot No. 932 for Plot No. 959. It was the plaintiff's case that with the expiration of the terms of the thika, the title of the first party to remain in possession of Plot No. 959 by virtue of the exchange ceased to operate and that the plaintiff was accordingly entitled to resume possession of the land. The second party defendants did not file any written statement and the suit was contested by the first party defendants only. At the trial these defendants set up the case that they had been inducted into Plot No. 959 by the manager of the plaintiff in the year 1313 F. S. and had paid rent to him. Their case, therefore, was not one of adverse possession but of a lease from the plaintiff. The learned Munsif found that the case that the defendants first party had been inducted as tenants by the manager was false. He also found that in 1313 the plaintiff was in khas possession, the thika having expired in 1312 and being renewed again in 1314. The learned Munsif finds that although the defendants first party were not inducted by the manager, they in 1313 set up a right to occupy, and as limitation began to run from that date, the suit is barred. In the opinion of the learned Munsif the fact that the factory obtained a thika again with effect from 1314, and were in possession till 1322, does not prevent limitation from continuing to run.

In appeal before the Subordinate Judge the only point that was argued was the question of limitation. The learned Judge held that as the plaintiff had not proved possession within 12 years of the suit which was brought in 1327, the suit was barred.

In second appeal it is urged on behalf of the plaintiff that there has been no proper trial of the case in the Court below. The plea that the defendants became tenants by contract having been proved to be false, the onus is upon the defendants to show some title which will either extinguish or diminish the extent of the plaintiff's title. If the defendants fail then the plaintiff is entitled to a decree. If the defendants plead adverse possession the onus is upon them and they must show what was the date from which such possession began to run. Now, upon this point there is no finding by the Subordinate Judge. The learned Munsif does find that the defendants have acquired an occupancy right by adverse possession, but it is not shown upon what evidence he has come to this finding. It is not known whether the right which he, the defendant, set up in 1313 was the right to retain possession of Plot No. 959 in lieu of Plot No. 932 of which they were the mortgagees. If so, they cannot claim a right to occupy Plot No. 959 as an occupancy raiyat.

It is true that a limited interest can be acquired by adverse possession, but the facts necessary to prove such possession must be found, there is no finding by either Court when the declaration of the

right to hold Plot No. 959 as a raiyat was first made.

In this case the plaintiff's suit cannot be dismissed till the precise title acquired by adverse possession has been determined. The judgment of the lower Court is set aside and the appeal will be decreed with costs.

Bucknill, J.—I agree.

Appeal allowed.

1925 PATNA 741

ROSS AND KULWANT SAHAY, JJ.

Maharaja Pratap Udai Nath Sahi Deo —Defendants—Appellants.

v.

Mahabir Sahu and *others*—Plaintiffs—Respondents.

Appeal No. 1063 of 1922, Decided on 13th May 1925, from the decision of the Judicial Commissioner of Chota Nagpur, D/- 24th June 1922.

Chota Nagpur Tenancy Act (1879), *S.* 10(*b*) *as amended by Bengal Act 5 of* 1903, *S.* 5—*Section governs transfers between* 1*st January and* 4*th November* 1903.

Section 10(b) contemplates that all transfers, whether made before the Act came into operation or not, provided they were made after the 1st of January 1903, would come within the provisions of this section; though the section is silent as regards the fate of the transfers between the 1st day of January and 4th November 1903, yet the meaning is plain and such transfers would come within the operation of the section, and would be rendered invalid by the operation of that section. Where such title is invalid, the title remains in the original tenant or his heirs. It is not permissible to add words to the section in order to construe it. The section must be construed as it stands.

[P. 742, C. 1 & 2]

(*b*) *Landlord and Tenant—Surrender.*

A tenant, even after having created an encumbrance, can surrender his holding; 4 *P.L.T.* 581, (*F. B.*), *Foll.* [P. 743, C. 2]

(*c*) *Civil P.C., S.* 100—*Finding of fact.*

Question as to abandonment is one of fact.

S. M. Mullick and *B. C. Dey* — for Appellants.

Rai G. S. Prasad and *Anand Prasad*— for Respondents.

Kulwant Sahay, J.—This is an appeal by the Defendants 1 and 5 and arises out of a suit brought by the plaintiffs for a declaration of their title to, and recovery of, possession of certain plots of land. It appears that one Jaglam had a holding in Mouza Okhar Garha, of which the Defendant No. 5, the Maharaja of Chota Nagpur, is the proprietor. On the 7th May 1903 Jaglam executed two deeds in favour of Mt. Mango. One of these deeds was a zarpeshgi deed for Rs. 159 in respect of a portion of the holding, and the other was a rehan deed for Rs. 57 in respect of another portion of the same holding. Mt. Mango took possession of the lands given to her under the zarpeshgi and the rehan. The Plaintiffs 1 to 3 purchased the interest of Mt. Mango under a deed of sale dated the 13th December 1916. They were, however, dispossessed by Defendant No. 1 who claimed the holding of Jaglam under a settlement from the Defendant No. 5 on the allegation that Jaglam had abandoned the holding and the Maharaja had taken direct possession of the land and settled the same with the Defendant No. 1 in November 1917. There was a criminal case which was decided against the plaintiffs in May 1919 and the plaintiffs stated that they were dispossessed as the result of this criminal case. The suit was brought by the Plaintiffs 1 to 3 who are the purchasers of the interest of Mt. Mango, and by the Plaintiffs 4 and 5 who are the sons of Jaglam. The suit was contested by the Maharaja, the Defendant No. 5, and by the Defendant No. 1, and their case was that the original tenant Jaglam had abandoned the holding and that the Maharaja had taken possession thereof. It was further alleged that the transfer by Jaglam to Mt. Mango was invalid under the provisions of the Chota Nagpur Tenancy Act. After the filing of the plaint, and before the filing of the written statement, the Plaintiffs 4 and 5 filed a petition on 6th May 1920, in which they alleged that certain proceedings taken by the Defendant No. 5 under S. 73 of the Chota Nagpur Tenancy Act were correct and legal, and they admitted that their father Jaglam had ceased to have any right to the disputed land and that these plaintiffs, namely, Nos. 4 and 5, had no claim to the land, and they asked that their claim might be dismissed and they might be exonerated from the liability of paying costs. The Munsif who tried the suit held that there was no abandonment and that the transfer to the Plaintiffs 1 to 3 was not invalid under the provisions of the Chota Nagpur Tenancy Act. He

refused to give effect to the application of the Plaintiffs 4 and 5 and made a decree in favour of Plaintiffs 1 to 3. On appeal by the Defendants 1 and 5 the learned Judicial Commissioner has affirmed the decree of the Munsif.

The principal question for decision in the present case is whether the transfer by Jaglam to Mt. Mango under the two deeds of the 7th May 1903 was valid having regard to the provisions of the Chota Nagpur Tenancy Act. The Act in force at the time the transfer was made was the Act of 1879 as amended by Bengal Act V of 1903. By S. 5 of Act V of 1903, S. 10(b) was inserted in the Act of 1879. This S. 10(b) has been re-enacted in Act VI of 1908 and is now S. 46 in the latter Act. Act V of 1903 came into operation on the 4th November 1903. S. 10(b), which was enacted by S. 5 of Act V of 1903, provided that no transfer by a raiyat of his right in his holding or any portion thereof by mortgage, or lease for any period exceeding five years, or by sale, gift or any other contract or agreement, shall be invalid to any extent. Clause 5 of this section provided that nothing in this section shall affect the validity of any transfer not otherwise invalid of a raiyat's right in his holding or any portion thereof made bona fide before the 1st day of January 1903. The transfer in the present case took place on the 7th May 1903, that is, after the 1st of January 1903, and before the 4th of November 1903. The question is as to whether a transfer of a raiyati holding effected between these two dates comes within the mischief of the section. It has been held by the learned Judicial Commissioner that S. 10(b) had no retrospective effect and that, although the transfer in question in the present case was made after the 1st of January, yet inasmuch as it was before the 4th November 1909, when the Act came into operation, the transfer was valid. Now, in order to put this interpretation upon the wording of the section the learned Judicial Commissioner had to introduce certain words into the section. He was of opinion that the words "made after this Act comes into operation" have to be added to Cl. 1 of S. 10(b). In other words, he was of opinion that it is only transfers made after the Act came into operation that would be invalid under the provisions of this section. I am, however, of opinion that it is not permissible to add words to the section in order to construe it. We must construe the section as it stands, and having regard to the language used, it is clear that all transfers, whether made before the Act came into operation or not, provided they were made after the 1st of January 1903, would come within the provisions of this section. Clause 5 of the Act clearly says 'transfers made bona fide before the 1st day of January 1903.' That shows the intention of the Legislature. That is, it is clear from Cl. 5 of the section that but for this exception all transfers even of a period prior to the 1st day of January 1903 would have come within the operation of this section; and the Legislature has deliberately saved transfers made bona fide before the 1st day of January 1903, otherwise there appears to be no object in enacting Cl. 5 of the section. The learned Judicial Commissioner says that unless some such words, as he intends to add to the section, are added, the meaning of the first clause of the section would become absurd. In my opinion there is no absurdity in the section. Clause 1 provides that no transfer shall be valid if it purports to create an interest for a period exceeding five years and Cl. 3 of the section provides that no transfer in contravention of sub-S. (1) shall be registered or shall be in any way recognized as valid by any Court, whether in the exercise of civil, criminal or revenue jurisdiction. On reading the different clauses of this section I am of opinion that it was clearly intended by the Legislature to provide that all transfers for the period exceeding five years of raiyati holding would be invalid and the Courts were enjoined to refuse to recognize such transfers as valid. By Cl. 5 bona fide transfers and not all transfers were saved if made before the 1st day of January 1903. The section is no doubt silent as regards the fate of the transfers between the 1st day of January and 4th November 1903, but the meaning, to my mind, is plain, and such transfers would come within the operation of the section.

Reliance has been placed upon certain decisions of this Court and of the Calcutta High Court. The case of *Mrs. Vesta Clifton Sebastian* v. *Kuloda Prasad Deogharia* (1) referred to a case in

(1) [1910] 15 C.W.N. 43=7 I.C. 763.

Manbhum. The Chota Nagpur Tenancy Act was introduced in Manbhum by a notification of the Government dated the 22nd December 1909. In that case a deed of sale had been taken by the petitioner to the High Court on the 19th August 1909, that is, before the Act was extended to Manbhum, and it was held that the deed of sale which was taken before the Act was extended to Manbhum, did not come within the operation of S. 46 of the present Act which corresponds to S. 10(b) of the Act of 1879 as amended by Act V of 1903. This case was followed by a Division Bench of this Court in *Braja Lal Dutta* v. *Kenaram Pal* (2). That was a case from Ranchi in Chota Nagpur where the Act came into operation in November 1903. In *Ganpat Mahto* v. *Chotan Ram* (3) the question related to the effect of S. 47 of the present Chota Nagpur Tenancy Act. In that case a sale of a holding had been ordered by the Court before the Act came into operation and their Lordships held that the Act did not apply to an order already passed by a Court. The present case is distinguishable from all these cases; and upon a plain reading of the section itself I am of opinion that the transfer by the original tenant Jaglam to Mt. Mango by the deeds of 7th May 1903 was invalid, and by the purchase of the 13th December 1916 the Plaintiffs 1 to 3 acquired no valid interest in the holding. The transfer of Mt. Mango and to the Plaintiffs 1 to 3 being invalid, the title would remain in the heirs of the original tenant, namely, Plaintiffs 4 and 5. The Plaintiffs 4 and 5 by their petition expressly asked the Court to dismiss the claim so far as they were concerned. Having regard to the petition filed by these two plaintiffs, it is clear that the Court could not make a decree in their favour. The claim therefore of the plaintiffs must be dismissed.

In this view of the case the other questions referred to in the judgment of the learned Judicial Commissioner and argued by the learned advocates on both sides do not arise. As regards the effect of the application filed by the Plaintiffs 4 and 5 it was contended that it amounted to a surrender. The learned Judicial Commissioner relied upon the decision of the Calcutta High Court in *Syed Mohsenuddin* v. *Baikuntha Chandra Sutradhar* (4) which held that a tenant having created an encumbrance could not by any act of surrender derogate from the encumbrance created by him. This decision of the Calcutta High Court has been expressly dissented from by a Full Bench of this Court in *Sheoraji Kuer* v. *Dhani Mian* (5).

As regards the finding of the learned Judicial Commissioner that the evidence on the record showed that there was no abandonment by the original tenant, that is a finding on a question of fact which it is not open to us to interfere with in the second appeal. But as I have said this question does not properly arise in view of the interpretation placed on S. 10(b) of the Chota Nagpur Tenancy Act of 1879 and upon that interpretation the plaintiffs are not entitled to a decree.

The result is that the appeal will be allowed and the suit dismissed with costs

Appeal allowed.

(2) [1919] 4 Pat. L.J. 411=50 I.C. 515.
(3) [1917] 2 P.L.W. 149=42 I.C. 387.
(4) [1921] 48 Cal. 605=25 C.W.N. 29=61 I.C. 443=32 C. L. J. 286 (F.B.).
(5) 1924 Patna 1=3 Pat. 1=4 P.L.T. 581=1 Pat. L.R. 402=(1923) P.H.C.C. 305 (F.B.).

1925 PATNA 743

DAWSON-MILLER, C. J., AND MACPHERSON, J.

Tokh Narain Puri—Defendant—Appellant.

v.

Ram Rachhya Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1500 of 1922, Decided on 23rd June 1925, against a decision of the D. J., Monghyr, D/- 8th September 1925.

(a) *Pre-emption—Muhammadan Law of pre-emption applies to Hindus in Behar.*

The Muhammadan Law relating to pre-emption applies also to Hindus in Behar. The right of pre-emption applies in the case of the cosharers in the vended property known as shafi-i-sharik, sharers in the appendages or appurtenances of the vended property, shafi-i-kalit, and neighbouring proprietors holding contiguous property known as shafi-i-jar. [P. 744, C. 2]

(b) *Pre-emption — Parties to suit — Stranger joining plaintiff. destroys plaintiff's right but one entitled to pre-empt, but not performing ceremonies does not.*

It is well settled that if a person entitled to claim pre-emption joins with himself as co-plaintiff a person who has no such right, he

forfeits his own pre-emptive right and the suit must be dismissed as against both ; but not where cosharer has joined as a plaintiff one who, although otherwise qualified, had not himself performed the preliminary ceremonies of talabi-mowasibat and talab-i-ish-had : 31 *All.* 623 (*F. B.*) and (1893) *A. W. N.* 25, *Foll.*

[P 745 C 2]

(c) *Pre-emption—Owner of servient tenement—When entitled to right of shafi-i-khalit.*

Where there in an *ahar* of considerab'e extent in the p aintiff's patti and the vendors have a right of taking water for the irrigation of their own land from this *ahar*, and the proprietors of the two pattis have joint rights over the *ahar*, and the owners of the vended patti have a right of easement over the *ahars* and water courses situated in the plaintiff's patti the owner of the servient tenement has the right of shafi-i-khalit.

[P 746 C 1]

(d) *Muhammadan Law — Pre-emption—Ceremonies indicated.*

Muhammadan law requires that the pre-emptor immediately on hearing of the sale should make known his intention of exercising his option of purchase. He should rise and declare his intention there and then whether witnesses are present or not. The ceremony is known as talab-mowasibat. Having done this he must also with the least practicable delay make a formal declaration claiming his right of pre-emption before witnesses in the presence of either the vendor or the vendee or on the premises sold. The ceremony is known as talab-i-ish-had.

[P 746 C 2]

(e) *Muhammadan Law — Pre-emption—Until price is known pre-emptor cannot exercise his right but unreasonable delay in ascertaining price would destroy claim.*

On general principales unless the purchase price is known to the person entitled to pre-emption he has not all the facts before him to enable him to decide whether he will exercise his right. However, he would be bound to take immediate steps to ascertain the price and any unreasonable delay in doing so would operate as a forfeiture of his claim. 16 W. *R.* 13 (*F. B.*) and 35 *Cal.* 402 (*P. C.*) *Foll.*

[P 747 C 1]

P. Dayal and *R. T. N. Sahay*—for Appellant.

Sultan Ahmad and *S. N. Ray*—for Respondents.

Dawson-Miller, C. J.—This is an appeal from a decision of the District Judge of Monghyr, dated the 8th September 1922. The appellant Mahanth Tokh Narain Puri is the defendant first party in a pre-emption suit instituted by some of the respondents as plaintiffs against the appellant as purchaser and the defendants second party, also respondents, as vendors of an estate in Mauza Beiman bearing Tauzi No. 7094 on the rolls of the Collector of Monghyr. Some years ago by a Collectorate batwara mauza Beiman was partitioned amongst the cosharers and divided into several separate revenue-paying estates bearing separate tauzi numbers. Tauzi No. 7094, which constitutes the property in dispute in this case fell to the patti of certain cosharers now represented by Jagdip Narain Singh and others, the second party defendants in the suit. Tauzi No. 3814 and Tauzi No. 7093 fell to the patti of those who are now represented by the plaintiffs. These two estates are contiguous with the estate in suit lying immediately to the south and east thereof respectively. The appellant (defendant first party) is the proprietor of Mauza Bindaban which lies immediately to the west of the estate in suit. On the 13th December 1918 the defendants second party, who may be conveniently referred to as the vendors, sold their interest in Tauzi No. 7094 to the appellant, who may be referred to as the purchaser for Rs. 3,775 and a further sum of Rs. 125 to cover the arrears of rent then due. The plaintiffs as proprietors of Tauzis Nos. 3814 and 7093 claim the right of pre-emption on payment of the price agreed between the vendors and purchaser and instituted the present suit to enforce their claim.

The Muhammadan Law relating to pre-emption applies also to Hindus in Bihar. The right of pre-emption applies in the case of three classes of persons. The first class are the cosharers in the vended property known as shafi-i-sharik. The second class are sharers in the appendages or appurtenances of the vended property, shafi-i-khalit. The third class derive their right from vicinage and the right applies in favour of neighbouring proprietors holding contiguous property. They are known as shafi-i-jar. The plaintiffs claimed originally as owners of the adjoining property, but by an amendment of their plaint they alleged that the pattis of the plaintiffs and the vendors had all along been irrigated from water of the same *ahar* and *pynes* and they also claim as sharers in the appurtenances common to both properties (shafi-i-khalit).

The purchaser resisted the suit on various grounds. He contended that the plaintiffs were not entitled to pre-emption on the ground of vicinage as he also was a neighbouring proprietor ; that the plaintiffs were not entitled to the right of shafi-i-khalit as they were not in fact sharers in appurtenances common to the two estates; and, further, that such a

right had not been properly claimed in the plaint ; that the ceremonies necessary to be performed in order to found a right of pre-emption had not been properly performed, and that such ceremonies, if performed, had been performed by the Plaintiff No. 4 alone, and by adding other plaintiffs in the suit who were strangers having no claim to pre-emption he had forfeited his right.

The learned Subordinate Judge, before whom the case came for trial, appears to have found all the facts in favour of the plaintiffs, but considered that although the plaintiffs were entitled to pre-emption as shafi-i-jar and shafi-i-khalit they could not enforce their right as they were not actual cosharers in the vended property.

On appeal the learned District Judge of Monghyr, without considering the questions of fact which had been determined by the trial Court, upheld the decision of the Subordinate Judge.

An appeal was preferred to the High Court, but as the facts had not been found by the lower appellate Court the case was remanded to that Court for re-hearing and for decision after coming to a finding as to what the facts were.

The learned District Judge, on remand, has found that the ceremonies were properly performed by the Plaintiff No. 4 ; that the plaintiffs other than the Plaintiff No. 4 were not strangers and were entitled to be added ; that they could not succeed merely as shafi-i-jar because the purchaser was also a neighbouring proprietor, but that they had established their right as shafi-i-khalit, sharers in appendages, a right which the purchaser did not enjoy, and he passed a decree for pre-emption in favour of the plaintiffs.

The purchaser has appealed from that decision which he challenges upon three grounds, (1) that the Plaintiff No. 4 who performed the ceremonies has lost his right to claim pre-emption by joining as plaintiffs other persons who had not joined in the ceremonies and who were strangers as that expression is understood in Muhammadan Law, (2) that the plaintiffs having claimed on the ground of vicinage only should not have been given a decree as sharers in the appendages, and (3) that delay in performing the talab-i-ish-had was fatal to the validity of that ceremony without which the right could not be asserted.

As to the first point it is well settled that if a person entitled to claim pre-emption joins with himself as co-plaintiff a person who has no such right he forfeits his own pre-emptive right and the suit must be dismissed as against both (see Wilson's Anglo-Muhammadan Law, 5th Ed., p. 388). The basis of this rule appears to be that as the right of pre-emption only exists in favour of those who are cosharers either in the vended property or in the appurtenances, or who are proprietors of adjoining property, as against persons who are not so qualified, it would be manifestly unjust as against the vendee to allow persons who do not possess the necessary qualifications to assert a right of pre-emption. In the present case the plaintiffs are all members of the same family and are all proprietors in Tauzis Nos. 3814 and 7903. They do not therefore come under the category of strangers as understood for this purpose in Muhammadan Law. It was contended, however, on behalf of the appellant that nobody could be joined as a plaintiff who, although otherwise qualified, had not himself performed the preliminary ceremonies of talabi-mowasibat and talab-i-ish-had, but no authority was produced in support of this proposition. As pointed out by Banerji, J., in *Wajid Ali* v. *Shaban* (1) in almost all the cases in which it has been held that a person possessing the right of pre-emption forfeits it by joining a stranger, the person joined was a stranger to the coparcenership body and a total outsider, and reference is made to the case of *Chotu* v. *Hussain Baksh* (2) in which it was held that the mere joining by a person having a right of pre-emption of persons who have an equal right of pre-emption, but have not qualified themselves according to the Muhammadan law to enforce it, and who are not strangers, will not disentitle the person entitled to maintain a suit for pre-emption, if he had sued alone, from maintaining a suit brought by him so far as he himself was concerned. In that case pre-emption was claimed by several persons, one of whom, Chotu, only had performed the preliminary demands and it was held that Chotu had not forfeited his right of pre-emption by joining with him the other plaintiffs in bringing the suit. The

(1) [1909] 31 All. 623=6 A. L. J. 887=3 I. C. 820=6 M. L. T. 252.
(2) [1893] A. W. N. 25.

point appears to have been settled by that decision. Moreover, the learned Judge, whose judgment is under appeal, states that this point was not pressed before him by the purchaser and I do not think we should in the circumstances allow the appellant to raise the point afresh. In any case were it necessary to do so I should hold that the suit is not bad for misjoinder of parties.

With regard to the second point it is true that in the relief portion of the claim the plaintiffs ask for a declaration that they have the right of pre-emption as they are proprietors of the adjoining pattis. But by the amendment of para. 15 in the body of their plaint they do allege that the pattis of themselves and the vendors have all along been irrigated from water of the same ahar and pynes and at the trial, as well as in the lower appellate Court, the question whether the plaintiffs were entitled to come in under the second class of pre-emptors was raised and decided. The facts with regard to this part of the case are found by the learned District Judge on remand. There is an ahar of considerable extent in the plaintiffs' patti, Tauzi No. 3814, and the vendors as proprietors of Tauzi No. 7094 have rights of taking water for the irrigation of their own land from this ahar. The learned Judge finds that the proprietors of the two pattis have joint rights over this ahar and that in fact the owners of the vended patti have a right of easement over the ahars and watercourses situated in the plaintiffs' patti. The result is that the plaintiffs' patti is a servient tenement. Such a case has always, so far as I am aware, been treated as bringing the owner of the servient tenement within the right of shafi-i-khalit.

It was contended, however, that the ahar in question had been left ijmal at the time of the batwara and that it was not an appendage or appurtenance to either of the two pattis over which the parties had common rights and the case of *Keshab Singh* v. *Bandi Singh* (3) was referred to. In that case an estate had been partitioned into several mahals but certain roads and a well and a tank and other properties had been left undivided and remained the joint property of the proprietors of the different estates. It was found that the fact that this joint property remained enjoyable by the proprietors of each of the separate mahals was not sufficient to give any of them a right of pre-emption in the second degree, or khalit, as the joint property was not an appurtenance of any of the estates but a separate property owned by the proprietors jointly. In the present case the facts appear to be different. The ahar in question is within the plaintiffs' patti and the title to it belongs to the plaintiffs alone. It is not shown to be joint property and it is found by the learned District Judge that the right which the proprietors of the vended property have was merely a right of easement in the ahar. This being so, I think the plaintiffs come within the second class of pre-emptors, namely, shafi-i-khalit.

With regard to the third point it may be stated that the Muhammadan Law requires that the pre emptor immediately on hearing of the sale should make known his intention of exercising his option of purchase. He should rise and declare his intention there and then whether witnesses are present or not. The ceremony is known as talabi-mowasibat. Having done this he must also with the least practicable delay make a formal declaration claiming his right of pre-emption before witnesses in the presence of either the vendor or the vendee or on the premises sold. The ceremony is known as talabi-ish-had. It is not disputed that the first demand was properly made by the Plaintiff No. 4. It is contended, however, that there was a delay of four days in performing the second demand and that this delay is fatal to the plaintiffs' right. The facts found are that the property was sold on the 13th December 1918. The Plaintiff No. 4 came to hear of it on the 16th December and immediately declared his intention of exercising his right of pre-emption in the presence of several witnesses. He was not aware, however, of the amount of the purchase price paid for the property and in order to ascertain this he sent his servant Munshi Gajadhar Lal by train on the evening of the same day to Shaikhpura to obtain a copy of the sale deed. There was some delay in obtaining the copy of the sale deed owing to the registration office being closed. Eventually Gajadhar Lal obtained a copy of the sale deed on the 19th December and took it to his master at mauza Barhi who, as

(3) [1919] 4 P. L. J. 420=52 I. C. 31.

soon as he received it on the 20th, proceeded to the house of the vendors who lived in the same village and there performed the second ceremony of talab-i-ish-had in the presence of some of the vendors and other witnesses. The same ceremony was performed by him on the vended property on the following day and in the presence of the purchaser on the 22nd, but these last two ceremonies were not necessary in order to complete his right The question is whether by waiting until he had ascertained the amount of the purchase money the Plaintiff No. 4 forfeited his right. The learned District Judge considered that the delay was satisfactorily explained and that the plaintiff was justified in waiting until he ascertained the purchase price before performing the second ceremony. It seems to me on general principles that unless the purchase price is known to the person entitled to pre-emption he has not all the facts before him to enable him to decide whether he will exercise his right. The price when ascertained may be higher than that which he is inclined to pay. There can be no doubt, however, that he would be bound to take immediate steps to ascertain the price and any unreasonable delay in doing so would, in my opinion, operate as a forfeiture of his claim. In the case of *Abadi Begam* v. *Inam Begam* (4) the opinion was expressed that a claim relinquished upon misinformation of the amount of the sale consideration, or of the property sold, may be resumed when the real facts became apparent. This opinion, however, upon the facts of that case, would appear to be merely obiter. It is referred to apparently with approval by Sir Roland Wilson who states : "But a person who refrains from pre-empting when he first hears of the sale, owing to being misinformed of the price, is not estopped from reviving his right on becoming subsequently aware of the true price." (See Anglo-Muhammadan Law, 5th Ed., p. 401). The rule laid down by Sir William Macnaghten and referred to with approval in the case of *Mt. Jumeelun* v. *Luteef Hossein* (5) is that the talab-i-ish-had should be made with the least practicable delay and it was further laid down in that case by a Full Bench of the Calcutta High Court that the due and sufficient observance of that formality, as to time, is a question to be decided in each case by the Court which has to deal with the facts and I do not think that in second appeal we should interfere with the finding of fact on a question of this sort unless the ascertained facts clearly show that there was no evidence to support the finding. In the case of *Baijnath Gaenka* v. *Ramdhari Chowdhry* (6) there was a considerable delay between the date (the 20th December 1897) when the pre emptor first heard of the sale and the 7th January following when he performed the second ceremony of talab i ish had. The delay between the 20th December and the 4th January was due to the fact that the pre-emptor was during that time endeavouring to procure from the registration office a copy of the sale deed, the office being closed for the Christmas vacation. Their Lordships of the Judicial Committee appear to have assumed that the circumstances were adequate to excuse that delay. The trial Court had held that the delay was not fatal to the claim. The High Court on appeal had reversed that decision. Their Lordships observed : "There is no question of law in the case. It is clear that the right of pre-emption must be exercised, and the claims necessary to give effect to it must be made with the utmost promptitude, and that any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. And whether there has been such a delay is a question to be determined upon the facts of each particular case. It is enough for their Lordships to say that, in their opinion, the grounds stated by the learned Judges of the High Court for overruling the decision of the first Court on a pure question of fact were insufficient." In my opinion the delay in the present case has been amply explained and I do not think that any sufficient reason has been made out why we should differ from the learned District Judge on a pure question of fact. Indeed had the case come before us in the first instance I should have taken the same view. In my opinion the third objection also fails and this appeal must be dismissed with costs.

Macpherson, J.—I agree.

Appeal dismissed.

(4) [1877] 1 All. 521.
(5) [1871] 16 W. R. 13=8 B. L. R. 160 (F. B.)

(6) [1908] 35 Cal. 402=35 I. A. 60=12 C.W.N. 419=10 Bom. L. R. 253=7 C. L. J. 318=18 M. L. J. 116=3 M. L. T. 349 (P. C.)

★ 1925 PATNA 748

DAWSON-MILLER, C. J., AND MACPHERSON, J.

Sheikh Abdul Ghani and *others*—Defendants—Appellants.

v.

Harnam Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1274 of 1922, Decided on 25th June 1925, against a decision of the Sub-J., Shahabad, D/- 25th August 1922.

★ (*a*) *Lim. Act, S.* 26—*The section is not exhaustive of the methods of acquiring easements.*

Section 26 provides for the acquisition by peaceable enjoyment without interruption for a period of 20 years of a right of easement either in a water course or in any other matter, but if one is claiming a right given under that section then he has to prove that the right has been exercised for 20 years and that there has been no interruption of the right at any period further back than two years before the commencement of the suit. In other words, uninterrupted enjoyment ending not later than two years before the commencement of the suit and extending not less than 20 years back from that time must be proved. The acquisition of the right of easement referred to in S. 26 of the Act is not the only method of acquiring a right of easement. The section is not exhaustive, and if a right of easement is acquired by any other method such as by a grant either proved or implied then S. 26 can have no operation to a suit brought to enforce such a grant. The object of the statute is to make more easy the establishment of rights of easement by allowing an enjoyment of 20 years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easement. But the statute is remedial and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all; but it does not exclude or interfere with other titles and modes of acquiring easements 6 *Cal.* 394 (*P. C.*) *Ref.* and *Foll.* [P 749 C 2 & P 750 C 1]

(*b*) *Civil P. C., S.* 100—*Implied grant—Existence of, is a question of fact.*

Where the lower Court, on the evidence before it came to the conclusion that there was an implied grant which gave rise to a right of easement.

Held; that it was a finding of fact.

[P 750 C 2]

L. N. Singh and *R. Prasad*—for Appellants.

P. Dayal—for Respondents.

Dawson-Miller, C. J.—This appeal arises out of a suit instituted on behalf of the plaintiffs to enforce a right to irrigate certain lands lying within their estate with water from a *tal* situated within the adjoining lands of the defendants. It is the plaintiffs' case that they have enjoyed this right for a great number of years and that within recent years the defendants have obstructed their right and they claim a declaration and damages for the loss sustained by them by reason of the obstruction.

In order to understand the effect of the decision of the learned Subordinate Judge now under appeal, which found that the plaintiffs had acquired a right by a presumed grant some time in the past apart altogether from the mode of acquisition referred to in S. 26 of the Limitation Act, it is necessary to refer shortly to some of the salient facts proved in the case. The estates of the plaintiffs and the defendants adjoin each other and they both form part of Mouza Malaon. That village was held in joint ownership until the pear 1870 and the *tal* in question had undoubtedly existed long before that time, and there can be no doubt, upon the facts found, that this *tal* which is one of considerable size had been used for the purpose of irrigating not only the lands in its immediate vicinity but certainly the whole or some portion of the lands which are now in the exclusive possession of the plaintiffs. In fact there is a *karha* leading from the lands of the defendants into the lands of the plaintiffs, which is found to have existed for a great number of years and which obviously could only have served the purposes of carrying water from the *tal* in question into the lands now held by the plaintiffs. At the partition in 1870 the plaintiffs obtained a takhta bearing Tauzi No. 5589, whereas the lands of the defendants lie in an adjoining takhta bearing Tauzi No. 5591. It is within the lands of the defendants' takhta that the tal is situate.

There was evidence to show that from the year 1870 right up to the year 1905, when the defendants first acquired by purchase an interest in Tauzi No. 5591, this right of taking water from the tal in the defendants' lands through channels, for the purpose of irrigating the plaintiffs' land, had been exercised. A comparatively old man called Gobardhan Bind, who had resided for the last 40 years at the place in question, said that during that time he had seen the plaintiff's takhta being irrigated with water from this *tal*, and that evidence is accep-

ted by the learned Subordinate Judge. It follows therefore that up to the time when the defendants first acquired an interest in the property which they now hold, a right to irrigate their lands from the *tal* in question had been exercised by the plaintiffs. In 1905 some friction appears to have occurred. The defendants, the new purchasers, seem to have made some attempt to stop the plaintiffs' right of irrigation, and in 1906 an agreement was entered into between the parties whereby the plaintiffs' right to irrigate their lands was to continue and a new water channel was to be cut from the south-west of the *tal* leading into the old water channel which had been in existence for some years. This was to be carried out at the expense of both parties and a small rental of Rs. 12 a year was to be paid to the defendants for the use of the water.

What subsequently happened is perhaps not very clear, but it appears that the new water course was not in fact constructed at the expense of the parties, but it also appears that there was a provision in the agreement that until this was down the plaintiffs should be entitled to irrigate their lands from the *tal* by any such means as might be arranged between the parties. So that the right at all events appears to have been recognized at that date ; but it is unnecessary in this case to complicate the matter by reference to that agreement, or the terms thereof, because it is the case of both parties that it was not acted upon, and neither party in this case relies upon it. They both had in fact at some earlier period, repudiated it.

Although some attempt was made, as I have stated, in 1906, to interfere with the plaintiffs' right, according to the findings by which we are bound, the plaintiffs did manage to get water from this *tal* without any further serious interruption up to the year 1912. The finding of the learned Subordinate Judge upon that matter is to this effect : "The next point that incidentally arises is if the right of the plaintiffs has become barred by limitation, they not having exercised it since 1912 as appears from the fact that plaintiffs' lessees had to bring a suit in 1912 it would be improbable that after the withdrawal of that suit the defendants allowed the plaintiffs, water from the *tal* for irrigation of their fields. I do not think that there is sufficient evidence on the record of this suit to show the obstruction of the right before 1912." There is therefore a clear finding that there was obstruction of the right in 1912 and that there was no real obstruction of the right before that date.

Upon these facts it was contended by the defendants that the claim for an easement, which is the claim in this case, must fail by reason of the provisions of S. 26 of the Indian Limitation Act. That section provides for the acquisition by peaceable enjoyment without interruption for a period of 20 years of a right of easement either in a water course or in any other matter, but if one is claiming a right given under that section then you have to prove that the right has been exercised for 20 years and that there has been no interruption of the right at any period further back than two years before the commencement of the suit. In other words, you have got to prove uninterrupted enjoyment ending not later than two years before the commencement of the suit and extending not less than 20 years back from that time. It was contended therefore that the interruption having taken place in 1912 the present suit must fail. In answer to that the plaintiffs rely upon the decision of their Lordships of the Judicial Committee in the case of *Rajrup Koer* v. *Abdul Hossein* (1). It was pointed out by Sir Montagu Smith in that case, in delivering the judgment of their Lordships, that the acquisition of the right of easement referred to in S. 26 of the Act is not the only method of acquiring a right of easement, and that the section is not exhaustive ; and if you have acquired a right of easement by any other method, such as by a grant either proved or implied, then S. 26 can have no operation to a suit brought to enforce such a grant. It is pointed out in the judgment there delivered that "the object of the statute was to make more easy the establishment of rights of this description (that is, rights of easement) by allowing an enjoyment of 20 years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements. But the statute is remedial and is neither prohibitory nor

(1) [1881] 6 Cal. 394=7 I. A. 240=7 C. L. R. 529=4 Sar. 199 (P. C.).

exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements" It then goes on and deals with the facts in the case and points out that there was abundant evidence, upon the facts found by the Courts, for presuming the existence of a grant at some distant period of time and having come to the conclusion that, on the facts of that case, a grant at some time or other, between 20 and 60 years earlier, may be presumed, it was decided that S. 26 of the Limitation Act had no application to the case. In dealing with the evidence from which such a grant may be presumed the judgment proceeds as follows : "This being an artificial pyre constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since, or at least down to the time of the obstruction complained of, by the plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought, to refer such a long enjoyment to a legal origin. and under the circumstances which have been indicated to presume a grant or an agreement between those who are owners of the plaintiff's mahal and the defendant's land by which the right was created. That being so, the plaintiff does not require the aid of the statute and his right, therefore, is not in any degree interfered with by the provision in the 27th section, upon which the Munsif decided. I ought to point out that the Act which Sir Montagu Smith in that judgment was referring to was the Limitation Act of 1871, S. 27 ; but that section is for all material purposes similar to S. 26 of the present Act. In the present case upon the evidence which I have referred to the features are not unlike the features in the case to which I have just referred. The learned Subordinate Judge found, accepting the evidence of long user from 1870 down to 1912, with a slight interruption in 1905, that the plaintiffs predecessors' and afterwards the plaintiffs' use of the water may be attributed to some implied grant made long ago, but some time after the partition in 1870. In my opinion, if there was evidence to support a grant made after the year 1870, the learned Judge acting upon the principle referred to in the case of *Rajrup Koer* v. *Abdul Hossein* (1) was perfectly justified in finding in favour of the plaintiffs and the only question which remains is ; Was there in this case any evidence which would justify the learned Judge in arriving at his conclusion ? There undoubtedly was evidence from which it might be found that there had been an uninterrupted user for a great number of years, certainly more than 20 years, before the defendants had any interest in the property at all ; and although it is unnecessary for us to say at what conclusion we should have arrived upon the evidence before the Court, and indeed we have not the evidence before us in second appeal, still it appears from what has been said by the learned Judge in his judgment that there was some evidence to support his finding. He is the ultimate judge of fact in such a case and I do not think that in the particular circumstances of this case we would be justified in saying that there was no evidence to support his finding. The result, in my opinion, is that the case is one concluded by the findings of fact, and this appeal must be dismissed with costs.

Macpherson, J.—I agree.

Appeal dismissed.

1925 PATNA 750

DAS AND ADAMI, JJ.

Suraj Narayan Choudhury— Defendant—Appellant.

v.

Saraswati Bahuria and *others*—Plaintiffs—Respondents.

Appeal No. 274 of 1921, Decided on 19th February 1925, from a decision of the Sub-J., of Darbhanga in original decree, D/- 25th June 1921.

(a) Bengal Rev. Sale Law, S. 7—Notice under—Day of payment according to settlement need not be mentioned.

It is necessary for the Collector to mention in the notice under S. 7 the last day fixed for payment of Government revenue under S. 3 of Act 11 of 1859. It is not necessary for him to state the day on which the Government revenue should have been paid according to the settlement and kistbandi of the mahal. Care should be had in avoiding confusion between the month for which the instalments are due according to the original settlement and kista-

bandi of mahal and the month in which the latest dates of payment are fixed. [P 752 C 2]

(b) *Bengal Rev. Sale Law, Ss. 2 and 3—Collector cannot sell before the expiry of period fixed.*

According to Ss. 2 and 3 Government Revenue is not in arrear until the first of the following month when the Government revenue should be paid according to the original kistbandi; and the Collector has no power to put up the estate for sale until the expiry of the latest date fixed for the payment after the estate is in arrear. [P 752 C 2]

(c) *Bengal Rev. Sale Law, S. 6—Arrears need not be mentioned.*

Section 6 does not require the Collector to mention the arrears for which the property is put up for sale. [P 752 C 2]

Fazal Ali, S. K. Mitter and *Hasan Jan* —for Appellant.

B. N. Mitter and *K. N. Moitra* — for Respondents.

Das, J.—The question for determination in this appeal is whether the sale of 5 annas 10 gandas in Ladugaon, Touzi No. 554 for arrears of Government revenue ought, in the circumstances of the case, to be set aside. The respondent was the proprietor of this share which was the residuary share in the Touzi. On the 6th June 1919 this residuary share was put up for sale and was purchased by the appellant. According to the notice under S. 6 of Act XI of 1859 the estate was in arrears for Rs. 45/7/3. The respondent unsuccessfully moved the Commissioner for setting aside the sale. The suit out of which the present appeal arises was thereupon instituted on the 6th February 1920 and on behalf of the plaintiff two specific points were argued in the Court below, first, that there was collusion and conspiracy between the plaintiff's patwari and the defendant second party and that her share was purchased by the defendant second party in the benami name of defendant first party as a result of that conspiracy, and, secondly, that the estate was not in arrears on the 6th of June 1919 and that accordingly the Collector had no jurisdiction to put up that share for sale on that date. On the first question the learned Subordinate Judge found against the plaintiff and I entirely agree with his decision on the point. As the question is a short one I will deal with it at once. The allegation in regard to the question of fraud and collusion is as follows: "When she (the plaintiff) learned of this namely the sale of her estate" she began to make inquries and came to know that the defendants second party having bribed the plaintiff's Patwari Khantar Das won him over to their side, did not let the arrears of revenue be paid, in spite of the fact that the patwari had money with him. They took recourse to fraudulent, illegal and surreptitious proceedings and having got the disputed share sold by auction on the 6th June 1919, for a grossly inadequate price, purchased the same in the name of their relative, defendant first party. In her evidence the plaintiff repeated her allegations made in the plaint. She said that defendant second party won over Khantar Das to his side by bribe and "hence he did not pay Government revenue and the property was sold." In cross-examination she said that her patwari had sufficient money with him to pay the Government revenue and that he acted in collusion with defendant second party. She was then asked the following questions :—

Q. How do you say that Khantar, in collusion with defendant 2nd party got the property to be sold ?

Her answer was as follows :—

"I always saw Khantar having friendly relation with defendant 2nd party and the property was sold through Khantar and I say so. There is no other reason for my saying so."

It seems to me that on this evidence the learned Judge was right in saying that the plaintiff has entirely failed to establish her case of fraud and collusion. It may be that she was defrauded by her patwari Khantar, but if that be so, she ought to proceed against Khantar. In order to succeed in this action she must establish collusion between her agent and the actual purchaser at the revenue sale ; and upon her own evidence it is impossible for the Court to give her any relief on the footing that there was fraud and collusion between her agent and the purchaser at the revenue sale.

But although the learned Subordinate Judge decided this particular issue in favour of the defendants, he actually set aside the revenue sale on the second ground urged before him on behalf of the plaintiff. As I have said before, the property was actually put up for sale on the 6th June 1919. The case of the plaintiff is that the property was sold for her default in paying the Chait kist and that the estate was not in arrears until the 1st of

Baisakh, corresponding to 7th of June. She accordingly contends that the sale held on the 6th of June 1919 was entirely without jurisdiction. If the plaintiff be right in her view that the property was sold for her default in paying the Chait kist, she is undoubtedly entitled to succeed in the action.

The sale having taken place, it is for the plaintiff to show that there was no jurisdiction in the Collector to put up the property for sale on the 6th of June 1919. The only evidence which she adduces in support of her case is a notice issued by the Collector under S.7 of Act XI of 1859 and the sale certificate issued in this case. The notice under S. 7 runs as follows :—

"Whereas a sum of Rs. 45-7-2 is due on account of arrears of revenue for the period ending the 21st Chait 1326, corresponding to the 28th March 1919, in respect of Touzi No. 554, having a Sadar jama of Rs. 167-8-3 lying within the jurisdiction of this Court for the realization of the same, the 6th of June 1919, is hereby fixed as the date of sale by auction. A notification is, therefore, issued in the name of Mt. Saroshwati Bhahuria for bidding all the tenants as well as the co sharers of the said mahal to pay to the defaulting proprietor their dues accruing after the last day fixed for payment of Government revenue on pain of not being allowed credit in their accounts with the purchaser in respect of the sum so paid."

In order to understand the significance of this notice, it is necessary to consider S. 7 of Act XI of 1859. That section provides as follows :—

Whenever an estate or share of an estate is notified for sale, as provided by S. 6 of this Act, the Collector or other officer as aforesaid shall affix a proclamation in the language of the district in his own office, and as soon thereafter as may be in the Munsiff's Courts and police thanas within which the estate or share of an estate, or any part of it, is situated, and also at the cutchery of the malguzar or the owner of the estate, or share of an estate, or at some conspicuous place upon the estate or share of an estate, forbidding the raiyats and under-raiyats to pay to the defaulting proprietor any rent which has fallen due after the day fixed for the last day of payment, on pain of not being entitled to credit in their accounts with the purchaser for any sums so paid.

It is necessary then for the Collector to mention in the notice under S. 7 the last day fixed for payment of Government revenue under S. 3 of Act XI of 1859. It is not necessary for him to state the day on which the Government revenue should have been paid according to the settlement and kistbandi of the mahal. As has been often pointed out, care should be had in avoiding confusion between the month for which the instalments are due according to the original settlement and kistbandi of mahal and the month in which the latest dates of payment are fixed. S. 2 of Act XI of 1859 defines an arrear of revenue and it provides that if the whole or a portion of a kist or instalment of any month of the era according to which the settlement and kistbandi of any mahal have been regulated be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue. S. 3, on the other hand, empowers the Board of Revenue to determine upon what dates all arrears of revenue and all demands which by the Regulations and Acts in force, are directed to be realized in the same manner as arrears of revenue, shall be paid up in each district under their jurisdiction in default of which payment the estate in arrears in those districts, except as hereinafter provided, shall be sold at public auction to the highest bidder. It is necessary to remember that Government revenue is not in arrear until the first of the following month when the Government revenue should be paid according to the original kistbandi; and the Collector has no power to put up the estate for sale until the expiry of the latest date fixed for the payment after the estate is in arrear. Now there can be no doubt as to this on the construction of S. 2 and S. 3 of the Revenue Sale Act. To take a concrete example, if revenue should be paid in the month of March according to the original kistbandi, then the estate is not in arrear until the first of April and the Collector has no jurisdiction to put up that estate for sale until the expiry of the next latest date fixed for payment after the first of April. The argument of the plaintiff in this case is that according to the original kistbandi the

revenue, to recover which the property was ultimately sold, should have been paid on the 28th of March. The estate was therefore not in arrear until the 1st April, and as the next latest date fixed for payment of the Government revenue was the 7th of June the Collector acted beyond jurisdiction in putting up the property for sale on the 6th June 1919. In my opinion there is no substance in the argument on the construction of the document upon which the plaintiff relies. As I have said, that was a notice issued under S. 7 of the Act; and, as it appears from S. 7, the date mentioned in that document is the latest date fixed for payment under S. 3 and not the date for payment of Government Revenue under S. 2 of the Act. That being so, it is clear that the estate was already in arrears and the latest date fixed for payment was the 28th of March. That being so, the Collector had complete jurisdiction to put up the property for sale on the 6th June.

The learned vakil also relies on the sale certificate Ex. G. No doubt it is stated there that the property was sold for arrears of revenue for March Kist of 1919; but the document was inartistically drawn, and there is nothing to indicate that the term "kist" used in that document is used in the sense in which that term is used in S. 2 of the Act. I may point out that the manner in which those notices are drawn up by the Collector gives us endless trouble and that care should be had in avoiding confusion between the month for which the instalments are due according to the original settlement and kistbandi of the mahal and the month in which the latest dates for payment are fixed under S. 3 of the Act. On the construction of Ex. B, I have no doubt at all that the latest date fixed for payment was the 28th of March and that the property was liable to be put up for sale on the 6th of June.

The only other point which has been argued before us is that there was an excess payment of 10 annas 7 pies per year ever since 1902 on behalf of the respondent and that accordingly there was in the hands of the Collector Rs. 11 in all, which he should have credited to the respondent in her account. Assuming that the argument of the learned vakil is right, it is to be pointed out that the arrear to recover which the property was sold was Rs. 45-7-3. The learned vakil states that in that case the notice issued under S. 6 was wrong in so far as that notice stated that the arrears were Rs. 45-7-3. But S. 6 does not require the Collector to mention the arrears for which the property is put up for sale.

In my opinion the decision of the learned Subordinate Judge on the second question which I have dealt with is erroneous. It follows that this appeal must be allowed and the judgment and decree of the learned Subordinate Judge must be set aside and the plaintiff's suit must be dismissed with costs in this Court and in the Court below.

Adami, J.—I agree.

Appeal allowed.

1925 PATNA 753

DAS, J.

Sarban Lal—Appellant.

v.

Bhuplal Missir and *others* — Respondents.

Appeal No. 831 of 1922, Decided on 18th December 1924, from a decision of the D. J., Bhagalpur, D/- 24th April 1922.

(a) *Record of Rights—Construction—Trees on tenant's rent free homestead land—Entry saying: "Half share of tenant and half share of malik"—Landlord cannot claim* falkar *rent.*

Falkar rent was claimed in respect of rent free homestead land of the defendants. Reliance was placed on an entry in the Record of Rights. The entry showed that there were a certain number of trees in the land and then the entry recorded as follows "Half share of the tenant and half share of the malik."

Held: that the entry merely recorded the fact that the landlord was entitled to half the share in the trees mentioned and that the tenant was entitled to the remaining half share in those trees. It did not purport to regulate the rights of the parties as to the fruits and it would be an extraordinary thing if the landlord were entitled to claim rent from the defendant's rent free land. The landlord was not entitled to claim *falkar* from the defendants. [P.754, C.1]

L. N. Singh—for Appellant.

Hareswar Prasad for *S. N. Sahay*—for Respondents.

Judgment.—The tenant is the appellant in a suit for *falkar* rent by the landlord. It is found by the lower appellate Court that the *falkar* rent is claimed in respect of rent free homestead land of

the defendants. The Courts below relying upon the entry in the record-of-rights have come to the conclusion that the tenant is liable to pay *falkar* rent.

The entry in the record-of-rights upon which reliance is placed shows that there are a certain number of trees in the land in respect of which rent is claimed :— Three mango trees, one bel tree, 10 palm trees, one tar tree, one guava tree, one plum tree and one lemon tree, and then the entry records as follows : " half share of the tenant and half-share of the malik." In my opinion the entry to which reference is made and upon which reliance has been placed in the judgments of the Courts below does not support the case of the plaintiff. It merely records the fact that the landlord is entitled to half the share in the trees mentioned and that the tenant is entitled to the remaining half-share in those trees. It does not purport to regulate the rights of the parties as to the fruits and it seems to me that it would be an extraordinary thing if the landlord were entitled to claim rent from the defendant's rent free land.

The entry in the record-of-rights being out of the way, the question arises whether I should remand the case to enable the Court to decide whether there is any evidence upon which the plaintiff's right may be found. Only one witness has been examined on behalf of the plaintiff and in order to save a remand I have read that evidence. His evidence does not establish that there is any right in the landlord to claim *falkar* rent from the tenant. It is quite true that he says that the defendant has paid *falkar* rent from 1324 to 1327 and that the danabandi papers were regularly prepared: but this portion of the evidence has been disbelieved by the Court below and I must wholly ignore it from my consideration. There is nothing in his evidence to suggest that there was any agreement between the parties by which *falkar* rent became payable by the tenant to the plaintiff. That being so, it is not necessary for me to remand the case to the Court below.

I would allow this appeal, set aside the judgments and decrees passed by the Courts below and dismiss the plaintiff's suit with costs in all the Courts.

Appeal allowed.

1925 PATNA 754

KULWANT SAHAY, J.

Bhagwan Singh and *another*—Defendants—Appellants.

v.

Lachuman Prasad Sahu and *another*—Plaintiffs—Respondents.

Second Appeal No. 1249 of 1921, Decided on 27th June 1923, from a decision of the Sub.-J. of Patna, D/- 20th June 1921.

Evidence Act, S. 35—Village Note—No presumption of correctness attaches.

A village note prepared by a Settlement Officer is only a piece of evidence and no presumption of correctness is attached to it. [P. 755, C. 1]

L. N. Singh and *S. N. Rai*—for Appellants.

S. M. Mullick and *N. K. Prasad*—for Respondents.

Facts.—This appeal arises out of a suit brought by the plaintiffs-respondents for ejectment of the defendants on the ground of their having purchased certain occupancy holdings which were not transferable by custom. The holdings originally belonged to the Defendant No. 4. He sold them to the Defendants 1 to 3 under three sale deeds, one dated the 13th July 1915, and the other two dated the 3rd August 1915. The plaintiffs' case is that there was no custom of transferability of occupancy holdings without the consent of the landlord and therefore their old tenant having abandoned the holdings the purchasers had no right to remain in possession and that the plaintiffs were entitled to eject them.

The defence taken was that there was a custom of transferability in the village and that the purchasers had been recognized by the plaintiffs as their tenants.

The trial Court came to the conclusion that the evidence adduced by the defendants established a custom of transferability in the village. As regards the question of recognition he did not come to a direct finding that the transferees had been recognized by the landlords, but he observed that having come to the finding that there was a custom of transferability of occupancy holdings it was not open to the landlords to refuse recognition.

There was an appeal against this decree to the Subordinate Judge, and he, on a consideration of the evidence in the

case came to the conclusion that the defendants failed to prove a custom of transferability of occupancy holdings in the village and also to prove that the transferees were recognized by the plaintiffs. He accordingly decreed the suit.

The defendants aspealed to the High Court.

Kulwant Sahay J.—[After stating facts as set out above, his Lordship proceeded.] It has been argued on their (Dfts.) behalf that the learned Subordinate Judge has not considered the cumulative effect of all the documents and the oral evidence on the question of custom. The learned Subordinate Judge has considered each one of the documents produced by the defendants to prove custom. There were nine instances of transfer upon which the defendants relied. The learned Subordinate Judge has considered each one of these instances and has held that they did not prove custom. He has also considered the oral evidence and he has come to the finding that the witnesses examined by the defendants did not prove the custom alleged by the defendants. It cannot be said that he has not taken the effect of the entire evidence into consideration. It has been argued that the village note prepared by the Settlement Officer and admitted in evidence in this case under S. 35 of the Evidence Act has not been given proper effect to by the learned Subordinate Judge. The village note says that "the custom of transfer of occupancy rights is admitted by the landlords. The landlord does not realize any salami from the transferee, but he realizes the arrears due from the holding from the transferee." This entry in the village note is only a piece of evidence. There is no presumption of correctness attached to it and as a piece of evidence it was considered by the learned Subordinate Judge who came to the conclusion, that standing alone, this village note was sufficient to establish the plea of the defendants. The learned Subordinate Judge was entitled to give such weight to this piece of evidence as in the circumstances of the case he considered proper, and this is not a ground in second appeal for disturbing the judgment of the learned Subordinate Judge. Having regard to the finding arrived at by the learned Subordinate Judge, in my opinion it is not open to the appellants to say that he has come to a wrong conclusion. His findings are based upon evidence on the record and cannot be disturbed. The appeal is dismissed with costs.

Appeal dismissed.

★ 1925 PATNA 755

MACPHERSON, J.

The Bengal Nagpur Railway Company, Ltd.—Petitioner.

v.

Shaikh Makbul—Opposite Party.

Criminal Rev. No. 327 of 1925, Decided on 13th August 1925.

★ (a) *Criminal P. C., S. 493—Representative of Railway appointed under S. 145 (2) of Railways Act, cannot insist to lead prosecution in presence of Public Prosecutor—Railways Act, S. 145 (2).*

Sec. 145 (2) only entitles a person authorised by the Agent of a railway to conduct prosecutions on behalf of the railway administration without the permission of the Magistrate, which would, except for the provision, be required under S. 495, Criminal P. C. Prima facie, neither S. 145 (2) of the Railways Act, nor S. 495 Criminal P. C., affects S. 493 of the latter enactment which deals with the right of appearance and precedonce of the Public Prosecutor before any Court in which any case of which he has charge, is under trial. Where the Public Prosecutor has charge of the prosecution the pleader instructed by a private person, including the agent of a railway administration, shall, it is enjoined, act under the directions of the Public Prosecutor. [P.758.C.1]

★ (b) *Railways Act, S. 145 (2)—Section contemplates private prosecutions.*

Sec. 145 (2) of the Railways Act, contemplates mainly if not exclusively, prosecutions for offences under that enactment, that is to say, private prosecutions undertaken by the railway administration in which the Public Prosecutor does not appear, as distinguished from public prosecutions undertaken or taken over by the State and in particular prosecutions under the Indian Penal Code. [P. 758, C. 1]

(c) *Criminal P. C., S. 209—Case triable by First Class Magistrate as well as by Sessions—Commitment is discretionary.*

Where a case is triable by Sessions as well as by First Class Magistrate, Magistrate has a discretion to commit the case or to try it himself. In view of the maximum sentence, however, which the Magistrate cannot inflict, a commitment would only be justifiable on very special grounds.

Where a Magistrate in his discretion considered that a commitment would result in an unwarrantable waste of public time without any advantage to anybody.

Held: that he exercised a sound discretion in rejecting the idea of commitment to the Sessions. [P 759 C 1]

(*d*) *Criminal P. C., S.* 539—*Affidavits.*

Affidavits sworn before Presidency Magistrates of Calcutta are not admissible in the Patna High Court. *Criminal Rev.* 255 *of* 1925, *Ref.* [P 760 C 1]

C. C. Das and *S. N. Chattarji*—for Petitioner.

Govt. Advocate—for the Crown.

Ali Imam and *G. P. Das*—for Opposite Party.

Macpherson, J.—This rule was issued on an application in revision by the Bengal Nagpur Railway Company, Limited, that the Court should direct that the representative of the applicant authorized by the agent of the railway under S. 145 (2) of the Indian Railways Act, 1890, has the right to conduct the prosecution in the case *Crown* v. *Sheikh Makbul* under S. 304 A of the Indian Penal Code which is pending in the Court of the Deputy Magistrate of Balasore and further should direct that the case be committed to the Sessions. At the hearing a further prayer has been made that if the case be not committed to the Sessions it be transferred to another district on the ground that the Magistrate is biassed against the applicant. All the prayers are opposed by the Crown and by the accused, but after perusing the report of the Deputy Magistrate and the affidavit on behalf of the accused and hearing the Government Advocate on behalf of the Crown, I have found it unnecessary to call upon Sir Ali Imam for the accused.

The circumstances are briefly these. About 5. 40 a. m. on the 9th November 1924 there was a collision at the southern level crossing of the Cuttack railway station on the Bengal Nagpur Railway between the Madras mail and a motor lorry driven by the accused which resulted in the death of two and severe injuries to one or more passengers of the motor lorry. About 6 a. m. a head constable gave information of the occurrence to the Sub-Inspector of railway police at Cuttack railway station and the latter proceeded under S. 174 (c) of the Code of Criminal Procedure to hold an inquest on the persons killed and came to the conclusion that the gateman of the level crossing, a servant of the applicant, was responsible for the accident. While the Sub-Inspector was conducting this inquiry, the station master at Cuttack sent an "all concerned" message somewhere about 8 a. m. and the Superintendent of Police thereafter handed his copy to the Sub-Inspector who treated it as a first information under S. 154 of the Code of Criminal Procedure. Eventually the police sent up the accused Sheikh Makbul, the driver of the lorry, and the trial began in the Court of a Deputy Magistrate of Cuttack. The prosecution case is that the accused forced his way on to the railway by opening the western gate and injured the gateman who opposed, while the defence is that the western gate was open and, therefore, the applicant is responsible for the accident. The applicant deputed a vakil from Howrah to conduct the prosecution, but though it is alleged by the applicant that the Magistrate permitted the vakil to conduct the prosecution, the allegation is incorrect, the fact being that the Public Prosecutor was in charge of the prosecution and conducted it, and under his direction the representative of the railway took some part in examining witnesses in the absence of the Public Prosecutor. Exception was taken by the accused to the participation of the Railway vakil on the score of unfairness in his methods. The Magistrate, however, filed the petition of accused, framed a charge under S. 304 A against him and called upon him to cross examine. The accused thereupon moved the Circuit Court then in Session at Cuttack for a transfer of the case to some other district and the applicant filed a similar petition on the ground that the master of accused holds a prominent position in Orissa. The applications were heard by Ross, J. who transferred the case to Balasore and further made the following order :

"It should be noted that the conduct of the prosecution should be in the hands of the Public Prosecutor. The petitioner has taken objection to the part taken in the trial by the pleaders representing the Railway Co. The learned Govt. Pleader however, has explained this by saying that he was in charge of the case under the orders of the District Magistrate and that the pleaders retained by the Railway Company were only acting under his instructions and during his absence. So long as this is clearly understood there is no objection to this being done

but the conduct of the prosecution should be in the hands of the Public Prosecutor."

The applicant makes it a grievance that this order was passed while the vakil of the railway was engaged in another Court, but it is clear from the applicant's petition that an attempt made on behalf of the applicant to induce the learned Judge in chambers to alter the order was unsuccessful.

When the trial began at Balasore the vakil for the applicant presented a formal authorization under S. 145 (2) of the Railways Act from the Agent of the railway to conduct the prosecution, but the Court refused to entertain his prayer to take the lead in view of the order of the High Court quoted above. Because of the representation made by the applicant in his application for transfer of the trial from Cuttack, the Crown had in order to secure impartiality, specially introduced a Public Prosecutor from outside Orissa to conduct the prosecution of the accused. This special Public Prosecutor conducted the case in accordance with his own ideas of what is just and proper, and while taking full advantage of assistance pressed upon him by the representatives of the railway refused to place himself unreservedly in their hands. In particular the Public Prosecutor opposed a commitment to the Sessions and declined to put questions which had only a bearing on the civil liability of the applicant in suits instituted against the latter by passengers travelling in the lorry driven by accused, a state of affairs of which the applicant unjustifiably makes a grievance.

The prosecution having examined thirty-one witnesses, the trying Magistrate expressed an intention of committing the case to the Sessions. The accused, however, claimed the right to cross-examine all the prosecution witnesses before commitment and thereupon the Magistrate, considering that, if cross-examination were to take place in his Court, it would be useless to commit, gave up the idea and framed a charge under S. 304-A for trial in his own Court.

He also declined to accede to a prayer on behalf of the applicant that an additional charge be framed under S. 124 of the Railways Act. Obviously a charge under S. 124, which punishes with fine up to Rs. 50 for the opening of a railway gate in certain circumstances was unnecessary in law so that the point has no significance and need not be further discussed. At the stage at which applicant obtained the present rule the cross-examination which had extended to nine or ten full days had just been concluded and the defence having declined to adduce evidence the case had been fixed for argument prior to judgment.

Mr. C. C. Das, who appears for the applicant, claims an order in his favour on substantially the following three grounds:

(1) That the trying Magistrate has illegally withheld permission to conduct the prosecution from the vakil appointed under S. 145 (2) of the Railways Act ;

(2) that the trying Magistrate has exhibited bias against the applicant ; and

(3) That though the offence under S. 304-A of the Indian Penal Code is triable by a Magistrate as well as by the Court of Sessions, a higher punishment may be given by the latter.

The third submission has no weight. The maximum term of imprisonment for the offence is within the powers of punishment of the Magistrate, and if his powers in respect of fine are limited to Rs. 1,000 while those of the Sessions Court are unlimited, it is clear that in the circumstances of the case an appropriate sentence of fine would not exceed Rupees 1,000.

As regards the first point, it is clear that in view of the order of Ross, J., it was not open to the Magistrate to eliminate the Public Prosecutor and entrust the conduct of the case to the representative of the applicant. Mr. Das would draw a distinction between the vakalatnama filed by the vakil for the railway in the course of the proceedings at Cuttack, which was before Ross, J., and the subsequent mandate of the Agent under S. 145 (2) of the Railways Act. But in fact no distinction exists except that the latter is more formal. In the vakalatnama the vakil is, in so many words, authorized by the Agent of the Bengal-Nagpur Railway Company to conduct the prosecution in the case against Sheikh Makbul, accused, under S. 304-A of the Indian Penal Code. The circumstances had in fact not altered and it was not open to the Magistrate to ignore the orders passed by the High Court in the case.

Accordingly the question of the position of a vakil appointed by the Agent of

the Bengal-Nagpur Railway Company under S. 145 (2) to conduct the prosecution in this case in preference to the Public Prosecutor does not properly arise at this stage ; the point having already been decided on the same materials by this Court against the contention of the Railway Company, it being explicitly directed that the conduct of the prosecution shall be in the hands of the Public Prosecutor. The first point, therefore, fails. It is not, therefore, necessary to express a final opinion on the subject, but one may say that the indications, are strongly against the claim in that regard of the applicant. S. 145 (2) only entitles a person authorized by the Agent of a railway to conduct prosecution on behalf of the railway administration ; to do so without the permission of the Magistrate, which would, except for the provision, be required under S. 495 of the Code of Criminal Procedure. Prima facie, neither S. 145 (2) of the Railways Act nor S. 495 of the Code of Criminal Procedure affects S. 493 of the latter enactment which deals with the right of appearance and precedence of the Public Prosecutor before any Court in which any case of which he has charge is under trial. The Public Prosecutor has charge of the prosecution under discussion and the pleader instructed by a private person, including the Agent of a railway administration, to prosecute a case of which the Public Prosecutor is in charge shall, it is enjoined, act under the directions of the Public Prosecutor. The entire propriety of such a provision, which could hardly be better demonstrated than in the present instance, is in favour of the interpretation. Then again. I am unable, as at present advised, to accept the view that there is no force in the argument advanced by the learned Government Advocate that S. 145 (2), of the Railways Act contemplates mainly, if not exclusively, prosecutions for offences under that enactment, that is to say, private prosecutions undertaken by the railway administration in which the Public Prosecutor does not appear as distinguished from public prosecutions undertaken or taken over by the State and in particular prosecutions, such as the present, under the Indian Penal Code.

Before dealing with the allegation of bias on the part of the Magistrate, it is expedient to indicate more fully than has been done above, what the case for the prosecution and the case for the defence is. At the level crossing there are drop-gates and the western and the eastern gates are about 134 feet apart. Two lines of railway are within the crossing, the westmost being a goods line passing close to the western gate and the other being the main line passing close to the eastern gate. The prosecution case is that some one opened the western gate which had been closed by the gateman because the Madras mail was about to pass, and the accused drove his lorry towards the eastern gate knocking down the gateman who tried to stop him. The defence case is that the western gate was standing open and that the accused drove his lorry through it, it being the rule that the crossing is open unless both gates are closed. Obviously, therefore, the railway is at least as deeply concerned with its prospective civil liability, if the gate was in fact open, as with the criminal liability of the accused, and the point of view of its representative is materially different from that of a Public Prosecutor and from that of a judge presiding in the Court. It is clear that the former addressed himself amid considerable difficulties created by the representative of the applicant to securing impartial justice, therein acting in accordance with the best traditions of his office. It is right in the circumstances to quote here with approval the view of the Magistrate : " He has conducted the case very ably and impartially, and with perfect fairness to both parties. He has not identified himself wholly with the railway version of the case, and so the railway pleaders are dissatisfied with him. The railway company is an interested party in this case and so he should not ally himself with them."

The allegation of bias on which a commitment to the Sessions or a transfer to another Court was claimed, was supported by four instances, two of which appear in each of the two petitions of the applicant. They are : (a) that the Magistrate did not grant the conduct of the prosecution to the applicant's representative ; (2) that the case was not committed to the Sessions in accordance with the original intention of the Magistrate ; (3) that, on 25th June the Magistrate asked the police Sub-Inspector, before he went into the witness-box for cross-examination : "Why did you not send up the gateman ?" and (4) that on the 26th June, when the representative

of the railway was moving a petition for the production of a letter alleged to have been sent on the day of occurrence by the Assistant Station Master to the Civil Surgeon of Cuttack requesting the latter to examine the injuries of the gateman, the Magistrate made a remark which showed that he was prejudiced against the applicant and such as, it is suggested, he would not, if he had not been influenced by high official opinion, have expressed when the matter was sub-judice.

The first instance has already been discussed and it has been determined that the Magistrate's action was entirely proper, the order of the High Court on the point being conclusive in this trial. As regards the second instance, the Magistrate had a discretion to commit the case or to try it himself. In view of the maximum sentence, however, a commitment would only be justifiable on very special grounds, and it is obvious that if the Magistrate made any mistake, it was in at all contemplating commitment. When the accused expressed the intention of cross-examining all the prosecution witnesses, the Court could not but see that a commitment would result in an unwarrantable waste of public time without any advantage to anybody, and rightly reconsidering the matter exercised a sound discretion in rejecting the idea of commitment to the Sessions. It must also be remembered that the Public Prosecutor argued against commitment. Even if the Magistrate had not exercised a sound discretion in changing his mind, it could not fairly be contended that the order, though unfavourable to the applicant, exhibits even the faintest trace of bias. It was entirely proper not to commit the case to the Sessions.

As to the third instance cited, there was nothing in the casual enquiry of the Magistrate that was not, in thecircumstances, entirely reasonable. The Sub-Inspector who held the inquest had formed the opinion that the western gate was not closed as asserted by the prosecution, but was open, as stated by the defence, and the Court would have failed in its duty if it did not obtain from the police officer who had recorded such an opinion, the reason for not placing on trial the gateman, who, if the police officer's opinion was correct, must be responsible for the occurrence. The Magistrate did not give expression to any opinion.

I accept the version of the Magistrate as to the fourth incident. It appears that the representative of the applicant was pressing for the production of a letter on the ground that it would show how the gateman received his injuries. The Magistrate pointed out that the letter could not be legally taken in evidence in proof of the manner in which the gateman had received his injuries and in the course of the discussion remarked: "Supposing it were written in that letter that the gateman had come by his injuries by being knocked down by accused's lorry, do you think I will have to implicitly believe it? When such a serious railway accident takes place, your railway people can write anything and I cannot take it as true without proof." Apart from other considerations, I fail to see how this remark indicates bias or the influence of high official opinion (as to the latter there is not the slightest trace of anything to support it, and it is wholly groundless and should not have been asserted). The Magistrate only points out that the mere fact that a railway subordinate has written somethingwill not make it evidence or show it to be true.

Moreover, the facts clearly show that in calling after great delay and towards the end of the cross-examination for the letter, and describing it as an important document, the representatives of the applicant then sought to make much out of nothing at all, as indeed is sought now. No mention was made of the letter in examination in chief. In cross-examination the gateman says he carried no letter and the Assistant Station Master says he did not even see the gateman during that day except shortly after the accident. The first mention is in cross-examination of the Station Master who merely says that he asked the Assistant Station Master to write such a letter. The Assistant Surgeon cannot recall it. The Civil Surgeon, though wired to, was unable to produce it and the case of the Crown is that it does not exist, and that in any case its evidentiary value would be slight. There is in fact medical evidence as to the injury to the gateman, and the Assistant Station Master has himself

been examined, so that the only value of the letter would be to show that his deposition is in accordance with his statement in the letter. The Magistrate is manifestly right in his view that an interested party like the applicant, who, as all the indications show, was pressing the case in a manner not consonant with the impartial conduct of criminal cases by the Crown or a public authority, who should comply strictly with the law of evidence and procedure, more especially in a matter where the vakil for the applicant was pursuing a course wherein he had not the support of the Public Prosecutor or under whose directions the statute enjoins that he shall act. Mr. C. C. Das, indeed, concedes that the letter is practically valueless as evidence. What he objects to is the remark of the Magistrate. But the remark in my judgment does not contain any indication whatever of prejudice or amount to anything more than a demand that the prosecution should prove its case to the satisfaction of the Magistrate by admissible evidence. A similar rebuff to an unreasonable demand by the prosecution, especially when as in this case unreasonably urged or at a later stage, is not infrequently and with justice administered to a public prosecutor without implying any prejudice on the part of the Judge.

In my opinion bias and prejudice have not only not been proved but have been abundantly disproved. The trial appears to have been properly conducted by the Public Prosecutor and by the Magistrate, any difficulties arising being attributable to unseemly ardour on the part of the representatives of the applicant.

Accordingly no ground has been established on the merits for granting any of the prayers made by the applicant.

The rule is accordingly discharged and the trial should proceed and the case be disposed of without any avoidable delay.

I add that I have dealt with the case as if it had come regularly before the Court, but it is to be observed that the affidavits in the case being sworn before Presidency Magistrates of Calcutta are not admissible in this Court under the interpretation, in *Ramchandra Madak* v. *King-Emperor* (1), of S. 539 of the Code of Criminal Procedure, and that the application might also have been rejected on that ground.

Rule discharged.

(1) Criminal Revision No. 255 of 1925.

★ 1925 PATNA 760

ROSS, J.

Balaram Manjhi and *others*—Plaintiffs—Appellants.

v.

Jagannath Manjhi and *others*—Defendants—Respondents.

Appeal No. 38 of 1923, Decided on 24th July 1925, from an Appellate decree of the Sub-J. of Purulia, D/- 30th November 1922.

★ (*a*) *Civil P. C., S.* 151 *and O.* 41, *R.* 23—*Order of remand affecting the whole suit, is an order under S.* 151 *and so not appealable—Civil P. C., O.* 41, *R.* 23.

Where there was no question of any preliminary point and the order of remand affected the whole decision of the whole suit:

Held: that the remand must be taken to have been made under inherent powers and no appeal lies. 3 *P. L. J.* 253, *Foll.* [P.761,C.1.]

(*b*) *Civil P. C., S.* 115—*Subordinate Court ordering partition—Omission of one of the properties—Parties should draw the attention of trial Court to the matter and no revision lies.*

Where a partition was to be a partition of the whole property and by oversight or for any other reason one of the properties was left unpartitioned:

Held: that it was open to the parties to draw the attention of the trial Court to the omission and to get a direction from it in the matter and no revision lies. [P.761 C.2.]

Achalendra Nath Das—for the Appellants.

Subal Chandra Mazumdar—for the Respondents.

Ross, J.—This is an appeal against an order of the Additional Subordinate Judge of Purulia reversing a decision of the Munsiff of Raghunathpur and remanding a partition suit for allotment of *hasil* land and *began* according to the principles laid down in the judgment.

A preliminary objection is taken on behalf of the respondents that this is not a remand under O. 41, R. 23 nor under R. 25: it is remand under the inherent power of the Court and no appeal lies: *Raghunandan Singh* v. *Jadunandan*

Singh (1). On behalf of the appellants it is contended that the order is a remand under O. 41, R. 23. It seems to me plain that this is not a case of a suit being disposed of upon a preliminary point. The order of remand goes on to the whole principle on which the partition is to be made and there is no question of any preliminary point; it affects the whole decision of the whole suit. The remand must therefore be taken to have been made under the inherent powers and no appeal lies.

I am then asked by the appellants to treat the appeal as an application in revision. The question then arises as to whether there is any point of jurisdiction. The contention on behalf of the appellants is that the parties having agreed to the allotment as made by the Commissioner, the Subordinate Judge had no jurisdiction to alter it; and, secondly, that the Subordinate Judge had no jurisdiction to lay down a principle of partition which is against the settled law. Reference was made to a passage in the Commissioner's report where he says; "Both the parties requested me to divide that chak according to their respective shares keeping them in possession of their lands as far as practicable and accordingly I divide the chak keeping the parties in possession of their lands as far as possible." Evidently the partition made by the Commissioner did not meet the wishes of the parties because it was objected to when the report came before the Munsiff. The objection of the defendant was that as he had reclaimed more of the danga land he ought to be left in possession of it. It cannot be therefore said, with any show of reason, that the allotment made by the Commissioner was agreed to by the parties. All that the parties agreed to was that they should be left in possession as far as possible, but from the manner in which this agreement was applied in practice there is no reason to suppose that the parties agreed to the allotment because in fact objection was taken to the partition actually made.

With regard to the principle of law, reference was made on behalf of the appellants to the decision of the Judicial Committee in *The Midnapur Zamindary Co.* v. *Naresh Narain* (2), where it was laid down that if a cosharer purchases any jote right in the lands held in common by the cosharers such a purchase will be held to have been a purchase for the benefit of all the cosharers, and it is contended that the view that the Munsiff took was right, namely, that if the defendant expended money, on reclaiming the danga land which was held in common tenancy, he did so at his own risk and that the reclamation would be for the benefit of the joint property. On the other hand there is a decision reported in *Kallian Banerjee* v. *Madhusudan Banerjee* (3), where, in precisely similar circumstances to the present, the principle adopted by the learned Subordinate Judge was laid down by the Calcutta High Court. In any case if the learned Subordinate Judge was in error in this part of his judgment it is merely an error of law and does not affect his jurisdiction.

It was further contended that he had acted without jurisdiction in directing a partition of the Bagan because the Bagan was not partitioned by the Commissioner and no objection was taken on this score before the Munsiff. It seems true that this objection was not taken before the Munsiff; but the partition was to be a partition of the whole property and, if by oversight or for any other reason one of the properties was left unpartitioned I think that it was open to the parties to draw the attention of the learned Subordinate Judge to the omission and to get a direction from him in the matter.

In my opinion this appeal as a second appeal does not lie and must be dismissed with costs; nor can it succeed as an application in revision.

Appeal dismissed.

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(1) [1918] 3 P. L. J. 253=43 I. C. 959=4 P. L. W. 450.

(2) 1924 P. C. 144=51 Cal. 631=51 I. A. 293=47 M. L. J. 23=26 B. L. R. 651=35 M. L. T. 169=23 A. L. J. 76=5 L. R. P. C. 137=29 C. W. N. 34=20 M. L. W. 770=(1924) M. W. N. 723 (P. C.).

(3) 8 C. L. R. 259.

★ 1925 PATNA 762

JWALA PRASAD, J.

Udit Singh and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 726 of 1924, Decided on 22nd January 1925 from an order of the Dt. Magistrate, D/- 3rd December 1924.

(a) *Penal Code, S. 97—Injury caused to complainant while rescuing cattle led by accused to cattle pound—Accused have the right of private defence.*

Some cattle belonging to the complainant were doing damage to the accused's field. They consequently seized them and were taking them to the pound. In the meantime the complainant and his men came and began to rescue the cattle by the use of force. The accused, however, succeeded in taking some of the cattle to the pound. But the accused's party inflicted some injuries on the party of the complainant.

Held: that the act of the complainant in rescuing the cattle was unlawful and therefore the accused were protected by their right of private defence. [P 743 C 1 & 2]

★ (b) *Penal Code, S. 97—Question of exceeding right does not always depend on injuries caused.*

The question of exceeding the right of private defence does not always depend upon the amount of injuries caused. [P 764 C 2]

S. P. Varma and *Sham Bahadur*—for Petitioner.

Judgment.—The petitioners, seven in number have been convicted of assault. Petitioners Udit Singh, Narain Singh and Khiro Singh have been convicted under S. 325, Indian Penal Code, and sentenced to imprisonment till the rising of the Court and to pay a fine of Rs. 100 each. The remaining petitioners, Dipan Singh, Baldeo Singh, Gursahai Singh and Daso Singh have been, convicted under S. 323, Indian Penal Code, and sentenced to pay a fine of Rs. 50 each. Two other persons Rameshwar Lall, and Ram Sarup Singh were also put on their trial along with the petitioners. They have however, been acquitted.

Rameshwar Lall is the patwari of the malik; Ram Sarup Singh is his gomashta and Udit Singh, Narain Singh and Dipan Singh are *barahils* of the malik. The accused are residents of a village called Handia and the complainant, Chhotoo, is a resident of village Ekowna. The tkhudkasht lands of village Handia are just after the lands of village Ekowna. The complainant is the son of Bidu Gope, Mithu is his brother. They are residents of village Ekowna. The case for the prosecution is that on the day of occurrence the abovenamed *barahils* of the malik namely, petitioners Narain Singh, Udit Singh and Dipan Singh, went to the complainant's house and asked him to supply five seers of milk and one pot of curds for the Tilsankranti festival. The complainant declined on the ground that he had no milk cow. The accused began to abuse the complainant who returned their abuse. The accused went away thereatening him, and in the evening they came in the company of other accused in a mob of about 125 persons in number, all armed with *lathis*, to the complainant's *khalihan* where he was with his brother Mithu and his father Bidu Gope. Patwari Rameshwar Lall and gomashta Ram Sarup Singh ordered his companions to assault the complainant and his men, to remove paddy and to impound his cattle. Thereupon Khiro Singh and Narain Singh assaulted Bidu Gope on his palms causing fracture of left ring finger and right thumb while Dipan Singh assaulted on his head and Udit Singh on his left leg. Baldeo Singh, Daso Singh, Gursahai and Khiro Singh assaulted Mithu Gope. The complainant fled to a distance of four or five bamboos out of fear. The accused then removed sixty maunds of paddy worth about Rs. 90 and drove away 18 heads of cattle from the *bathan* and impounded them in the Nardiganj pound. The complainant afterwards got them releasd on payment of Rs. 13-8-0.

The defence story is that the complainant and his witnesses were grazing their buffaloes about 40 in number in the khudkasht land of the malik of Handia and the jagir land of Paro Singh when Janki Kahar, Gokhal Singh and the petitioners Khiro Singh and Dipan Singh seized them and were driving them to the pound when the complainant and his men came armed with lathis and forcibly rescued the cattle after assaulting Janki Kahar and Khiro Singh. That was the subject of a counter-case.

The learned Magistrate held that the prosecution failed to establish the motive alleged by the complainant for the commission of the offence by the accused. The motive alleged was the refusal on the part of the complainant to supply

milk and curds to the accused. The Magistrate has held upon excellent reasons given by him that the motive alleged is "absurd;" on the other hand, the Magistrate has accepted the origin of the occurrence as stated by the accused. He says: "The village Handia is at a distance of about half a mile from Ekowna and the khudkasht land of the proprietor of Handia begins after the land of Ekowna. It is also admitted by the Prosecution Witness No. 5 that the cattle of Ekowna go to Handia for grazing. It is, therefore, no wonder that the cattle of the complainant and his witnesses were seized by the accused for grazing the crop and that the complainant and his witnesses in the attmept to rescue the cattle received injuries, but being overpowered the accused succeeded in impounding 18 heads of cattle." "The counter-complaint (of the defence) was filed quite in time, whereas this complaint was filed in the last hour at about 5 p. m. after taking time to concoct the motive . . . I have no reason to disbelieve the defence story." The Magistrate disbelieved the case of the prosecution that the cattle of the complainant were removed from his Bathan and that sixty maunds of paddy was also removed by the accused. The Magistrate says: "I am not prepared to believe this part of the story." He accepts the defence case that "the complainant and his witnesses were grazing their buffaloes in the khudkasht field of Handia and the accused Khiro Singh and others began to drive the cattle to pound when the complainant and his men raised an alarm and forcibly rescued about 22 heads of cattle after assaulting Khiro Singh and Janki Kahar who, however, succeeded in impounding 18 heads of cattle." Upon these findings the Magistrate acquitted the accused of the charges under Ss. 147, Indian Penal Code, of rioting and 379, Indian Penal Code, of theft. After this, the only charge against the accused was of assault under Ss. 325 and 323, Indian Penal Code.

The accused pleaded right of defence with respect to this part of the prosecution case. The Magistrate has refused to give the accused the right of private defence upon the ground that the cattle in question belonged to the complainant and in trying to rescue them from the accused who had seized them while trespassing in their field and were taking them to the pound, the complainant was not committing any theft, robbery or mischief whereas S. 97, Indian Penal Code, gives right of private defence to defend a property only against an offence following the definition of theft, robbery, mischief or criminal trespass. In the present case the Magistrate says that the cattle belonged to the complainant and, therefore, there could be no theft and hence no right of private defence against the rescue of the same accrued to the accused. Another reason why the Magistrate refused the right of private defence to the accused is stated by him to be that there was time to have recourse to the protection of public authorities and consequently there was no occasion for the exercise of right of private defence. This view of the Magistrate is entirely wrong. After having taken this view the Magistrate held that the accused were not justified in causing severe injuries to Bidu Gope and simple hurt to Mithu Gope. The view taken by the Magistrate will not stand a critical examination of it. The learned Sessions Judge has lightly treated this point and has not entered into any discussion. He simply says in his judgment: "The decision of the lower Court on the question of the right of private defence is, in my opinion, sound and in view of this I uphold the conviction."

Upon the findings of the Magistrate the accused were exercising the right given to them under S. 10 of the Cattle Trespass Act (I of 1871). According to his finding the complainant and his men were grazing their cattle upon the land of the accused and were doing damage thereto. The accused were, therefore, interested in seizing the cattle and taking them to the pound. S. 24 of the Act forbids resistance or opposition to the seizure of cattle liable to be seized under the Act. Therefore, the complainant and his men were not entitled to oppose the seizure of the cattle when they were being taken to the pound by the accused. Therefore, the accused were lawfully in possession of the property under the Cattle Trespass Act when they were taking them to the pound. The fact that the accused were not the owners of the property does not affect the question, for Illustrations (j) and (k) to S. 378 will show that removal from the lawful possession of a person is theft even by the owner of the property if the removal

with dishonest intention. In the present case, as observed above the accused were lawfully in possession of the property ; they had not only right but were bound to take the cattle to the pound within 24 hours of the seizure, The complainant and his men in trying to rescue the cattle were trying to remove them from the lawful possession of the accused with the dishonest motive of causing wrongful gain to themselves; at least with respect to the fee which they would have to pay in getting the cattle released from the pound. As a matter of fact the accused had seized 40 heads of cattle ; the complainants rescued 22 heads and thus saved to themselves the fee for those cattle, and got a release of the remaining 18 heads of cattle on payment of Rs. 13-8 only. In the present case it is absurd to say that there was time to have recourse to public authorities. The cattle were doing damage to the accused's field, and they consequently seized them and were taking them to the pound. In the meantime the complainant and his men came and began to rescue the cattle. The accused, however, succeeded in taking some of the cattle to the pound. Where was the time to go to the public authorities ? The suggestion of the Magistrate is that the accused should have left the cattle and allowed them to be rescued, and then they ought to have lodged a complaint against the complainant for illegal rescue. This is no doubt a very good suggestion of the principle of non-violence to be exercised on the part of the accused, but they had a right to commit violence and to protect the cattle from being illegally rescued and also to protect their own person from the attacks of the complainant and his party; and I wonder if the exercise of the principle of non-violence would have saved the accused in the situation in which they were placed and I am afraid if they had not stood up boldly and fought against the unlawful act of the complainant they would have received severer injuries than what they received. Suppose for the sake of argument that the rescue by the complainant of the cattle seized by the accused was not an act of theft. Still the question remains that when the complainant and his men came and actually rescued about 22 heads of cattle, more than half the number, they could not do so without using violence and if they used violence the accused were entitled to return the blows in order to defend themselves from the attacks of the complainant and his men. The question of exceeding the right of private defence does not always depend upon the amount of injuries caused. Both sides were admittedly injured in the present case, although the injuries on the person of the men of the complainant were more in number and severer in nature, still the accused having the right of private defence were justified in causing more injuries to the party of the complainant than they themselves received for if they had not done so, they would not have been able to save themselves and the 18 heads of cattle which they successfully took to the pound. This aspect of the case has not been looked into by the Courts below. Rescue of cattle is a very serious thing and must be put an end to, for the owners of fields cannot tolerate the cattle of the other persons trespassing upon their lands. Consequently the law has given them power to seize the cattle and put them into pound. Forcible rescue has also been held to be illegal. Therefore the complainant and his men were aggressors in the present case as held by the Court below and they must thank themselves if in their illegal attempt to rescue the cattle they received injuries on their person. There is nothing to show, and the facts found are not clear, that the accused inflicted more injuries than were absolutely necessary to defend themselves and the cattle in their possession.

The result is that the application is allowed, the convictions and the sentences are set aside, and the fine, if realized, should be refunded.

Application allowed.

★★ 1925 PATNA 765

DAWSON-MILLER, C. J., AND FOSTER, J.

Tofa Lal Das—Plaintiff—Appellant.

v.

Syed Moinuddin Mirza and *others*—Defendants—Respondents.

First Appeal No. 208 of 1922, Decided on 19th January 1925, from a decision of the Sub.-J., Purnea, D/- 31st May 1922.

★ (a) *Lim. Act, Articles—Two articles applying—One article general and the other special—Latter should be preferred.*

Where the relief claimed is covered by two articles of the schedule, one being of general import and the other of special import, applying to the particular facts of any case, the latter shall govern. [P. 767 C. 1]

★★ (b) *Lim. Act, Arts. 96 and 62—Money paid under mistake—Suit to recover is governed by Art. 96 and not by Art. 62.*

Article 96 should be preferred to Art. 62 in a suit to recover money paid by the plaintiff to the defendant by mistake in excess of the amount legally due, 431 *Mad.* 230, *Ref*; 12 *Cal.* 533, *Discussed.* In cases where the relief is based on mistake the period of limitation should run from the time when the mistake was first discovered even if some other article in the Limitation Act should be wide enough to include the cause of action. Otherwise in many cases the relief would be barred before the plaintiff could possibly be aware that he had a right to sue. The remedy in such a case as the present is provided by S. 72 of the Contract Act which enacts that a person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it, and it is reasonable to suppose that it was not the intention of the legislature in passing the Limitation Act to take away that remedy in the case of money paid under mistake merely because the mistake remained undiscovered for three years from the date of payment. [P 768 C. 1]

★ (c) *Lim. Act, Articles—Applicability—Two or more articles applying—One providing longer period should be preferred.*

In giving effect to a statute of limitation if two articles limiting the period for bringing the suit are wide enough to include the same cause of action, and neither of them can be said to apply more specifically than the other that which keeps alive rather than that which bars the right to sue should generally, and apart from other equitable consideration, be preferred. [P. 768 C. 2]

(d) *Civil P. C., S. 151—Order declaring appeals are analogous, does not result in their consolidation—Practice—Consolidation of suits.*

The effect of an order declaring that appeals are analogous is merely that they shall be heard together. It has not the effect of consolidation and an order passed in one does not govern the other unless expressly stated.

★ (e) *Civil P. C., O. 22, R. 4—One plaintiff dying during suit—Plaintiff misled by Court's order and hence not applying to bring proper legal representatives on record—Plaintiff should not be made to suffer—Lim. Act, S. 5.*

Where, on the death of the executor of one of two defendants, during the pendency of suit, plaintiff applied for substitution of heirs of defendant on the record and the Court without investigating under R. 5 whether the heirs were proper representatives directed the suit to proceed but subsequently at the appellate stage it transpired that the proper legal representative was the next executor and not heir of defendant and therefore the suit was contended to have abated.

Held: that plaintiff was misled by the order of Court allowing suit to proceed and should be entitled under S. 5 of the Limitation Act to have the abatement, if there was an abatement, set aside. [P. 770 C. 2]

L. N. Singh and *S. N. Hussain*—for Appellant.

K. Hussain—for Respondents.

Dawson-Miller, C. J.—The plaintiff, who is the appellant in this appeal, was the patnidar of a share in two villages comprising part of the Khagra estate in the Purnea district of this province, and owned by two brothers, Syed Mohiuddin Mirza and Syed Moinuddin Mirza each of whom owned a separate 8 annas proprietary share. Shortly before July 1921 when the present suit was instituted Syed Mohiuddin died and the persons impleaded as defendants in the suit are the surviving brothers Syed Moinuddin and the executor, the widow and the daughter of the deceased brother.

The suit was instituted to recover back with interest a sum of Rs. 5,312-8-0 paid by the plaintiff to his landlords as cess in excess of the amount for which he was legally liable for the mulki years 1318 to 1325 and half of the year 1326, which comprise a period between the first half of 1910 and the second half of 1918 A. D.

The patni taluk which the plaintiff held was assessed in the Collectorate rolls in or just before the year 1910 at a valuation of Rs. 7,714 to take effect from the beginning of the year 1318 M. S. As the cess demanded by the landlords and paid by the plaintiff had been calculated on a valuation of Rs. 17,714 the annual cess paid to the landlords based upon the larger valuation was Rs. 974-1-6, whereas the proper amount payable on the actual valuation was Rs. 349-1-6. The excess payment therefore was Rs. 625 for the first eight years and half of that amount for the last year by which time the mistake had been discovered.

The plaintiff alleged in his plaint and proved by his evidence that the larger sum was represented to him as the correct valuation by the landlords' muharrir Manmohan Das who produced a copy of the cess valuation roll showing the valuation as Rs. 17,714 and that he paid on that valuation. He also deposed that he did not himself receive from the Collector a copy of the valuation roll. It appears from the evidence given by the plaintiff and his son that he acted upon the representation made on behalf of the landlords and had no suspicion that the valuation was not correct. In his plaint he further alleged that the landlords' valuation roll had been fraudulently altered so as to make the valuation appear to be Rs. 17,714 instead of Rs. 7,714, and that they fraudulently induced the plaintiff to pay on that valuation. A criminal proceeding was in fact instituted before the District Magistrate against the manager of the Khagra estate, Mr. P. W. Duff, in 1919 but as no criminal offence against him could be proved, the proceedings were withdrawn and in the present suit the charge of fraud has not been persisted in. It is the fact, however, that the defendants' copy of the cess valuation roll shows the valuation as Rs. 17,714 and not Rs. 7,714 as appears in the Collectorate rolls. It should also be mentioned that in proceedings before the Collector on the 13th June 1919, at the instance of the plaintiff, the Collector passed orders that the Khagra estate should be informed that the correct valuation of the plaintiff's tenure in the cess roll was Rs. 7,714 and not Rs. 17,714 as appeared in the landlord's copy.

The defendants in their written statement denied the charges of fraud and maintained that the correct valuation was the larger figure and not the smaller and that the cess was payable upon a valuation of Rs. 17,714. They further pleaded that the suit was barred by limitation.

The learned Subordinate Judge of Purnea before whom the case came for trial found that the correct valuation was that pleaded by the plaintiff. As the charge of fraud had been abandoned he found that the charge had not been substantiated. On the question of limitation he found that Art. 62 of the Limitation Act, as contended by the defendants, was applicable and that Art. 96, as contended by the plaintiff, did not govern the case and that the claim was barred in respect of any cess paid more than three years before the commencement of the suit. It followed therefore that the only sum recoverable was the sum of Rs. 312-8-0 paid on the 19th November 1918, the claim for the earlier payments made more than three years before the commencement of the suit being barred by limitation. He accordingly passed a decree for Rs. 312-8-0 together with interest at 12 per cent. per annum from the date of payment to the date of the suit amounting to Rs. 99-8-0 making Rs. 412-0-0 in all and allowed 6 per cent. per annum interest upon the decretal amount from the date of the decree to the date of realisation.

From this decree the plaintiff has appealed and contends that Art. 96 of the Limitation Act and not Art. 62 as found by the learned Subordinate Judge is applicable. Art. 62 relates to a claim for money received by the defendant for the plaintiff's use and prescribes a limitation period of three years from the date when the money is received. Art. 96 applies to a suit for relief on the ground of mistake and the period of limitation therein prescribed is three years from the date when the mistake becomes known to the plaintiff. It follows, therefore, that if the latter article is applicable the plaintiff is entitled to recover the whole sum claimed as the mistake was not discovered until within three years from the date of the suit. Apart from the question as to which article applies on the assumption that the excess payments were made by reason of a mistake on the part of the plaintiff, it has been contended on behalf of the defendants that the relief claimed in the plaint is based not upon mistake but upon fraud and that the case of fraud has failed. The relief claimed in the plaint is framed as follows: "The plaintiff prays for the following reliefs:

(a) A decree may be passed in favour of the plaintiff against the defendants for the refund of Rs. 9,606-4-0 as principal and interest as per account given below on account of the excess amount realized from him by the defendants' estate."

Clauses (b) and (c) relate to costs and any other relief to which the plaintiff may be deemed entitled. It is true that

in the body of the plaint where the facts are set out it is alleged that the landlords fraudulently realized from the plaintiff the excess amount every year and that the defendants are liable to refund the same. At the same time paragraph 2 of the plaint alleges that the manager and amlas of the landlords showed the karpardaz and son of the plaintiff a valuation roll with an entry of Rs. 17,714 as the valuation on account of their patni mahal and after having assured them collected from the plaintiff cesses according to the said valuation and the plaintiff continued to pay cesses according to the valuation as represented and assured by the manager and amlas of the landlords ; and in paragraph 4 it is alleged that the plaintiff's suspicion having been aroused he obtained a copy of the valuation roll on the 12th April 1919 and on perusal of it, it transpired that the correct valuation was Rs. 7,714 and that he afterwards claimed back the balance overpaid. The actual relief as claimed is not stated to be based either upon mistake or fraud but must be taken as based upon the acts alleged in the body of the plaint. In substance the plaint makes out a case of mistake induced by the representations of the defendants or their servants and whether these representations were fraudulent or not the ground upon which the plaintiff is entitled to recover, if at all, is that the payment was made under a mistake of fact as to his liability. Even in cases of fraud the foundation of the claim is based upon mistake, for if the alleged fraud did not deceive the plaintiff he would not have any cause of action. It is true the charge of fraud has failed but the case of mistake has been amply proved and, in my opinion, the plaint is comprehensive enough to cover the relief claimed on that ground.

It remains to consider which article of the Limitation Act governs the present case. It is well established that where the relief claim is covered by two articles of the Schedule, one being of general import and the other of special import applying to the particular fact of any case the latter shall govern. Art. 62 undoubtedly covers many more cases than those of money paid under a mistake of fact. It is a general article covering all cases covered by the well known action in English Law for money had and received by the defendant for the plaintiff's use. It would apply to cases of money received upon a consideration which happens to fail or of money rightfully received by the defendant for the plaintiff 's use but wrongfully detained as also for money obtained through extortion, deceit or oppression as well as to the case of money paid by mistake. Some of these cases are undoubtedly provided for by later articles in the schedule. Instances will be found in Art. 87 which relates to suits by the assured to recover premia paid under a policy voidable at the election of the insurers. Art. 89 which provides for suits by a principal against his agent for moveable property received by the latter and not accounted for and Art. 97 which relates to suits for money paid upon an existing consideration which afterwards fails. In each of these cases the commencement of the period of limitation is different from that provided in Art. 62 and the provision made with regard to the special cases would govern rather than that provided as to the commencement of the period of limitation in Art. 62. If Art. 96 provided specifically for the case of a suit to recover money paid under a mistake and nothing more there could be no doubt that that article rather than Art. 62 would govern the present case. Art. 96, however, is itself an article of general import and covers all cases in which relief is sought on the ground of mistake. It would, for example, cover the case of a suit for rectification of a document on the ground of mutual mistake and other reliefs relating to moveable as well as immovable property.

In *Mathura Nath Kanda* v. *Steel* (1), a suit by a tenant to recover from the landlord a sum of money paid in excess of the amount demandable for cess, the High Court at Calcutta applied Art. 96 but in that case it does not appear to have been contended that Art. 62 was applicable. In *Hanuman Kamat* v. *Hanuman Mandur* (2) the claim was to recover purchase money on the ground of failure of consideration. Their Lordships held that if there never was any consideration from the beginning the price paid was money had and received within Art. 62 but they were inclined to think that the consideration did not fail at once so as to render the contract void but only when the pur-

(1) [1888] 12 Cal. 533.
(2) [1882] 19 Cal. 123=18 I. A. 158=6 Sar. 91 (P. C.).

chaser could not obtain possession of the property and that the consideration then failed so that the case appeared to them to come within Art. 97. It was not necessary, however, to decide definitely which of these articles should be applied as in either case the suit was barred. In *Dharamchand* v. *Goralal* (3) a case decided in the Court of the Judicial Commissioner of Nagpur the claim was to recover the purchase price paid for a house and it was held that in such a case it was only where the sale was void ab initio that Art. 62 applied but where the consideration subsequently failed Art. 97 being more specific would govern. But no case has been drawn to our attention in which it was directly determined whether Art. 62 or Art. 96 should be preferred in a suit to recover money paid by the plaintiff to the defendant by mistake in excess of the amount legally due. It has been determined by the High Court at Madras that relief sought on the ground of fraud within the meaning of Art. 95 is governed by that article and not by Art. 62 or Art. 97. See *Moidiyan's son* v. *Raman Nair* (4).

On the whole I am of opinion that the intention of the legislature was that in cases where the relief is based on mistake the period of limitation should run from the time when the mistake was first discovered even if some other article in the Limitation Act should be wide enough to include the cause of action. Otherwise in many cases the relief would be barred before the plaintiff could possibly be aware that he had a right to sue. The remedy in such a case as the present is provided by S. 72 of the Contract Act which enacts that a person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it, and it seems to me reasonable to suppose that it was not the intention of the legislature in passing the Limitation Act to take away that remedy in the case of money paid under mistake merely because the mistake remained undiscovered for three years from the date of payment. Moreover, I consider that in giving effect to statute of limitations if two articles limiting the period for bringing the suit are wide enough to include the same cause of action, and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right to sue should generally, and apart from other equitable considerations, be preferred. This applies I think with particular force to a case like the present where, if Art. 62 should be held to govern, the plaintiff through no laches or delay on his part would be deprived of his remedy before he could reasonably become aware that he had a remedy at all.

It was argued, however, that the plaintiff ought to have been aware all along that the correct valuation was the lower figure because his copy of the cess valuation roll must have disclosed it. As against this the plaintiff deposes that he never received a copy of the revised valuation roll in 1910 but accepted the correctness of the defendants' copy whilst the defendants' witness Manmohan Das alleged that the plaintiff had a copy of his own and that the valuation there mentioned was also the larger figure. Neither of the copies was produced in evidence but whichever version be correct there can be no doubt that the plaintiff was acting under a bona fide mistake in making the excess payment. Nor is there any reason to suppose that the plaintiff if he was aware of the correct valuation, as he must have been if he received a correct copy of the register would voluntarily pay cess based upon a larger figure.

It was also argued that the cess was in fact paid under legal process and therefore could not be recovered back until the decree or order compelling payment had been set aside. The argument rests solely upon an answer given by the plaintiff in cross-examination that his rents were usually realized under the patni sale law. What the exact significance of this statement may be is left in doubt but the point was never taken either in the pleadings or before the Judge in the trial Court nor was any issue framed with regard to it before the trial. There is, in my opinion, no evidence sufficient to justify a finding that the excess payments made in this case were made under legal compulsion. I am of opinion that the claim is governed by Art. 96 of the Limitation Act and that the suit is not time-barred.

A preliminary point was taken on behalf of the defendants that the appeal had abated as against the representatives

(3) [1918] 47 I. C. 886.
(4) [1908] 31 Mad. 230=18 M.L.J. 19=4 M. L. T. 80.

of Syed Mohiuddin Mirza and that as the cause of action did not survive against his brother, the Defendant No. 1, the suit could not proceed and was defective for nonjoinder of parties. When the suit was instituted Dr. A. C. Taylor, the 2nd defendant, was the executor of the late Syed Mohiuddin's estate and was properly impleaded as his legal representative. His widow and daughter, the 3rd and 4th defendants respectively, were also joined on the ground that they were his heirs. On the 27th October 1922 after the decree had been passed in the trial Court and pending the appeal to this Court Dr. Taylor died. Within 90 days of that date, namely on the 8th January 1923, before another, executor or administrator had been appointed, the plaintiff applied to the Registrar of this Court to substitute in place of Dr. Taylor the 3rd and 4th defendants, who were already on the record, as the legal heirs of the deceased Syed Mohiuddin and an order was passed on the 10th January as follows:

"Let it be noted that the heirs of the deceased Respondent No. 2 are already on the record."

Subsequently, some time before the 4th May 1923, Mr. T. N. Patridge was appointed administrator of the estate in place of Dr. Taylor but no application to substitute him in place of the former executor was made and Syed Mohiudin, it is contended, is not properly represented in this appeal, which has accordingly abated as against his legal representatives. The proper person to substitute failing the appointment of a successor to Dr. Taylor to administer the estate, it was argued, was the legal representative of the late executor and not the widow and daughter and even after Mr. Patridge's appointment no application was made to bring him on the record. It was contended on behalf of the Defendant No. 1 that the whole appeal failed for defect of parties in the absence of the legal representatives of Syed Mohiuddin as the right to sue did not survive against the Defendant No. 1 alone. This argument, however, cannot prevail, for it is conceded that each of the brothers held a separate half share in the estate. We held therefore that the appeal could proceed at least against the first defendant to recover his half share of the excess payments. We accordingly directed the appeal to continue. The Defendants 3 and 4 have not appeared to contest the appeal, but we intimated that we should like to hear what Mr. Patridge had to say on the question of abatement if the appellant took steps to bring him before the Court without delay. An application to set aside the abatement was subsequently filed at the end of last term before judgment was delivered and we reserved our judgment on the merits of the appeal until Mr. Partridge, the successor to Dr. Taylor, should have been served and given an opportunity of appearing and being heard on the application. He has now appeared and opposes the application. He contends that the appeal abated as against the estate of Mohiuddin which he now represents and that the abatement should not be set aside. It should be mentioned that the present suit was tried and heard together with a rent suit in which Dr. Taylor as executor of Mohiuddin was plaintiff and the present appellant was defendant. The appellant appealed to this Court from the decree in both those suits which were determined by the same judgment in the trial Court. The appeals were by order of the Registrar declared analogous and were heard together. We have delivered a separate judgment in the rent appeal. The widow and daughter were not plaintiffs in that suit. But on the death of Dr. Taylor an application was made to substitute them in his place as respondents in the appeal on the ground that they were the heirs and legal representatives of Mohiuddin. For some reason service of notice of the application was not effected upon them, and on Mr. Patridge's appointment a few months later the application was renewed and he was substituted as respondent in place of Dr. Taylor in the appeal in the rent suit.

The appellant contends in the first place that as the appeals were made analogous it was not necessary to effect substitution in both appeals. I am unable to accede to this argument. The effect of an order declaring that appeals are analogous is merely that they shall be heard together. It has not the effect of consolidation and an order passed in one does not govern the other unless expressly stated.

It is next contended that the appeal has not abated, and even if it should be held that it has, there was sufficient cause within S. 5 of the Limitation Act

for not applylng to set aside the abatement sooner. The provisions of that section are applicable by O. 22, R. 9 (3), to an application under the earlier part of the same rule to set aside an abatement.

Now there can be no doubt that the appellant was not guilty of any laches in applying for substitution after Dr. Taylor's death. He was certainly in a difficulty as no one had been appointed to succeed Dr. Taylor. He applied in proper time to substitute the heirs and the order of the 10th January 1923 was passed. In his petition he says that he was misled by the order of the 10th January 1923 which he considered as tantamount to acceptance by the Court of the heirs of Syed Mohiuddin as the proper persons to represent him after the executor's death, and as those parties are still alive, the appellant did not think it necessary to bring Mr. Patridge on the record even after his appointment as Administrator of Mohiuddin's estate. I confess that there is considerable force in this argument. I will assume that the heirs were not the proper legal representatives and that, pending the appointment of Dr. Taylor's successor, the proper person would have been his executor if he had one or his legal representative whoever he might be. Nevertheless by O. 22, R. 4, Sub-rule (1), when one of two defendants dies and the right to sue does not survive against the surviving defendant, the Court shall on an application made in that behalf, cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. By Sub-rule (2) of that rule, any person so made a party may make any defence appropriate to his legal character as legal representative of the deceased defendant. By Sub-rule (3) where within the time limited by law no such application is made under Sub-rule (1) the suit shall abate as against the deceased defendant. No question was raised as to whether the heirs were the legal representatives of Mohiuddin. If it had been, it was the Court's duty under O. 22, R. 5, to decide that question. The appellant contends that the order of the 10th January 1923 was an order substituting the heirs as the legal representatives and the proper persons to defend the suit under O. 22, R. 4. The order does not in terms decide that they are the legal representatives, but merely notes that the heirs of Mohiuddin are already on the record. The object of this was no doubt to intimate that service of notice upon them of the application for substitution was not necessary. The appellant took this as a direction of the Court on an application under R. 4 that the heirs were the proper legal representatives. I think it is clear that the appellant was misled, and not unnaturally misled, as to the legal effect of this order. It cannot be said that he was guilty of laches in the matter as he did in fact take steps in the rent suit to bring Mr. Patridge on the record after Dr. Taylor's death, and it may be assumed that had he not been misled by the order of the 10th January 1923, he would have taken similar steps to bring Mr. Patridge on the record in the present suit also. Whatever may be the legal effect of that order, I think that the appellant was misled by it and should be entitled under S. 5 of the Limitation Act to have the abatement, if there was an abatement, set aside. Mr. Patridge has now been brought before the Court, and it cannot be said that the interest which he represents, that is the estate of Mohiuddin, has been in any way prejudiced by what has happened. He has been given an opportunity of arguing the appeal on the merits, but the learned vakil who represents him, and who argued the case fully, on behalf of the first defendant, does not desire to add anything on his behalf in addition to the arguments he has already put forward. In these circumstances I think the proper order to make is that Mr. Patridge should be substituted as respondent in place of the widow and daughter of the late Syed Mohiuddin Mirza in this appeal and that the abatement, if it has taken place, should be set aside.

The result is that the decree of the learned Subordinate Judge will be varied by ordering that the respondents Syed Mohiuddin Mirza and Mr. Patridge, as Administrator of the estate of the deceased Syed Mohiuddin Mirza, are liable severally for a moiety of the sums paid in excess of the amounts of cess due for the years 1318 to 1325 M. S. amounting to Rs. 5,000. In the circumstances these sums will carry no interest up to the date of this decree, but interest at 6 per cent. per annum will be payable on the amount awarded hereunder from this date up to the date of realization.

The appellant is entitled to the costs of this appeal from the first defendant who alone has contested the appeal. Each party will bear his own costs of the application for setting aside the abatement.

Foster, J.—I agree.

Decree varied.

1925 PATNA 771

MULLICK AND BUCKNILL, JJ.

Chanchal Mahton and *others*—Defendants—Appellants.

v.

Bhagwan Gir and *others*—Plaintiff and Defendants—Respondents.

Appeal No. 314 of 1922, Decided on 18th March 1925, against Appellate Decree of the Dist, J., Darbhanga, D/- 2nd December 1921.

Bengal Tenancy Act, S. 116—*Lessees from person holding for a term of years—Possession is as lessees from year to year—Occupancy rights will not accrue in their favour.*

Persons holding under a lease for a term of years cannot make any contracts of tenancy with raiyats except contracts for a term not exceeding the period of their lease. The tenants, therefore, will be presumed to be in possession for successive terms of one year by oral lease; S. 116 does not permit the accrual of occupancy rights in favour of such tenants. They cannot claim the rights of a non-occupancy raiyat under any part of the Bengal Tenancy Act and the special law of limitation in Sch. III of the Act does not apply; therefore, the tenants are liable to ejectment as trespassers on the expiry of the tenancy of their lessors with which their own was co-terminous. [P 772 C 1]

N. N. Sinha—for Appellants.

Anand Prasad and *B. K. Sinha*—for Respondents.

Mullick, J.—In 1876 the proprietor, the predecessor of the plaintiff, settled 24 bighas 10 kathas of khudkasht zerait land with one Teg Ali for a period of nine years and thereafter with the 1st party defendants who are the proprietors of the Jitwarpur Factory by successive leases from 1885 (corresponding to 1293 F. S.) down to 1914 to (corresponding to 1321 F. S.). In 1322, the plaintiff made a demand for khas possession, but no possession was given by the Factory till 1324. Negotiations for a new lease went on during that year and the next year, and finally on the 23rd September 1916 the present suit was lodged for a declaration of title and recovery of possession. It was discovered that the defendants 1st party had caused to be recorded in the survey papers that they were in possession of only 7 bighas, 8 kathas and 1 dhur of zerait land, and that the remainder of the land constituted the occupancy raiyati holdings of the 2nd party defendants.

The Munsif found that the plaintiff was entitled to recover khas possession of the whole 24 bighas, 10 kathas.

In appeal the District Judge came to the same conclusion.

In second appeal the High Court was of opinion that the District Judge's reasons for holding that the lands were zerait were not conclusive and it remanded the whole appeal for re-hearing and decision in accordance with law.

The District Judge has re-heard the appeal and come to the same conclusion as before and the present second appeal is preferred against his judgment of the 2nd December 1921.

The first question is whether the lands in suit are private lands within the meaning of S. 116 of the Bengal Tenancy Act. S. 120 of the Act prescribes what lands the revenue officer shall record as proprietor's private lands and it provides that "if any question arises in a Civil Court as to whether land is or is not a proprietor's private land, the Court shall have regard to the rules laid down in this section for the guidance of Revenue Officers." The learned District Judge has upon evidence found that an area of 7 bighas, 8 kathas, 1 dhur is admittedly zerait. With regard to the remaining 16 bighas odd he has accepted the evidence adduced by the plaintiff. That evidence was to the effect that the proprietor had cultivated it with his own ploughs and bullocks since three or four years before the lease of 1876. In my opinion there was evidence from which the inference could be drawn that the land was private land and the finding of the District Judge cannot be challenged in second appeal.

The next question is, whether the plaintiff has rebutted the entry in the Record of Rights which shows the 2nd party defendants to be occupancy raiyats in the 16 bighas odd. The District Judge finds by implication that the Record of Rights has been rebutted by the plaintiff who gives evidence that there never was any raiyat on these lands. He relies upon

the recitals in the leases given to Teg Ali in 1876 and to the predecessor of the 1st party defendants in 1881 which speak of the lands being in the possession of the lessor. He also relies upon the circumstance that no power was given in the lease in favour of Teg Ali to settle raiyats on the land. The lease of 1881 in favour of the 1st party defendants is not so clear. It recites that "the lessee by holding possession and occupation and by making and causing to be made proper cultivation of the lease-hold property either by himself growing indigo or other crops or by making settlement with the tenants according to his own choice shall appropriate the proceeds thereof till the term of the lease." The learned Judge apparently construes these words as meaning that the lessee shall arrange for the cultivation of indigo and other crops through agents, and not through persons inducted as raiyats, He finds that there was no tenant on the land when the 1st party defendants entered into possession and the case made by the 2nd party that they were in possession from before and that they gave kurtwali pattas first of all to Teg Ali and then to the 1st party defendants and put them in possession, cannot be believed. These kurtwali pattas came down to the year 1310 and the learned Judge finds that the whole story of the 1st party's acquiring possession from the tenants is false and that the pattas were created in order to supply evidence for the Settlement operations. These findings inasmuch as they involve the rebuttal of the settlement record, would have been sufficient to dispose of the case but the learned Judge adds at the end of his judgment that even if the 2nd party defendants were settled as raiyats by the factory they did not acquire any right of occupancy. It is not clear how he comes to this conclusion. Possibly his reasoning may be this : the first party were holding under a lease for a term of years and, therefore, they could not make contracts of tenancy with raiyats except contracts for a term not exceeding the period of their lease, no lease registered or unregistered is produced. The tenants, therefore, could only have been in possession for successive terms of one year by oral lease : S. 116 does not permit the accrual of occupancy rights in favour of such tenants, and it has been held by the Privy Council in *Jagarnath Das* v. *Janki Singh* (1) that they cannot claim the rights of a non-occupancy raiyat under any part of the Bengal Tenancy Act and that the special Law of Limitation in Sch. III of the Act does not apply ; therefore the tenants are liable to ejectment as trespassers on the expiry of the tenancy of their lessors with which their own was co-terminous. The mere finding that the lands are the private lands of the proprietor was not sufficient for the disposal of the suit, but possibly the learned Judge's reasoning was as given above.

But the point really does not arises and it is not understood why the learned Judge has discussed a case which has not been made by either party. The case made by the raiyat defendants was not that they at any time were inducted into the lands by the factory but that the lands were their ancient ancestral occupancy holdings. The Munsif does appear to have found that there had been such an attornment at invervals between 1312 and 1322 and that the tenants had become non-occupancy raiyats but that as they were not claiming under a lease they were not non-occupancy raiyats to whom the period of limitation of six months prescribed for suits for ejectment applied. This was nobody's case and in fact it was destructive of the case made by the 2nd party defendants.

The 1st party have given up the land in their possession and have no further interest in the litigation and the appeal will, therefore, be dismissed with costs against the 2nd party defendants.

Bucknill, J.—I agree.

Appeal dismissed.

(1) 1922 P. C. 142=1 Pat. 340=49 I. A. 81=35 C. L. J. 506=3 P. L. T. 197=43 M. L. J. 55=(1922) M. W. N. 410=31 M. L. T. 231=26 C. W. N. 833 (P. C.).

★ 1925 PATNA 772

BUCKNILL AND KULWANT SAHAY, JJ.

King-Emperor.

v.

Akhileshwar Prasad—Accused.

Reference No. 1 of 1925, Decided on 3rd March 1925, on reference by the Assistant S. J., Patna D/- 12th January 1925.

★ (a) *Evidence Act, S. 24—Moral exhortation by direct superior of accused is not objectionable.*

If a person who is suspected of an offence is examined by a person in direct authority over him and if it is only in consequence of an inducement by way of benefit or a threat that the person under suspicion makes self-incriminating statements such are, broadly speaking, not receivable in evidence because they are not in law regarded as strictly of a voluntary nature but as having been perhaps induced in the one case by a false hope and in the other by fear. On the other hand a merely moral exhortation to tell the truth is in no way objectionable. [P. 781, C. 1]

★ (b) *Practice—Holding Court beyond office hours is improper unless parties and the pleaders concerned agree—Civil P. C., O. 9.*

For practical purposes it is quite improper for a Judge to insist on sitting beyond the prescribed hours unless, of cousre, the lawyers in the case agree. The lawyers are professional men who have to regulate their interviews in accordance with the regular and prescribed hours of the Court's sittings and it is not reasonable except for really unavoidable necessity or for the agreed convenience of all concerned that a Court should insist on sitting at times neither prescribed nor suitable. 1922 *All.* 372 and 41 *Cal.* 299, *Ref.* [P. 782, C. 1]

P. K. Sen, Manohar Lal, S. P. Verma, D. N. Sircar and *S. Dayal*—for Accused.

Assistant Govt. Advocate — for the Crown.

Bucknill, J.—This was a reference dated the 12th January 1925, made to this Court by the Assistant Sessions Judge of Patna under the provisions of S. 307 of the Criminal Procedure Code.

It relates to one Akhileswar Prasad who was charged with having committed offences under Ss. 409 and 467 of the Indian Penal Code. He was tried before the Assistant Sessions Judge of Patna sitting with a jury. The jury unanimously found him not guilty. The learned Judge disagreed with this verdict and he states that he considers it grossly perverse and against the weight of evidence. The learned Judge recommends that the accused should be convicted under both sections of the Indian Penal Code under which he was charged, hence this reference in support of which the Assistant Government Advocate has appeared.

The matter is, therefore, one which needs most careful scrutiny.

The accused is a young man of about 23 years of age ; his father is dead : he is of respectable family and of reasonably good education having passed the I. A. Examination and having appeared at a recent P. L. Examination; he is married and has three children and has to support besides them and his wife, his mother ; he was at the time of the alleged occurrence a probationer official in the offices of the High Court where he was employed as what is known as a despatcher in the vernacular department. We are informed that he was in receipt of a salary of Rs. 35 per mensem. He has a good knowledge of English and is by caste a Kayestha.

Part of his duties was to send away by post or rail packages of records for transmission to other Courts.

In order to pay for the cost of transmission of these parcels by the train (some of course being bulky) the accused was provided with money by the cashier. It was the regular and correct practice for the accused to ask in writing for an advance of cash to meet his requirements. This writing requisition had to be placed before the Deputy Registrar for his approval and initials, signifying his acquiescence. Armed with this, the accused would then quite properly take it to the cashier who would then give the accused the amount of cash authorized by the Deputy Registrar to be paid out. No entry in the cashier's books is made at that time of the transaction, the requisition being temporarily kept by the cashier as the equivalent of cash until the accused had made up an account for the amount actually expended by himself, had presented that account through the superintendent, vernacular department, to the Deputy Registrar, had had the account passed by the Deputy Registrar, had received it back and brought it back thus passed to the cashier. The cashier on being given the account thus passed by the Deputy Registrar by the accused would obtain from him an endorsement on it that he (the accused) had received cash for the amount of the account and would then enter up his (the cashier's) cash book and contingent register account book. The original requisition, being no longer of any use, was either destroyed or returned to the accused. The Deputy Registrar, in the evening, examines and checks the cash book with the contingent register account book.

The usual amount of advance made to the accused was Rs. 20.

This was undoubtebly the usual and regular practice, and in working seems a very ordinary scheme ; whether it is a good method or not I do not know.

The prosecution story was a very simple one. In April last the accused requisitioned to the Deputy Registrar for Rs. 20 ; this was allowed in the usual way. It is presumed, in view of what took place later, that he altered this requisition to show authorization for an advance of Rs. 40 ; for the cashier of the High Court deposes that the accused in fact obtained from him Rs. 40 depositing, as usual, with him (the cashier) the authorization.

On April 23rd the accused submitted his account to the Deputy Registrar for expenses amounting to Rs. 20 only. This account is Exhibit 1. It showed six items only when presented to the Deputy Registrar namely :

		M.	Sr.	Rs.	a.	p.	
16-4-24 Ry. freight	...	4	5	7	12	0	V. attached.
,, ,,	...	3	15	6	8	0	V. attached.
Tandom hire	...			0	6	0	
Cooly charge	...			0	1	0	
17-4-24 Ry. freight	...	2	0	4	14	0	V. attached.
Tandom hire	...			0	6	0	
Cooly charge	...			0	1	0	
Total	...			20	0	0	

The total of Rs. 20 was placed low down towards the bottom of the account which is written out on an ordinary sheet of foolscap which is headed : "The following are the accounts submitted of the amount advanced to me."

The whole was in the accused's handwriting This bill or account is not personally handed by the accused to the Deputy Registrar, but goes through the superintendent of the vernacular department, and it did so go ; it was approved by the Deputy Registrar who wrote on it "Passed for Rs. 20" and appended his initials. The vouchers attached are railway receipts from the E. I. Railway and appeared to be in order ; the account was then given back to the accused. It is alleged that he then added to it several more items namely :

		M.	Sr.	Rs.	a.	p.	
18-4-24 Ry. freight	...	1	4	3	11	0	V. attached.
,, ,,	...	2	5	6	5	0	,,
Tandom hire	...			0	6	0	
Railway freight	...	1	15	4	11	0	,,
,, ,,	...	1	20	4	14	0	,,
Cooly charge	...			0	1	0	
Tandom hire	...			0	6	0	

The sums thus added amounted to Rs. 20 which added to the previous Rs. 20 made a total of Rs. 40, for which sum he had received cash. He changed the "20" of the total into "40" : it is obvious that there has been such a change, and similarly changed the "20" of the Deputy Registrar's approval note into "40" ; the change is again obvious ; he attached railway receipts for the relative amounts alleged to have been expended by him on freight.

All the new matter is in the accused's handwriting. All the railway receipts of both the old and new items are forgeries and bogus, being written, however, on genuine forms purloined (some time ago) from the E. I. Railway.

The accused then took the account thus altered to the cashier ; he seeing that all the railway receipts appeared in order and tallied with the account and not suspicious of any fraud on the accused's part, accepted it, obtained the accused's endorsement "Received payment," returned the original requisition for the advance to the accused and then entered up the expenditure of the Rs. 40 in his books. The cashier in due course made over his cash-book (with the account, and of course, no doubt others) to the Accountant who in his turn makes up the contingent register book of Accounts. The accused by means firstly of altering his sanctioned requisition for an advance from Rs. 20 to Rs. 40 ; secondly, by utilizing and entering up bogus railway receipts ; and thirdly by adding items to the account or bill, after it had been passed by the Deputy Registrar for Rs. 20 so as to make it Rs. 40 was thus enabled to pocket the whole of the Rs. 40.

The fraud might well have remained undetected for a long time, the stolen genuine railway receipt forms constituted the key to the easy perpetration of the scheme and, not unnaturally, hoodwinked the officers engaged in routine work of the nature described.

But suspicion became aroused by a fortuitous circumstance.

When, on the evening of the 23rd April, the cash-book was brought to the Deputy Registrar in order that he should, as was his practice, check it with the contingent account register, he happened to notice the entry in the cash-book of the sum of Rs. 40 having been paid to the accused. He recollected, however, that he himself had only approved and passed the accused's bill or account for Rs. 20 and not for Rs. 40 ; his attention

was arrested and he sent for the bill, i. e., Exhibit 1 ; he at once saw the alterations and amplifications ; he sent immediately for the accused. When the accused came the Deputy Registrar showed him the bill. The accused denied having manipulated it.

The Deputy Registrar then asked the accused to show what were the contents of the parcels which he (the accused), according to the bill, purported to have sent away on April 18th which was Good Friday and a holiday ; but the accused could give or gave no satisfactory explanation.

The Deputy Registrar seeing that there were attached to the bill (Exhibit 1) a number of railway receipts then was proceeding to the railway station to enquire if they were genuine when the accused overtook him, threw himself at his (the Deputy Registrar's) feet and begged him not to go to the railway station admitting that he had added all the items under the date of April 18th.

The Deputy Registrar, however, went to the station and there ascertained that none of the vouchers, i. e., railway receipts, attached to the bill had been issued by the railway authorities. The Deputy Registrar reported the matter the next morning to the Registrar, and it was then placed in the hands of the police.

The Deputy Registrar furnished the first information report on April 25th last. It reads: "Babu Akhaleshwar Prasad Sinha is a probationer in the Lower Division in the High Court and used to work as despatcher in the vernacular department. It was one of his duties to send down records to lower Courts by railway parcel. In order to meet expenses he used to have an advance of money with him. After incurring the expenses he prepares a bill and submits it to me. I check his bill with reference to the vouchers attached thereto and then pass it. On day before yesterday, viz., the 23rd April, he submitted to me a bill for Rs. 20. The bill was dated the 23rd April and had entries for 16th and 17th of April. The bill was supported by three railway money receipts. I checked the total and passed the bill for Rs. 20. I made an endorsement with my own hand. "Passed for Rs. 20, A. C. 23-4." The same evening, when the Accountant brought the cash-books to me for signature I found an expenditure of Rs. 40 for despatch of records. This created a suspicion in my mind, and I had the bill brought to me. I found my figure "20" changed into "40" and some entries interpolated against the date 18-4-24. These entries were not on the bill when I had passed it. I sent for him. He denied having changed the entries or put in subsequent entries. But I fully remembered that I had passed the bill for Rs. 20 and entries making up a total of Rs. 20 only had stood in the bill when I passed it. So I suspected the bona fides of the man and proceeded to the railway station to enquire about the subsequent railway receipts which he had put down for the date, 18th April. When I passed some distance, he overtook me in the way and made a confession that those railway receipts for 18th April were sham receipts. I recorded his statement, but still went to the railway station and there, on enquiry, I found that not only the receipts for the 18th April, but also the other ones attached to that bill, had not been issued from the Patna railway office. I returned from the railway station at dusk. The next morning, soon after I came to office, I reported the matter to the Registrar, 'Necessary action may be taken up." The accused was duly charged with two charges. These were : "First that you, on or about the 23rd day of April 1924 at Patna New City forged a certain document purporting to be a valuable security, to wit, a bill of the despatcher of the vernacular department of the Patna High Court with cash payment order (marked Ex. 1) by changing the figure of Rs. 20 into Rs. 40 (and by interpolating the entries in Ex. 1 under date 18th April 1924, and by making false railway vouchers, marked Exs. 2-7, with intent to cause damage or injury to Government or to commit fraud) and thereby committed an offence punishable under S. 467 of the Indian Penal Code, and within my cognizance.

"Secondly, that you on or about the 23rd day of April 1924 at Patna New City, being a public servant in the employment of the Government as a despatcher in the vernacular department of the High Court, and in such capacity entrusted with certain property, to wit, the sum of Rs. 40, committed criminal breach of trust with respect to the said property and thereby committed an offence punishable under S. 409 of the Indian Penal

Code, and within my cognizance and I hereby direct that you be tried by the said Court on the said charge."

Before the Committing Magistrate the accused made the following statements :–

"My name is Akhileswar Prasad, my father's name is Hargauri Prasad. I am by caste Kayestha, and by occupation service. My home is at Mauza Kalabgunj, police station Kotwali, district Bhagalpure. I reside at Patna.

Q. Do you know English ?

A. Yes.

Q. Did you present this bill Ex. 1 originally to the Deputy Registrar only for Rs. 20 and subsequently when he passed it for that amount did you alter the figure of Rs. 20 written by him into Rs. 40 and made the interpolations for items covering Rs. 20 per 18th April 1924 and also changed your total for Rs. 20 to Rs. 40 ?

A. Yes, I did it.

Q. Why did you do it ?

A. The usual amount advanced to me was Rs. 20 only but in this bill I drew Rs. 40 as a temporary advance and submitted this bill in adjustment of that amount.

Q. But why did you not do it with the permission of the Deputy Registrar, and why did you forge the figures ?

A. He had originally ordered an advance of Rs. 20 which also I had changed into Rs. 40, so I had to prepare this bill also for Rs. 40.

Q. But why did you draw Rs. 40 when Deputy Registrar had passed for Rs. 20 ?

A. There were bulky records and Rs. 20 could not have covered the amount.

Q. But why did you not bring it to the notice of the Deputy Registrar ?

A. I did not do this, and that is my fault.

Q. Are these railway receipts attached with the bill genuine ?

A. No they are bogus.

Q. How did you get them ?

A. They were lying in the pigeon holes.

Q. Why did you do all this ?

A. I live on what I earn by, my that month's pay was pick-pocketted and so I had no money (weeps) and I did this.

What are your educational qualifications ?

A. I have passed the I. A. and appeared at the last P. L. Examination.

Q. Who are your relations ?

A. They are all respectable.

Q. How many members have you in your family ?

A. Old mother, wife and 3 children.

Q. No male member ?

A. None.

Q. Have you any income to support your wife, mother and children ?

"*A.* No, they are all dependent on me. My father died as Tauzi Nabis while still in service."

The accused was committed for trial, and before the Sessions Judge he withdrew substantially all that he had said previously which could be regarded as of confessional character. He now made the following statement :

Q. Please see this bill, and say in whose handwriting it is ?

A. There is nothing on this bill, Exhibit 1, in my writing. The portion encircled in red ink and marked Exhibit 1 (a) is in the handwriting of the Deputy Registrar, Babu Amarnath Chatterji.

Q. Were you employed in the Patna High Court ?

A. Yes, as a probationer.

Q. In what department did you work ?

A. I worked in the copying department at first, and then in the second appeal and then as a despatcher.

Q. Did you work as a despatcher in the vernacular department ?

A. Yes, I did.

Q. Were you despatcher in the vernacular department in April 1924 ?

A. I do not wish to answer. I will not answer any further.

Q. It is necessary to inform you that from your refusal the Court and the jury may draw such inference as it thinks fit.

A. I do not refuse to answer. I shall put in a written statement through my pleader.

Q. The law does not provide for the filing of a written statement to take the place of examination by Court. So if you do not now refuse to answer will you reply to the question whether you were despatcher or not in the vernacular department in April 1924 ?

A. I was despatcher in the vernacular department in April 1924 but I do not recollect up to what date I so acted.

Q. I am not certain what you mean ?

A. I was not despatcher the whole time in April.

Q. Up to what date were you employed in the High Court ?

A. I cannot say up to what date I was employed in the High Court. All I can say is that I did not get my pay for April 1924. I was suspended in April 1924 before the occurrence.

Q. What do you mean by before the occurrence ?

A. I cannot say. On what date the Deputy Registrar suspended me I cannot say.

Q. Shown Ex. 2 (1) to 2 (7). Say ?

A. I did not file any of them to the Deputy Registrar.

Q. Did you get these receipts Ex. 2 (1) to 2 (7) from the railway authorities ?

A. I cannot say, because the receipts are similar in size to what they give on the railway.

Q. (Shown statement recorded in the lower Court.) Did you make the statement to the committing Magistrate ?

A. Yes, I made the statement and signed it, as I was threatened by the Deputy Registrar to make a confession.

Q. When did the Deputy Registrar threaten you ?

A. It was during the trial in the lower Court in the verandah of the Court, when I was coming from the hajat, that the Deputy Registrar threatened me. I was confused by the threat of the Deputy Registrar. I made the statement in the lower Court a day or two after the Deputy Registrar threatened me.

Q. When were you arrested ?

A. It was perhaps in the month of September 1924. I had no information of the case, and was at my home at Bhagalpur, where I had gone in April 1924 after my suspension.

On being again examined later on, he said :

Q. Did you change the figure " 20 " in this bill (Ex. 1 shown) to " 40 " both where there is the payment order of the Deputy Registrar and at the place where the total was struck ?

A. I did not.

Q. Did you make entries under date 18—4—24 after the bill was passed by the Deputy Registrar (Shown Ex. 1) ?

A. No. I did not.

Q. Shown Exs. 2 (1) to 2 (7). Did you file these receipts in the High Court ?

A. No. I did not.

Q. Did you receive from the cashier of the High Court an advance of Rs. 40 to meet expenses of despatch of records ?

A. I never received an advance of Rs. 40 (forty). I usually received an advance of Rs. 20.

Q. Can you say when you got the last advance from the cashier of the Court ?

A. I do not remember.

Q. How were advances made ?

A. Sometimes advances were made under the order of the Deputy Registrar, and sometimes I had submitted my bill, and cash payment was made.

Q. Who received the advances ?

A. The requisition passed by the Deputy Registrar was sent by him to the superintendent, who again sent it to the Cashier, and the latter sent for me and I took the advance made from him.

Q. How was the advance adjusted ?

A. It was adjusted by the presentation of bill of expenses incurred. I used to present my bill to the superintendent of the vernacular department who sent it to the Deputy Registrar to be passed.

Q. Do you wish to adduce any evidence.

A. No."

It may be mentioned that the accused was suspended directly he fell under suspicion, and then appears to have disappeared. His home was at Bhagalpur, but the police were unable to find him either there or at Patna or elsewhere ; he was at last arrested at Patna Junction railway station in the 3rd class waiting-room (mosafirkhana) with his body covered with cloth.

The learned Judge appears to have summed up to the Jury very clearly and well. The Jury, as has been mentioned before, returned a verdict of not guilty. The Judge, in his reference to this Court, observes that he had at once no doubt that the verdict was perverse and that he therefore, in order to make sure that the Jury had not made some mistake put some questions to them and placed both them and the answers on record. They are as follows :

" Gentlemen, what is your verdict in respect to each of the charges under S. 467 and 409, I. P. C. ?

A. The Jury are unanimous that the accused is not guilty under each section.

Q. Is it your opinion that the bill, Exhibit 1, is not in the handwriting of the accused ?

A. We are unanimous that it is not.

Q. Is it your opinion that the figure " 20 " in the bill has not been altered to " 40 " ?

A. Our opinion is unanimous that the accused did not make the alteration.

Q. What is your opinion in regard to the entries under date 18—4—24 ? Whether the entries were made after the pay order of Deputy Registrar ?

A. No, the entries were not made after the passing order of the Deputy Registrar. This is our unanimous opinion.

Q. What is your opinion in regard to the receipts Exhibits 2 (1) to 2 (7) as to whether they are genuine or bogus ?

A. We are doubtful whether the receipts are bogus or genuine.

Q. Is it your opinion that the accused did not submit the bill, Exhibit 1 ?

A. We are in doubt whether the accused submitted the bill.

Q. What is your opinion as to whether the accused was given an advance of Rs. 40 some 8 or 9 days previous to the 23rd April 1924 or not ?

A. We all doubt if the advance was given. There is no paper to show that this amount of Rs. 40 was given to the accused."

It is necessary to see how the case made out for the prosecution was supported.

The system under which the accused obtained advances of money, and under which he was supposed to pay cash out and to account for such payments, appears to have been proved conclusively by witnesses whose credibility is really beyond criticism ; the Deputy Registrar, a gentleman of high standing and repute ; the Superintendent of the Vernacular Department, another prominent official of the High Court ; the Cashier of the High Court, and the High Court Accountant who are both high, responsible officers.

The fact that the Bill or account (Exhibit 1) was in the accused's handwriting seems to have been proved beyond any possibility of doubt by the same officials with or under whom the accused worked. The Deputy Registrar deposes quite clearly that he knows and can identify the accused's handwriting, and that the whole of Exhibit 1 (i. e., both original and added entries) was in the accused's handwriting. The Superintendent of the Vernacular Department definitely swears with certainty that the accused brought the bill or account (Exhibit 1) to him when it totalled Rs. 40 ; the Accountant also definitely identifies the account as being in the accused's handwriting. Apart from the statements made by the accused himself, to which reference must be made later, it would seem to me that the preparation by the accused of Exhibit 1 was clearly brought home to him. But the jury unanimously was of the opinion that the account, Exhibit 1, was not in the accused's handwriting.

There was, however, no suggestion that these officials had the slightest ill-feeling against this unfortunate young man and it is to me difficult to assign any good reason why the Jury could have thought that the account (Exhibit 1) was not in the accused's handwriting. Then, as to the alteration of the figures 20 to 40, no one, of course, can possibly help observing that there has been an alteration ; no one again could, in human probability, have actually seen who made the alteration ; but that the bill was first presented to the Superintendent of the Vernacular Department and to the Deputy Registrar with a total of Rs. 20 and passed back to the accused with that total; that it was presented by the accused with a total of Rs. 40 to the Cashier and was with this total entered up in the books and placed in the records seem facts proved by the officials mentioned beyond any doubt. Nor is it to my mind intelligible how any one except the accused could have so altered or could have had any interest in so altering the account. The jury, however, was unanimously of opinion that the accused did not make the alteration. I am again at a loss to understand the reason for such a view.

Then again with regard to the addition of the numerous items of expenditure which purported to refer to despatches made on April 18th, and the aggregate of which brought the total of the bill up to Rs. 40. Most of the observations which I have made with regard to the changing of the figures 20 to 40 apply with equal force here ; it is sworn by the Superintendent of the Vernacular Department and by the Deputy Registrar that, when the bill (Exhibit 1) was originally presented to them, these later items were not then on the account ; when presented to the Cashier they were included, and the additions are definitely alleged to have been made before they were again seen by the Superintendent, Vernacular Department, and the Deputy Registrar. That these later as well as the earlier entries were

all bogus, i. e., related to no real transactions of despatch, was conclusively proved not only by the railway authorities, but by the clerk who kept the register of the despatch of records.

The jury, however, expressed the view that these additions, dated April 18th, were on the account when first seen by the Deputy Registrar: that is to say that the additions were not made after the Deputy Registrar had approved the account but before he had done so. But both the Superintendent and the Deputy Registrar are positive about this question and there is no conceivable reason for doubting their sworn testimony; nor are they persons in a position in which it can well be seriously contemplated that they would depose to such a fact if they could not really recollect the circumstances. I cannot understand why or how the jury arrived at the view at which they did on this point.

Then as to the railway receipts i. e., the vouchers attached to the account Exhibit 1. To my mind it was conclusively proved that all these railway receipts, although on real railway forms, were fraudulently entered up.

The account Ex. 1 contained:

16—4—24	Rs.	...	7	12	0
,,	,,	...	6	8	0
17—4—24	,,	...	4	14	0
18—4—24	,,	...	3	11	0
,,	,,	...	6	5	0
,,	,,	...	4	11	0
,,	,,	...	4	14	0
,,	,,	...	4	14	0

These were supported by vouchers i. e., railway receipts Nos. I 98062 (for Cuttack), I 98047 (for Dhanbad), I 98048 (for Monghyr), I 98011 (for Gaya), I 98026 (for Cuttack), I 98027 (for Chapra), I 98038 (for Darbhanga). The evidence of Mr. Jhauri Lal, the Head Parcel Clerk for the last 11 years, at Patna Junction railway station, and a most respectable gentleman, proved to my mind conclusively that all these forms formed parts of a book of 100 forms (Nos. I 98001 to 98100) purloined in February or March 1924 from the railway station; that the forms had not been filled up by, i. e., were not in the handwriting of, any person attached to his office, and that no such parcels as were referred to in these forms were ever in fact despatched. The register kept at the High Court of despatched parcels also showed the despatch of none of the parcels mentioned in the forms. It does not seem to have been sought definitely to prove that the forms had been in fact filled in by the accused: it was perhaps thought that his direct confession made before the committing Magistrate that he had done so rendered any further action on this point unnecessary. The jury, however, stated that they were doubtful whether the receipts were genuine or bogus. I am entirely unable to understand why or how the jury could properly have entertained the least doubt that these forms had been filled in with entirely fictitious particulars.

There were two further direct questions put to the jury by the learned Assistant Sessions Judge: the first was as to whether the accused had submitted the account Exhibit 1 at all; the jury were in doubt as to whether he had done so. The second was as to whether the accused had in fact obtained the advance of Rs. 40/-: the jury again expressed doubt as there was no paper to show that that amount had been advanced to the accused. With regard to the 1st question it is difficult to see how there could be any doubt that the accused did present the account Ex. 1 unless we are to disbelieve the evidence of the Superintendent, Vernacular department, the Deputy Registrar and the Cashier of this Court; these gentlemen are not persons whose word could be brushed aside without most convincing and certain grounds for doing so: which do not exist in this case.

With regard to the advance of Rs. 40 the jury appears to have discarded, without any good reason, the testimony of the cashier, the whole of the evidence as to the system of requisition and of the return of the original requisition to the accused on its destruction, the whole of the evidence of the passage of this item of Rs. 40 through the books of the High Court and, of course, the account Exhibit 1 itself.

I am unable to see any reason for so strange a conclusion.

I now turn to the several statements, whether they are called admissions or confessions, made by the accused. The first of these statements is deposed to by the Deputy Registrar: when the Deputy Registrar noticed that an advance to the accused of Rs. 40 had been entered in the cash-book and remembered that Rs. 20 only had been sanctioned by him he sent

for the accused who denied having made any alterations in the account Ex. 1: he could give no satisfactory explanation of what records he had despatched on the 18th April: the Deputy Registrar was then going to the railway station to enquite into the vouchers (i. e., the railway receipts) when to use his own words "The accused followed me and overtook me on the way. He admitted that he had made the entries of the 18th April subsequently, threw himself at my feet and requested me to come back." This was the Deputy Registrar's evidence in the Sessions Court.

Before the Committing Magistrate his evidence reads, "I then sent for the accused and enquired what he had done. He said the entries stood as they were put up before me previously to be passed. Later, however, he admitted that he had interpolated entries of 18-4-24 for items covering another Rs. 20. He admitted having received Rs. 40.....He admitted having altered Exhibit 1 (2) from Rs. 20 to Rs. 40 and he had also changed his total."

For reasons, to which I will refer later, the Deputy Registrar was not cross-examined in the Sessions Court, and, as is often and often properly the case, cross-examination was declined before the Committing Magistrate.

The Superintendent Vernacular Department, was present at the interview to which I have just referred. He says. "The accused was there and he was asked as to the alteration. He at first denied having made the alteration, but subsequently admitted having made it. The Deputy Registrar asked the accused to show him from the despatch register whether the records for which he submitted a bill were actually sent. The accused brought the despatch register. He could not show from the despatch register that any record as shown in the bill was sent by railway parcel. The Deputy Registrar then went towards the railway station. To the Jury the witness said. "The accused admitted having made the interpolation shortly after his denial, and it was in my presence." In the Magistrate's Court this witness said. "The accused was there then.The Deputy Registrar asked the accused whether he had made the alteration. He at first denied, then made a statement admitting the alteration. The Deputy Registrar himself left for the railway station to make an enquiry." It will be seen that it is not very clear from these accounts whether the accused confessed what he had done before the Deputy Registrar was going to the railway station. As I read the Deputy Registrar's evidence in the Sessions Court, the impression it conveys to my mind is that it was only when the Deputy Registrar was going to the railway station that the accused, falling at the Deputy Registrar's feet, admitted his guilt. From the Deputy Registrar's evidence, however, before the Magistrate, this is not so clear; from the evidence of the Superintendent, Vernacular Department, it would seem that accused confessed *before* the Deputy Registrar started for the railway station.

The Accountant who had taken the High Court account books to the Deputy Registrar and who was also present when the accused was questioned by the Deputy Registrar deposed as follows. "The accused admitted he had received the payment (of Rs. 40)": in cross-examination the witness stated that he had said before the Magistrate that the accused at first denied, but when the Deputy Registrar told him that he (the Deputy Registrar) would take severe steps and he) would be punished if he did not state the truth then the accused admitted having forged the document. The witness added that what he had then said was quite correct. As a matter of fact what this witness had said was (accused) at first said he received Rs. 40 as passed by the Deputy Registrar, but when the Deputy Registrar told him that he would be severely punished if he did not tell the truth; then the accused admitted that he had forged the papers and received Rs. 40 from the Cashier. He asked the Deputy Registrar to excuse him as that was his first offence." This account corroborates what was stated by the Superintendent, Vernacular Department. It seems perfectly clear to my mind that the accused *did* confess his guilt to the Deputy Registrar and that the Superintendent, Vernacular Department and the Accountant heard him do so. The learned counsel, who has appeared for the appellant here, has urged that the confession was not altogether voluntary having been obtained under pressure from the Deputy Registrar who was in an authoritative position over the accused; and that in consequence this confession should not

properly have been regarded as admissible in evidence. There is a good deal to be said in favour of this contention : if a person, who is suspected of an offence, is examined, (i. e., asked questions) by a person in direct authority over him and if it is only in consequence of an inducement by way of benefit (e. g., if you confess you shall go free) or a threat (e. g., if you do not tell the truth or if you do not own up you will be severely punished) that the person under suspicion makes self-incriminating statements such are, broadly speaking, not receivable in evidence because they are not in law regarded as strictly of a voluntary nature but as having been, perhaps, induced in the one case by a false hope and in the other by fear. On the other hand a merely moral exhortation to tell the truth is in no way objectionable. For the above reasons I am inclined to think that, in view of the evidence given to the effect that the Deputy Registrar who was indubitably in an authoritative position relative to the accused, did tell the accused that he would be severely punished if he did not tell the truth, what the accused said by way of confession to the Deputy Registrar may not be admissible. There is however next the statement made by the accused to the Committing Magistrate : it has already been given in extenso and I need not repeat it now. The accused endeavours in the Sessions Court to explain away his having made this statement by saying that he "was threatened by the Deputy Registrar to make a confession" and that this threat took place "during the trial in the lower Court in the verandah of the Court when I was coming from the Hajat." The accused said that he was confused by the threat of the Deputy Registrar and made the statement which he did in the lower Court a day or two after the Deputy Registrar's threat.

In my view this is a wildly improbable story : but it was not tested in any way owing to the fact to which I have already referred namely that the Deputy Registrar was never cross-examined : the reasons for his not being cross-examined are somewhat peculiar and necessitate explanation.

It appears that the Deputy Registrar was examined on January 3rd; his examination-in-chief did not conclude until about 5 minutes past 5 in the evening : it was a Saturday ; the learned Assistant Sessions Judge wanted the accused's pleader to cross examine the Deputy Registrar forthwith : the Assistant Sessions Judge seems to have thought that as the Deputy Registrar was a very busy official the public work would suffer if the Deputy Registrar had to appear at the Sessions Court again on the 5th i. e., the following Monday. The accused's pleader protested against being compelled to go on at that late hour and on the Judge insisting declined to cross-examine the Deputy Registrar. In his letter of reference the Assistant Sessions Judge says that he did not consider the pleader's objection was a bona fide one as the cross-examination of the Deputy Registrar was not expected to last long. We do not find from the order sheet whether the convenience of the jury or of others other than the Deputy Registrar was consulted as to the continuance of the sitting after the usual hours : nor am I clear that the cross-examination of the Deputy Registrar would have been short ; he might have been interrogated at some length upon various subjects e. g., the system of advances, the circumstances under which the confession to him was made and as to the alleged threats made by him to and against the accused prior to the accused's statement in the Magistrate's Court.

But it is indeed extremely doubtful if it was open to the Assistant Sessions Judge to call on the accused's pleader at such an hour to commence (and apparently with the intention that he should conclude) the cross examination of such an important witness as the Deputy Registrar, and, then, notwithstanding the pleader's protest and without his assent, to discharge the Deputy Registrar on the ground that the pleader declined to cross-examine the Deputy Registrar. The ordinary hours for the sittings of Courts are laid down by rule ; and 4-30 p. m. in January is the normal closing time. I do not say that it is impossible to continue to sit after that time but not I think unless with the acquiescence of those appearing for parties.

One may see the basis for my view which I am convinced is a reasonable and proper one indicated in such cases as *Sadasiv Singh* v. *Emperor* (1) and

(1) [1914] 41 Cal. 299 = 25 I. C. 348 = 15 Cr. L. J. 596.

H. Bevis and Co., v. *Ram Prasad* (2). In the former case at a Sessions trial, for murder, counsel for the defence applied, after the examination in chief of the 1st P. W., for postponement of the cross-examination of the witness till the next day on the ground of his unpreparedness; but he did not ask for an adjournment of the trial itself; the application was refused. The counsel thereupon retired from the case; the result was that at least 4 important prosecution witnesses were not cross-examined at all and the later P. Ws. but inefficiently cross-examined; whilst it seemed possible that had the earlier witnesses been cross-examined matters might have been elicited which could usefully have been employed in the cross-examination of the later witnesses. Woodroffe and Sharffuddin (JJ.) held that the refusal was unreasonable and ordered a new trial by another Judge.

In the latter case the rules provided that the Court should normally close at 4-0 p. m. A certain Small Cause Court Judge, however, sat on till 5-0 p. m. and then called on a fresh case: the defendant was present but the plaintiff was not: the Judge dismissed the plaintiff's claim: Piggott (J.) held that he could not rightly do so.

I think it must be obvious that for practical purposes it is quite improper for a Judge to insist on sitting beyond the prescribed hours unless, of course, the lawyers in the case agree. The lawyers are professional men who have to regulate their interviews in accordance with the regular and prescribed hours of the Court's sittings and I do not think it is reasonable except for really unavoidable necessity or for the agreed convenience of all concerned that a Court should insist on sitting at times neither prescribed nor suitable.

It is true that in the present case it appears from the order sheet that on January 6th, the Public prosecutor suggested that the Assistant Sessions Judge should recall the Deputy Registrar in order to offer to the accused's pleader an opportunity of cross-examining him. The order sheet at this juncture reads "The vakil for the accused Mr. Mathura Nath Sinha says that he himself thought of asking the Court for this, but he does not wish to cross-examine the Deputy Registrar because some other witnesses have already been examined after the Deputy Registrar and he does not propose to cross-examine the Deputy Registrar now. Since the defence does not wish to avail of the facility which was proposed to be given to cross-examine the Deputy Registrar the Court does not think it necessary to recall the Deputy Registrar."

I think it is possible that this incident, i. e., the action of the Assistant Sessions Judge in insisting on the accused's pleader cross-examining the Deputy Registrar on the 3rd January after the usual hours not withstanding his protest—an incident which I feel was rather unfortunate—may have had a very considerable effect upon the Jury; but although I feel the difficulty in which the accused's pleader was placed, both on the 3rd and on the 6th, I think it was unfortunate again that the pleader on that latter date refused to cross-examine the Deputy Registrar; for he had then considerable material for so doing.

I think again that it is possible that the fact that the Deputy Registrar was not in the upshot cross-examined at all may also have affected the Jury's attitude and their verdict.

The learned counsel for the appellant suggests that the real reason why the accused made a confession before the Magistrate was because, having been induced to confess to the Deputy Registrar by threats of punishment, he felt that he would be in an incongruous position if before the Magistrate he adopted quite a different attitude; although counsel points out also that owing to the entire absence of cross-examination of the Deputy Registrar the accused's allegation that he was threatened by the Deputy Registrar in the verandah of the Magistrate's Court a day or two before he in fact made his confession before the Magistrate stands, however improbable it may sound, uncontradicted.

He also suggests that as the Deputy Registrar was not cross-examined, and, as the counsel puts it, the accused's pleader was given no proper opportunity to cross-examine the Deputy Registrar, the Deputy Registrar's evidence must be regarded as altogether inadmissible. The learned counsel, however, and in my opinion wisely, does not ask on these grounds for a new trial; nor could I, had he done so: have felt it desirable to order one. Although I think the Judge was

(2) 1922 All. 72=44 All. 325=20 A.L.J. 138.

wrong in his procedure on the 3rd, I do not think there was sufficiently suitable opportunity given for cross-examination of the Deputy Registrar on the 6th.

I do not, therefore, feel that there is any ground for contemplating the excision of the Deputy Registrar's evidence. I am not impressed with the suggestion that the accused thought his position would be adversely affected if he made before the Magistrate a statement totally different to that which he had made before the Deputy Registrar; for the same reasoning would apply, only with even greater force, at his appearance before the Sessions Court.

I certainly cannot credit the absurd story of the Deputy Registrar having access to the accused when in custody, and threatening him in the verandah of the Magistrate's Court-house.

I am unable to understand by what processes of thought the Jury arrived at their verdict. I can only imagine that they may have been moved by sentiments of compassion which, however laudable though they may be, could not justify a verdict of not guilty in the face of what I regard as overwhelming evidence to the contrary effect. If, however, their view was prompted by any feeling that the course of the trial resulting in the non-cross-examination of the Deputy Registrar had materially prejudiced the accused's defence, they certainly gave no indication that such was their opinion; nor do I think that any such considerations should in this case materially have borne upon their verdict.

I have on more than one occasion stated from the Bench my reluctance to interfere with the findings of a jury and I am still more loath to do so in a case where that verdict is one of not guilty. But sometimes one is bound to correct what is wrong and this is, I am sorry to say, one of those cases. I have no hesitation in this case, after having considered very carefully the entire evidence and after having given due weight to the opinions of the Assistant Sessions Judge and the jury in deciding that the recommendations in this Reference must be accepted; that the verdict of the jury must be set aside and the accused convicted of both the offences with which he was charged.

There remains only the question of sentence and here I am conscious that one must feel a certain sympathy with the accused's position; but his age and the nature of his offences preclude his being dealt with under those provisions of the Criminal Procedure Code which are applicable to first offenders.

It is, however, not unimportant to notice the young man's age (23) and his heavy family obligations which entailed the maintenance of wife and three children besides, owing to his father's death, his mother; his salary was very small and it is hard to see how he could well support such a family on it; and, if it is true that he had had, as he says, his previous month's salary stolen, he was no doubt hard pressed and a somewhat easy target for the arrow of temptation. It is sad to see a young man on the threshold of his career and life in such a predicament; but I feel sure that I am doing right in taking a lenient view of what has taken place. The learned counsel for the accused tells us that his client has already been in custody for some months, i. e., I gather since his arrest in September; and I think that that custody is probably sufficient punishment for him: but he must undergo simple imprisonment for one day. I hope that in future he will do his best to retrieve his name and error and that he may have in future a chance of doing so.

Kulwant Sahay, J.—I agree.

Reference accepted.

1925 PATNA 783

FOSTER, J.

Ramjas Pandey — Defendant—Appellant.

v.

Awadh Mahton and *another* — Plaintiffs—Respondents.

Appeal No. 301 of 1922, decided on 5th March 1925, against appellate Decree of the Addl. Sub.-J., Saran D/- 29th November 1921.

(a) *Bengal T. Act* (1 *of* 1885), *S.* 148-*A*—*Decree for arrears of rent obtained against some tenants only is not rent decree.*

Where the tenants were a group of lohars and a kumri, and not a joint family;

Held: the lohars could in no way represent the interest of the kumri, and the decree for rent passed against lohars cannot be declared to be a rent decree. [P 784 C. 2]

N. N. Sinha and *B. B. Saran*—for Appellant.

S. K. Mitter—for Respondents

Judgment.— The plaintiffs have a two-thirds raiyati interest in Khatas Nos. 81 and 82, which were put to sale in execution on the 6th September 1918 and purchased by Ramjas Pande, the appellant (Defendant No. 10). The suit is for declaration that the sale has not passed the plaintiffs' interest.

The facts are as follows : The Defendants Nos. 1 to 6 own shares in the villages Mohendra Buzrud, within which lies Khata No. 81 and Amwari Bahalia, which includes Khatas Nos. 82 and 83. These three parcels of land (81 to 83) form one holding with one consolidated rent. Plaintiffs have acquired the raiyati interest in two-thirds of each of these khatas in the following manner — by purchase from Gopal Lohar, Defendant No. 9, and one Daulat Malik, so far as Nos. 81 and 82 are concerned ; and by a family arrangement so far as No. 83 is concerned. In this Khata No. 83 one Kheta, plaintiffs' great-uncle, had a two-thirds interest. He died issueless, leaving brothers and nephews ; but by a family arrangement the interest in Khata No. 83 was made over to plaintiffs' father. Defendants Nos. 7 and 8 own the remaining one-third interest in the three khatas. The holding is not transferable without permission of the landlords by village custom.

In 1917 (after these acquisitions by the plaintiffs and their father) the landlords, Defendants Nos. 1 to 6, sued and obtained an ex-parte decree for arrears of rent. The suit was apparently in the form indicated in S. 148-A of the Tenancy Act and the decree is on the face of it a rent decree. Whether it was in fact a rent decree is an important question. The decree was put into execution, and Khatas Nos. 81 and 82, sold and purchased in September 1918 by Ramjas Pande, Defendant No. 10. If it was a rent-decree, it seems to me that the plaintiffs, transferees of a two-thirds interest in each of the khatas, would have no right to oppose the entry of the auction-purchaser, the rent being a first charge. On the other hand, if the decree was not a rent decree, the purchaser did not necessarily buy the entire Khatas Nos. 81 and 82, but only the right, title and interest of the judgment-debtors.

Now the defendants in that rent suit were Defendants Nos. 7, 8 and 9 and Daulat Malik. Ketha Mahto's interest was not represented, his heirs not being impleaded. But for this defect the decree would possibly have fulfilled the requirements of a rent decree in spite of the transfers made by Gopal and Ketha's heirs of parts of the holding to the plaintiffs. But the tenants were a group of lohars and a kumri, and not a joint family, and the lohars could in no way represent the interest of Ketha's heirs. So I find that the decree was not a rent decree. I refer to *Jagattara Dassya* v. *Daulti Bewa* (1).

Two points remain to be considered. It is urged that the plaintiffs, as transferees of part of the holding, have no right to bring this suit. There appears to be some confusion in this argument between the right to sue and the right to succeed in the suit. The plaintiffs' interest in the entire holding was threatened by the execution sale of two of the khatas ; I think that fact constituted a valid cause of action.

It is next urged that they should have sued for possession, but the delivery of possession to Ramjas Pande did not take place till after the institution of the suit.

The appeal is dismissed with costs.

Appeal dismissed.

(1) [1910] 37 Cal. 75=2 I. C. 695=13 C. W. N. 1110.

1925 PATNA 784

ADAMI AND BUCKNILL, JJ.

Haro Mandal—Defendant—Appellant.

v.

Dhiranath Das and *others*—Plaintiffs—Respondents.

Appeal No. 128 of 1923, Decided on 10th July 1925, against an appellate decree of Dist. J., Dumka, D/- 6th November 1922.

Limitation Act, Art. 14—*Main object of suit being to obtain declaration of plaintiff's right and setting aside Revenue Officer's order being unnecessary, Art.* 14 *does not apply though setting aside of order may also be claimed.*

Where the relief sought is primarily a declaration that the plaintiffs are entitled to succeed a deceased Hindu female owner as her next reversioners, and where for such a declaration the setting aside of the order of a Sub-Divisional Officer would not be necessary, Art. 14 has no application though the plaint may contain a prayer for the setting aside of the order of a Sub-Divisional Officer.

S. N. Bose—for Appellant.

Janak Kishore for *Dinesh Chandra Varma*—for Respondents.

Adami, J.—This second appeal comes from the Santal Parganas. It appears that one Mt. Sahodramani succeeded to the properties of her husband, that is to say, 63 bighas 16 kathas in village Sour Pachaisa. Shamlal Mandal, the prodhan of the village, was her bhoulidar and in Mr. Wood's settlement in 1873 and Mr. Craven's settlement in 1879 Sahodramani and Shamlal were recorded jointly for the lands, but an entry was made that Shamlal was the bhoulidar. In the settlement of 1908, the Settlement officer refused to record Shamlal as having a joint interest on the ground that the interest of any reversioners there might be would be prejudiced. Then Sahodramani and Shamlal put in a petition of compromise before the Settlement officer asking that they might be jointly recorded, but this was refused in 1909. On appeal the order of the Settlement officer was affirmed on the ground given by the Settlement officer. Thus Sahodramani was alone recorded in the settlement of 1908; she remained in possession till January 1916 when she died. On her death Rako Mandal, son of Shamlal, who had succeeded as prodhan, declared that Sahodramani had died issueless and without heirs and therefore the jote was *faut ferari*, and asked to be allowed to re-settle it with some raiyat of the village. The Sub-Divisional Officer remembered what had happened in the settlement proceedings and ordered an inquiry to be made as to the whereabouts and existence of Jhumak, the brother of Sahodramani's husband, who had put in an objection during the settlement proceedings. A peon was sent out to report if Jhumak existed and whether Sahodramani had left any one else claiming to be her heirs. The peon came back and reported that he could not find Jhumak or any heir of Sahodramani. On the 17th November 1916 the Sub-Divisional Officer passed the following order:

"Read the peon's and chowkidar's report. They failed to trace out any heir of the deceased raiyat; the prodhan may settle the land according to the village record-of-rights: any one aggrieved by his action may come up to Court with an objection."

As a matter of fact Jhumak was at Bousi, a village only eight miles from Sour Pachaisa. Rako Mandal, however, reported, on the 5th of January 1917, that he had settled the lands with the defendants Mohanlal Mandal, his nephew, and Haro Mandal, his brother. On that report the Sub-Divisional Officer recorded the order "File," on the 11th January 1917.

On the 11th May 1917, Jhumak Das, having heard what had happened, came forward and filed an objection, but it was rejected, and he then filed another objection which was again rejected on the 23rd August 1918, on the ground that, as Jhumak had been absent from the village and had no lands there, R. 27 of the Santal Rules would apply to the effect that in the settlement of *fouti* lands a resident jamabandi raiyat should be preferred to an heir of the recorded raiyat living miles off from the village in which the lands were situate. The order of the Settlement officer on the 23rd August 1918 was to the following effect:

"As already ordered Jhumak Das should go to the civil Court to establish his claim to get the land as legal heir of the deceased recorded raiyat, Mt. Sahodramani, and that, if he succeeds, he would be entitled to get possession of the land on payment of whatever sum the settlement-takers may be found to have actually paid to the prodhan as arrear rents for the holding." I may note here that the defendants Mohanlal Mandal and Haro Mandal had been allowed settlement of the jote on condition that they paid up the sum due as arrears which amounted altogether to Rs. 778-11-6, and this sum was paid by them to the prodhan.

Jhumak Das died in 1919 before he could move the civil Court, and it was not until the 31st August 1921 that his sons, the present respondents, filed the suit out of which this second appeal arises.

The plaintiffs in this suit prayed for a declaration that they, being the next reversioners of Mt. Sahodramani, were entitled to get the lands left by her, and that the defendants were not entitled to retain the property under the guise of its settlement as *fouti*. They asked also for a declaration that the order of the 17th November 1916, allowing the prodhan to settle the land, was obtained by fraud since the land was not *fouti*. Thirdly, they asked that the order of the 23rd August 1918, passed by the Sub-Divisional Officer in Revenue Miscellaneous Case No. 203 of 1916-17, should

be set aside, and they asked that they should be given possession of the lands in suit without being required to pay any rent to the prodhan, who, with the other defendants, had been in possession throughout.

The trial Court found that the plaintiffs had proved that their father Jhumak was the reversionary heir of Mt. Sahodramani, and after his death they were the next reversioners. It was found, too, that Jhumak Das was the brother of Sahodramani's husband.

The question whether the suit was barred by Art. 14 was considered by the Subordinate Judge and he held that that article would not apply, as the success of the plaintiffs in the suit was not contingent on the setting aside of the order passed by the Sub-Divisional Officer.

He decided that the payment of Rs. 778-11-6 by the defendants to the prodhan was proved, and considered the contention that R. 27 of the Attestation Rules would prevent settlement with Jhumak or his heirs. The Subordinate Judge held that R. 27 could not operate to change the order of succession laid down by the system of law and religion to which a family belongs. He found that the plaintiffs were entitled to recover possession without further payment to the defendants. He therefore decreed the plaintiff's suit.

The learned District Judge has upheld the Subordinate Judge on every point and dismissed the appeal which was brought before him.

The only points brought before us in second appeal are the point of limitation and the point of the liability of the plaintiffs to repay the defendants the sum of Rs. 778-11-6 which the defendants paid to the prodhan.

It is strenuously contended before us that Art. 14 of the Schedule to the Limitation Act barred the suit, since it would be necessary to set aside the orders of the Sub-Divisional Officer before the plaintiffs could recover possession.

The learned District Judge has dealt with this contention and overruled it. The learned vakil relies on the cases of *Parbatti Nath Dutt* v. *Rajmohan Dutt* (1). *Ganesh Shesho Deshpande* v. *The Secretary of State* (2), and *Raghunath Prasad* v. *Kaniz Rasul* (3), also on the case of *Nagu* v. *Salu* (4).

Now, if in the present case it would be necessary, in order to allow the plaintiffs to succeed, to set aside any order of the Sub-Divisional Officer, there is no doubt that Art. 14 would apply. But in the present case the relief sought is primarily declaration that the plaintiffs are entitled to succeed Mt. Sahodramani as her next reversioners, and for such a declaration the setting aside of the order of the Sub-Divisional Officer would not be necessary. It is true that the third relief asked for by the plaintiffs is the setting aside of the order of the Sub-Divisional Officer; but, if the first relief is granted, the third relief would not be required; and then, if we examine the order of the Sub-Divisional Officer made on the 23rd August 1918, wnich I have cited above, it is clear that there is no final order, and the plaintiff was told that, if he succeeded in obtaining a decree establishing his claim to get the land as legal heir, he would be entitled to get possession of the land on payment of whatever sum had been paid by the defendants. Therefore, it is quite clear that there would be no necessity to set aside the order of the Sub-Divisional Officer; for the suit is really a compliance with the order; nor would it be necessary to set aside the order of "File" passed when the prodhan reported that he had settled the jote with the defendants. The plaintiffs having obtained a decree declaring their title would enter on the land as heirs of Sahodramani. Therefore, I think, that the learned District Judge was quite correct in refusing to set aside the decree of the lower Court on the ground of limitation.

There is another view which might be taken also, and that is that in the plaint the plaintiffs asserted fraud, and though there is no distinct finding as to fraud in the judgments of the lower Courts, the tenor of those judgments is to show that Rako Mandal, the prodhan, acted somewhat fraudulently in allowing the existence of Jhumak to be concealed. If there were fraud found, then the question of limitation would not come in; but it is unnecessary to consider this view of the question.

(1) [1902] 29 Cal. 367=6 C. W. N. 92.
(2) [1920] 44 Bom. 451=57 I. C. 587=22 B. L. R. 212.
(3) [1902] 24 All. 467=(1902) A. W. N. 116.
(4) [1891] 15 Bom. 424.

The only point in which I would differ from the learned District Judge is with regard to the payment of Rs. 778. The reason given by the lower Courts for refusing to order payment of this amount by the plaintiffs is that the defendants, during the years they have been in possession, have been able to obtain profits from the land exceeding in value the amount of Rs. 778 paid by them. I do not think that this is the right view to take. The Courts below in fact have entered into the question of mesne profits and have set off those mesne profits against the payment. In their plaint, para. 18, the plaintiffs state that they will bring a separate suit for mesne profits and they do not ask in the present suit for mesne profits. If there is to be a set-off that set-off should be in the suit for mesne profits. It is not open to the Courts in the present suit to reckon what the mesne profits are and to set them off against the Rs. 778. It seems to be assumed, too, that the Rs. 778 went into the hands of the prodhan; the amount represented the arrears due and would have to be paid to Government by the prodhan. It is only right, in my opinion, that the plaintiffs should repay to the defendants, when they recover possession, this sum of Rs. 778-11-6 paid towards arrears by the defendants, and I would, therefore, modify the decree of the lower Courts to this extent that it be declared that the plaintiffs are entitled to recover possession of the lands on their payment to the defendants of the sum of Rupees 778-11-6 within a period of six months from this date. To that extent the decree of the lower Courts will be modified.

Each party will bear its own costs in this Court.

Bucknill, J.—I agree.

Decree modified.

★★ 1925 PATNA 787

JWALA PRASAD AND ADAMI, JJ.

Mt. Jasoda Kuar—Plaintiff—Appellant.

v.

Janak Missir and *others*—Defendants—Respondents.

Appeal No. 58 of 1921, Decided on 23rd December 1924, from original decree of the Special Sub-J., Palamau, D-/ 6th December 1920.

(a) *Evidence Act, S. 45—Person proving handwriting must prove his acquaintance with the handwriting to be proved.*

In order to prove the handwriting or signature of another person one must show that he is acquainted with the handwriting or signature of that person. [P. 790, C. 1]

★★ (b) *Registration Act, S. 28—Small property purchased and included by vendor in the sale deed to confer jurisdiction on the particular Sub-Registrar—No dishonest motive proved—Registration is valid—Defect in title of vendor's vendor does not affect validity.*

In a proceeding for registration of a document, title to property cannot be gone into. Section 28 does not require anything more than the existence of a property within the jurisdiction of a particular Sub-Registrar in order to entitle him to register the same; [52 *I. C.* 446, *Ref.*; 41 *I. A.* 110 and 25 *C. W. N.* 985, *Dist.*]

Where the vendor purchased a certain property in the jurisdiction of the Sub-Registrar and sold it immediately along with other properties of his in another jurisdiction with a view to get the deed registered at the particular Sub-Registry;

Held: that the registration was valid in the absence of evidence of dishonest motive in getting the deed registered in the particular place and any defect in the title of the vendor's vendor to the property does not affect the validity of the sale deed. [P. 794, C. 1]

★ (c) *Adverse possession—Title acquired under invalid registered deed—Vendee remaining in possession for over 12 years—Title is perfected.*

Even when a registered sale deed is found to be illegal, the purchaser gets full title to the property purchased, if he is put in possession in pursuance of the registered deed and continues to be in possession for over twelve years openly and adversely to the vendor. [P. 795, C. 1]

Syed Hasan Imam, Khurshaid Husain and *Syed Ali Khan*—for Appellant.

P. C. Roy and *N. N. Sen*—for Respondents.

Jwala Prasad, J.—This appeal arises out of a suit in ejectment. Shorn of the details, the plaintiff's case is that village Keri *asli* and *dakhli*, including its Tola Bhagiya was the ancestral Khairat property of three brothers, viz., Kinu Misra, Gopal Misra and Rupan Misra. Tola Bhagiya is one of the *dakhli* or dependent villages of mauza Keri. It was let out in mokarrari by Rupan Misra and his cosharers to one Prabhu Narayan Singh and others who granted a zarpeshgi lease, dated 7th April 1887, of their mokarrari right in favour of Bhawan Sahu and others. Defendant No. 6 is in possession of Tola Bhagiya as zarpeshgidar under sale deed, dated the 18th March 1909 (Ex. 13). Three brothers, Kinu Misra, Gopal Misra and Rupan Misra are dead. Defendant No. 1 is the

son of Kinu Misra, and Defendants Nos. 2 to 5 are the sons of Gopal Misra. On the 22nd May 1895, corresponding to Jeth 14th, 1952, Sambat, Defendant No. 1, Janak Misra, son of Kinu Misra, Gopal Misra, father of Defendants Nos. 2 to 5, and Rupan Misra, conveyed to plaintiff by a deed of sale (Ex. 3-a) the whole of village Keri including Tola Bhagiya and other appurtenant Tolas for a consideration of Rs. 8,900 and in pursuance of the said kabala delivered possession of the same to her. The plaintiff continued to be in peaceful possession of the disputed property and has been paying cesses to the Kumar of Tori, proprietor of the village. The plaintiff's husband, Bahadur Sahu, died in 1909, and she being a pardanashin lady there was nobody to look after her interest properly. The defendants, taking advantage of this, began to instigate the tenants of Keri to stop paying rent to the plaintiff, and managed to have Tola Bhagiya mapped and recorded as an independent village and to have some five hamlets or Tolas which really appertain to Keri proper included in Tola Bhagiya. They wrongfully and fraudulently got their names recorded in the settlement papers. The plaintiff coming to know of this, preferred an objection under S. 83 of the Chota Nagpur Tenancy Act, which was, however, rejected. The record-of-rights was finally published in Keri on the 14th January and in Bhagiya on the 21st January 1916. After this publication the defendants dispossessed the plaintiff from the whole property in 1916. Upon these allegations the plaintiff claims her title under the registered kabala, dated the 22nd May 1895, and also by adverse possession to the whole of village Keri *asli mai dakhli* including its hamlets. She further seeks a declaration to the effect that Bhagiya is a mere Tola (hamlet) which appertains to village Keri, and is not an independent mauza; that the real boundaries of Bhagiya are those contained in the kabala of Defendant No. 6 (Ex. 13), dated the 18th March 1909, and that the said defendant only is entitled to hold the area of Bhagiya which is covered by his kabala and that the remaining portion, which has been mapped as part of Bhagiya by the revenue authorities in course of the recent cadastral survey appertains to Keri proper. The plaintiff, therefore, prays for recovery of possession of Keri and its hamlets as detailed in the plaint, with the exception of the trees mentioned in Schedule A, together with mesne profits of the value of Rs. 2,400 from December 1973 to 1975 and future mesne profits pendente lite.

Three sets of written statements were filed in the case: (1) by Defendant No. 1, Janak Misra: (2) by Defendants Nos. 2 to 5; and (3) by Defendant No. 6, the zarpeshgidar. The allegations in the first two pleadings are substantially the same. They plead, amongst other things, that the suit is not maintainable by plaintiff, impugning the kabala of 1895 (Ex. 3-a) set up by the plaintiff as a forged and fraudulent transaction; that it is bad for defect of parties and is barred by limitation. They had no property at Ranchi and as such there was fraud in registration. Defendant No. 1 was gained over by plaintiff's husband, Bahadur Sahu, who was a famous litigant. They had incurred no debts and the so-called creditors were creatures of Bahadur Sahu. Bhagiya has correctly been surveyed and mapped. Plaintiff never held possession of the property, nor collected any rents from the tenants. Defendant No. 1 further contends that Bahadur Sahu was his agent (mukhtear-am), that he was entirely under his influence and executed a document in favour of Bahadur Sahu and his brother Binda Sahu on the representation that he would not have to part with possession of the property and that it would protect his interest in the same. Defendant No. 6 alleges that the mokarraridars Sham Karan Bharathi and others should have been made party to the suit, that Bhagiya has correctly been measured by the revenue authorities as an independent mauza, that the Khairatdar of Keri is only entitled to get an annual rent of Rs. 5 from the mokarraridar of Bhagiya and that Defendants Nos. 1 to 5 have all along been in possession of Keri and the plaintiff had no manner of title in or possession of the property. He pleaded limitation and contends that the plaintiff cleverly managed to get her name recorded in course of the settlement proceeding in the district without being in possession of the property. He, however, does not appear to have taken any keen interest in the Court below and has not entered appearance in this Court. The real disputants are Defendants 1 to 5,

and the two written statements filed by them are mutatis mutandis the same. The following issues were framed in the Court below :

(1) " Has the plaintiff any cause of action ?"

(2) " Is the Court-fee paid insufficient?"

(3) " Is the suit barred by limitation?"

(4) " Is Bhagiya a Tola of village Keri with boundaries as stated in the kabala, dated the 22nd May 1895, or is it an independent village as stated by Defendant No. 6 ?"

(5) " Has the plaintiff acquired any right, title or interest in village Keri and Tola Bhagiya and other Tolas with the exception of the trees mentioned in the plaint by her alleged purchase ?"

(6) " Is the plaintiff entitled to get possession of the disputed property ?"

(7) " Is defendant No. 6 a mere zarpeshgidar of Bhagiya only ?"

(8) " Is the plaintiff entitled to get mesne profits. If so, how much ?"

(9) " To what relief, if any, is the plaintiff entitled ?"

(10) " Is the suit bad for defect of parties ?"

(11) " Is the suit maintainable by plaintiff ?"

(12) " Whether the kabala set up by the plaintiff is illegal."

" Does it affect the property conveyed thereby ?

(13) " Was plaintiff's husband a mukhtear-am of the defendant ? " Did he commit any breach of faith in taking the above kabala ? Is it binding on the defendants ?"

Issue No. 2 is stated by the learned Subordinate Judge not to have been pressed by the defendants. Issue No. 10 has been decided in favour of the plaintiff. The remaining issues were decided against the plaintiff. In the result the Subordinate Judge dismissed the plaintiff's suit. The learned Subordinate Judge has considered Issues Nos. 3, 5, 6 and 13 together. The plaintiff's title is based upon the kabala of the 22nd May 1895 (Exhibit 3-a), and the first question is whether this kabala was executed by Rupan Misra and Janak Misra and Gopal Misra the predecessor-in-interest of Defendants 2 to 5. The learned Subordinate Judge says that "as regards the genuineness of the kabala (Exhibit 3-a) no express issue was laid down." He says that Defendants 2 to 5, the sons of Gopal Misra, emphatically deny the genuinenes of the deed and that the pleadings of Defendant No. 1, Janak Misra, as set forth in his written statement, are "sufficiently vague," but, says the learned Subordinate Judge, taking together his pleadings and deposition, he also challenges the execution of the deed. Thus, although no definite issue was framed as to the genuineness of the kabala, the learned Subordinate Judge has tried to deal with the question. He disposes of the witnesses called by the plaintiff to prove the execution of the deed by Rupan, Janak and Gopal with the remark that these witnesses are more or less creatures of the plaintiff's husband, Bahadur Sahu, and that most of them, though they say that the execution took place in their presence, did not subscribe themselves as witnesses to the deed. As regards the signatures of the executants upon the deed in question, he observes :

"Though each of them purported to have signed *beqalam khas* (by his own pen) the three signatures were affixed evidently by the same pen and hand. It is beyond dispute that whoever he might have been, it was the one and the same person who signed the names of the three executants on the deed. Again, though similarity of handwriting is no criterion for testing the genuineness of a deed, my attention has been drawn by the plaintiff's pleader to the signatures of those alleged executants appearing on certain registered mortgage deeds (Exhibits 4 to 4-C). But I must say that the signature of Rupan as affixed to the kabala, does not resemble the one appearing on the mortgage deed (Exhibit 4)."

There is, however, no such observation as regards the signatures of the other two executants Gopal and Janak, whose signatures also appear on the mortgage bonds (Exhibits 4 to 4-C). The learned Subordinate Judge does not definitely record a finding that Janak and Gopal, or for the matter of that Rupan, did not actually sign the deed in question.

He then refers to another circumstance throwing suspicion upon the transaction which is said to have resulted in the kabala in question, and that is that Anwar Khan, who is said to have identified the executants and was before the Registrar both when this kabala and the mortgage deed (Exhibit 4) were admitted

to registration, was Bahadur Sahu's gomashta.

In short, the learned Subordinate Judge has thrown out certain criticisms as regards the evidence adduced by the plaintiff to prove the execution of the kabala in question, but has not come to a definite finding that the kabala was not executed by Rupan, Gopal and Janak. That this is so will eminently appear from the finding of the learned Subordinate Judge upon the question of the execution of the kabala. He concludes his judgment upon this point in the following words :

" In fact, the circumstances attending the execution of the kabala are extremely suspicious and the evidence regarding execution offered on behalf of the plaintiff should, therefore, be received with caution."

True, but the learned Subordinate Judge stops here and does not give us his definite finding upon the point after examining the evidence in the case in the light of the above caution. A careful analysis of the evidence will show that there is no room for any suspicion as to the due execution of the deed in question by Rupan, Gopal and Janak. Two of the executants Rupan and Gopal are dead. Their heirs, Defendants 2 to 5, deny the execution of the kabala by them. Ramtahal Misra, Defendant No. 2, son of Gopal Misra, had examined himself to prove the negative and denies the signatures upon the kabala in question as being of his father, and Gopal and his uncle Rupan. But is he competent to prove or disprove the signatures of Gopal and Rupan ? He was 20 to 30 years of age on the 8th day of December 1920, when he was examined as a witness in the case. Therefore, in 1895, he was a lad of 9 years. He says in his evidence that he got discretion about 18 years ago, that is, in the year 1902. He nowhere makes himself competent to prove or disprove the signatures of Gopal and Rupan. In order to prove the handwriting or signature of another person one must show that he is acquainted with the handwriting or signature of the person. Ramtahal does not say a word about it in his evidence-in-chief. In cross-examination he gives up the show altogether, where he says:

" I have no paper written by my father or uncle. I have no recollection of their handwriting. Their writing was of different style. I know how to read and write a little."

Janak Misra, Defendant No. 1, has also examined himself in the case. He is 59 years of age and certainly he was associated with his brothers Rupan and Gopal in the management of his family affairs. He is supposed to be one of the executants of the bond. If there was anybody who was competent to speak about the signatures of Gopal and Rupan, it was Janak Misra. He, however, does not take the responsibility of denying their signatures upon the kabala in question. There is, therefore, though a denial in the written statement filed by Defendants 2 to 5, no evidence in the case disproving or denying the signatures of Gopal and Rupan upon the kabala in question. Therefore, the denial in the written statement is not substantiated and Janak's omission in the written statement, to expressly deny the signatures, is a proof positive that the signatures on the kabala in question, which purport to be of Gopal and Rupan, are theirs. Janak has not the hardihood of expressly denying in his written statement his own signature upon the kabala in question. His written statement, if carefully scrutinized, is a tacit admission of the execution of the bond under the influence of Bahadur Sahu by means of inducements for the future benefit of Janak. No doubt, in paragraphs 7 and 10 he denies the genuineness and the correctness of the deed. In paragraph 16 he says that the plaintiff's husband Bahadur Sahu and his brother Binda Sahu exercised complete influence and control over him (Janak), and under their advice and instructions he signed on plain papers, and perhaps the kabala in question is one of such papers In paragraph 21 he says : " So far as the Defendant No. 1 recollects, it is this : that the said Bahadur Sahu once proposed to him that it was proper for him to execute such a bond as would prevent (him) from contracting debts, and if any debt came to light, the same could be used against it ; that there would be no change in his possession and occupation and that it would be within his power to get the same set aside if he had any objection. If the bond in suit is in reality that very (instrument) which was executed under the advice and instruction

of the said Bahadur and Binda Sahu, the Defendant No. 1 was duped to execute it under fraud; but the contents of the bond in suit are certainly not those of the bond whose execution was (once contemplated)."

Therefore, whereas he starts with the denial as to the execution of the bond he tacitly admits that he executed the instrument in question under the advice and instruction of Bahadur Sahu and Binda Sahu, for the purposes mentioned in paragraph 21 of his written statement. According to him, he did execute such an instrument. No other instrument has been failed in the case or shown in evidence to have been executed by him as suggested in paragraph 21. Therefore, conclusively, the kabala in question is the instrument referred to in paragraph 21, and therefore the execution of the kabala is admitted, though it is said to have been executed under fraud and circumstances that effect should not be given to it. This has been his substantial plea as disclosed in his evidence. He says in his evidence that he had imposed great confidence in Bahadur Sahu who had a power-of-attorney in his favour (Exhibit F), dated the 14th December 1880, and that he used to manage his Keri property, which is the subject-matter of dispute in this case. Considering all the circumstances the learned Subordinate Judge stigmatizes the defence of Janak Misra as set forth in his written statement as being vague.

Now, as regards his signature upon the bond, the attitude of Janak Misra in the box has been to deny all his signatures on any paper whatsoever. He went so far as to deny his verification and signature on his written statement filed in this case. Upon this the Court remarked, "the man appears to be a fool." This pulled him up and he immediately admitted his signature upon the verification on the written statement. The Court records his deposition thus: "(Then says) I signed it myself." He says: "Bahadur Sahu was my karpardaz. He might have had the kabala fraudulently signed by me. I used to sign blank paper occasionally. Exhibit 3-A does not contain our signatures." The signature of Janak Misra upon the verification on his written statement filed in this case, which is now his admitted signature, and that upon the kabala in question are manifestly similar. We have carefully compared the signatures of Rupan, Gopal and Janak on the kabala in question and on the previous documents (Exhibits 4 to 4-e) from 1888 to 1891. The signatures, not only appearing as executants of the document in question but also those made before the Sub-Registrar in all those documents, appear to be similar, that is, Rupan's signatures on all these documents are similar; so are of Gopal and Janak Misra respectively. They have got peculiar ways of writing, particularly Janak. His letters are of a peculiar style and even a superficial look at them would not fail to impress one with their similarity. These signatures were examined by the learned vakil, Mr. P. C. Roy, on behalf of the respondents and he conceded that the signatures are similar. The learned Subordinate Judge is entirely wrong when he says that the signatures of the three executants were written by the same pen and hand. The signatures of three executants Rupan, Gopal and Janak are in different style altogether. The learned Subordinate Judge has overlooked the signatures of these executants before the Registrar. These signatures could not be by one and the same person, but must have been by three different persons. The documents bear their thumb impressions. The thumb impressions are not of one and the same person. They are evidently of three different persons. The suspicion lurking in the mind of the learned Subordinate Judge was that one and the same person signed the documents for all the three brothers. This is obviously wrong. There is direct evidence in the case of a number of witnesses on behalf of the plaintiff, who swore to the execution of the kabala by the three brothers. The learned Subordinate Judge brushes them aside upon the ground that they are servants or relations of Bahadur Sahu, husband of the plaintiff; but it is common knowledge that a vendee always wants to have his own men as witnesses to the sale deed. All the marginal witnesses of the kabala, except Piru Khan, are dead, and the plaintiff has examined him. No reason has been given by the Court below why his evidence should not be accepted. Upon a careful consideration of the evidence and giving our best consideration to the criticisms of the learned Subordinate Judge we have

unhesitatingly come to the conclusion that the document in question was executed by Rupan, Gopal and Janak.

The learned Subordinate Judge then addresses himself as to the consideration for the kabala.

[His Lordship then considered the various sums representing the consideration for the deed and came to the conclusion that the bond was executed for consideration and that the entire consideration money was paid off. The judgment then proceeded :]

Rupees 1,800 was paid in cash at the time of registration as is noted on the document itself. The document cannot be impugned as being without consideration. It was duly executed by Rupan, Gopal and Janak for good consideration. Therefore the document created a valid title in favour of the vendee with respect to the property purported to have been conveyed by it.

[His Lordship then dealt with the evidence as to possession adduced in the case and proceeded.]

The evidence before us has confirmed us in our conviction that the Mt. is the rightful owner of the property in dispute and has been in possession up to 1910 when disturbance began on behalf of the Misras, the defendants, and she was completely dispossessed about that time. Janak Misra had not produced any collection papers before the Assistant Settlement Officer, nor has he been able to produce any before us before 1910.

The conclusion to which we have arrived at in disagreement with the view of the Subordinate Judge is that the kabala in question is a genuine document and was duly executed by Rupan, Gopal and Janak. It was given effect to and the title passed to the plaintiff and that she obtained possession thereunder in 1895 just after the deed was executed and she continued to be in possession until she was dispossessed as stated above. The suit was instituted on the 16th May 1919 well within time for recovery of possession. This disposes of Issue No. 3, which relates to limitation.

Incidentally I may say a few words as regards Issue No. 13. This issue does not seem to have been drawn up artistically. The plaintiff's husband held a power of attorney from Janak Misra (Ex. F), dated the 14th December 1880, and, as already observed, this power of attorney was with a view to save the trouble of the principal going to the Registration office for registering her document. The evidence is not convincing as to Bahadur Sahu being a general Mukhtear-Am having a general power of attorney for all kinds of business to be transacted on behalf of the defendants. He had no special power of attorney of any sort from Defendants 2 to 4 or their ancestors Rupan and Gopal. No evidence has been given in this case of any breach of faith having been committed by Bahadur Sahu with respect to the kabala in question. If Bahadur Sahu was a shrewd man, as the Subordinate Judge calls him, Janak Misra appears to be equally shrewd for just after the death of Bahadur Sahu he began to manipulate all kinds of measures, proper or improper in order to disturb the possession of the lady. He set up some of the tenants to say that the plaintiff had only 8 annas share in the village and that the remaining 8 annas was held by Ramtahal Misra. He himself in the suit brought for rent by the Msmt. said that he was holding under Ramtahal Misra, proprietor of 8 annas share. He did not deny in that case that the Msmt. had no title to the village under the kabala in question. He took advantage of the plaintiff being a pardanashin woman and wholly dispossessed her by the time the Assistant Settlement Officer dealt with the village in 1915, and he succeeded in maintaining his, what the Assistant Settlement Officer calls, illegal possession as a trespasser in the village and had his name recorded as such. If we are right in our view that he solemnly executed the deed of sale and received consideration and gave possession of it to the vendee, he was repaying the faithful services of Bahadur Sahu by manipulating deceitful measures against her. No case of fraud and undue influence has been made out and no facts and circumstances sufficient to raise such a plea been definitely avered in the written statement or proved. The last portion of this issue " Is it binding on the defendants " has already been answered. The Defendant No. 1 and the predecessor-in-interest of Defendants 2 to 5 executed the sale deed in question and the kabala is therefore binding upon the defendants.

The next question would then naturally arise as is set forth in Issue No. 6 : " Is the plaintiff entitled to get possession of the disputed property ? "

The answer to this would have been a very simple one after what has been said

above had it not been for Issue No. 12 : "Whether the kabala which has been set up by the plaintiff is illegal ? Does it affect the property conveyed thereby ?" Therefore before Issue No. 6 is answered, Issue No. 12 must be disposed of. Under this issue the learned Subordinate Judge has decided that the Sub-Registrar of Ranchi, who registered the document acted without jurisdiction, inasmuch as the vendors Rupan, Gopal and Janak had no property within the jurisdiction of the Ranchi Sub-Registry. Now, the properties conveyed by the sale deed are the properties in dispute mauza Keri and its Tolas (dependent hamlets) and a portion of a house situate in Ranchi. Mauza Keri appertains to Palamau district and is outside the Ranchi district. According to the finding of the Subordinate Judge village Keri is 85 miles from Daltongang and 40 miles from Ranchi. The executants of the bonds are residents of Mouza Keri. The vendee Mt. Jasoda Kuar and her husband Bahadur Sahu were residents of Mouza Harhanj in the district of Palamau about 48 miles off. The house in question stood in the name of Liladhar Misra, Am-Mukhtear of Bahadur Sahu, and Ganpat Sahu, brother-in law of Bahadur Sahu. The house originally belonged to a Kumhar, who conveyed the same to Liladhar and Ganpat on the 25th of June 1883. Deocharan, brother of Liladhar, executed a Kabala (Exhibit 3) claiming half the share jointly with Liladhar in the house in question on the 22nd May 1895, wherein he claimed that he along with his brother Liladhar had half share in the house which was purchased in the name of Liladhar and Ganpat, and he sold one of the rooms of that house roofed with titles said to be in his possession for a sum of Rs. 10 to Janak Misra, one of the executants of the sale deed in question (Exhibit 3-a). The two sale deeds (Exhibits 3 and 3-a) were presented to the Sub-Registrar of Ranchi for registration almost simultaneously between 2 and 3 p. m. and they were registered. The sale deed (Exhibit 3) relating to the house bears No. 2630 for 1895 entered in Book I, Volume 19, at pages 87-88. The sale deed (Exhibit 3-a) relating to mauza Keri in dispute bears No. 2632 for 1895 entered in Book I, Volume 13, at pages 275-279. Janak Misra, in whose favour a portion of the house in Ranchi was sold by Exhibit 3 did not intend to keep the house to himself, for immediately he conveyed the same by means of the sale deed (Exhibit 3-a) to Mt. Jasoda Kuar. Therefore the sale deed (Exhibit 3) was executed with a view to give him title to the house situate in Ranchi in order that the sale deed (Exhibit 3-a) with respect to mauza Keri be presented for registration and registered in Ranchi. Neither of the parties lived either at Ranchi or at Daltonganj, and the distance from their respective residences to Daltonganj was almost double. Obviously they thought it convenient to have the document registered at Ranchi instead of at Daltonganj, as 45 miles in that part of the country is an inconvenient distance to travel for ordinary people not having good conveyance at their disposal, the country being covered by hills and jungle. This in itself is not a dishonest motive and might in the circumstances be a good motive to avoid going to Daltonganj. In the present case nothing has been shown why the parties would avoid having the document registered at Daltonganj, except the one ground referred to above. No circumstance has been shown to indicate that the parties wanted to avoid the publicity of the registration of the sale deed (Exhibit 3-a) in the Daltonganj district. There is nothing to show that they wanted to defeat or defraud any creditor or that they had any other sinister motive. Therefore the fact that Janak got the sale deed executed in his favour by Deocharan with respect to the house in Ranchi would not in itself affect the registration of the document provided it was a bona fide deed with a view to carry out the intentions of the parties in executing and registering the sale deed (Exhibit 3-a) in Ranchi with respect to mauza Keri. It is said that Deocharan had no interest in the house and that the house belonged to Bahadur Sahu and that he was the real purchaser under a sale deed, dated the 25th June 1883 from a Kumar in the farzi name of his Am-Mukhtear Liladhar Misra and his brother-in-law Ganpat Sahu. In support of this reference is made to Exhibit A, sale deed executed by Bahadur Sahu in favour of Akhouri Sundar Behari Lal, dated the 19th March 1902, several years after the kabala in question (Exhibit 3-a). In that sale deed Bahadur Sahu recites that he had purchased the house in question under a registered sale deed, dated

the 25th June 1883, with his own funds farzi in the name of his Mukhtear-am Liladhar Misra and his brother-in-law Ganpat Sahu, and that he disposed of it to Akhouri Sundar Behari Lal for Rs. 125. Deocharan Misra, brother of Liladhar Misra, on the other hand, in the sale deed (Exhibit 3) stated that he was a cosharer with Liladhar in the house in question and that he owned and possessed one of the rooms of that house and that he sold that off to Janak Misra per sale deed (Exhibit 3) on the 22nd May 1895. Bahadur Sahu took part in the execution of the sale deed (Exhibit 3-a) in favour of his wife, the plaintiff in the case. The deed confirmed the sale of the house by Deocharan to Janak by Exhibit 3. Bahadur Sahu, therefore, allowed the property to be sold by Deocharan Misra in favour of Janak Misra. The sale deed of the 25th June 1883 in favour of Liladhar Misra and Gopal Sahu on the face of it shows that Liladhar Misra had interest, and Deocharan is brother of Liladhar. Therefore, upon the document as it stands, it cannot be said that Liladhar or Deocharan had no title to the house in question. According to the tenor of the document and the relationship that existed between Deocharan and Liladhar, the former would appear to have title to the house in question which he purported to convey by the sale deed (Exhibit 3) to Janak. In a proceeding for registration of a document title to property cannot be gone into. There was a property, namely, the house situate within the Ranchi district and the Sub-Registrar of Ranchi had jurisdiction to register the document relating to the house in question. Deocharan Misra purported by kabala (Exhibit 3) to sell a portion of that house to Janak Misra, and Janak Misra therefore under that sale deed, acquired an ostensible title which he forthwith conveyed by (Exhibit 3-a) to the plaintiff. S. 28 of the Indian Registration Act does not require anything more than the existence of a property within the jurisdiction of a particular Sub-Registrar in order to entitle him to register the same: *Mt. Ram Dei* v. *Ram Chandrabati Debi* (1).

The cases cited are distinguishable. In the case reported in *S. C. Harendra Lal Roy* v. *Hari Das Devi* (2) the property mentioned in the mortgage bond in question was a fictitious property. It had no existence in Calcutta, and therefore under S. 28 the registration of the document was invalid. In the case of *Mathura Prasad* v. *Chandra Narain Chowdhury* (3) the sale deed with respect to 2 bighas 1 katha in Kolhua in the district of Muzaffarpur, which purported to give title to a party to a mortgage in order to entitle the registration thereof in the district of Muzaffarpur was not produced nor was it shown that there was delivery of possession by virtue of the sale deed. In that case it was found that to the knowledge of both parties the mortgagor had no title in that property and that he never intended to part with that property. In those circumstances the registration of the document in the district of Muzaffarpur was held to be inoperative having been registered outside the registration law. The circumstances of this case are quite different from any of those cases. The first case obviously does not apply, inasmuch as the house in the district of Ranchi is not a fictitious property. The second case does not apply, inasmuch as on the face of the previous sale deed of the 25th June 1883 Liladhar Misra, brother of Deocharan Misra, had title to the property, and Bahadur Sahu who took part in the execution of both the sale deeds (Exhibits 3 and 3-a) led Janak Misra to believe that Deocharan had title to the house and did not disclose his own title if any. Therefore, these decisions of their Lordships of the Judicial Committee do not apply to the present case. The vendees who themselves took part in the transaction re. the registration of the documents (Exhibits 3 and 3-a) cannot be permitted to take this plea.

We, therefore, hold in disagreement with the view taken by the learned Subordinate Judge that the document in question is not illegal on account of its having been registered by the Sub-

(1) [1919] 4 Pat. L. J. 433=52 I. C. 466.

(2) [1914] 41 Cal. 972=41 I. A. 910=1 L. W. 1050=27 M. L. J. 80=(1914) M. W. N. 462=16 M. L. T. 6=18 C. W. N. 817=19 C. L. J. 484=16 Bom. L. R. 400=23 I. C. 637=12 A. L. J. 774 (P. C.).

(3) [1921] 48 I. A. 127=40 M. L. J. 489=19 A. L. J. 385=33 C. L. J. 440=23 Bom. L. R. 629=(1921) M. W. N. 370=14 L. W. 1=29 M. L. T. 413=2 Pat. L. T. 397=60 I. C. 888=25 C. W. N. 985 (P. C.).

Registrar of Ranchi. The Issue No. 12, having been thus answered, the answer to Issue No. 6 is obvious; and that answer is in the affirmative.

The plaintiff is entitled to get possession of the disputed property. The plaintiff's title is fortified in this case by the fact that she had been in possession of the property for over 12 years from 1895 to 1909. Her possession was to the knowledge of Janak Misra who had taken part in the exercise of right of possession by the plaintiff, some of the counterfoils having been signed by himself. She, therefore, acquired an absolute title to the property by adverse possession for over 12 years, having exercised it openly and adversely to the knowledge of the defendants. Therefore, even if the registration of the document was illegal, the title acquired by her adverse possession remains in tact, and the defendants have no right to dispossess her in the manner in which they did in the year 1910 or thereafter.

The obvious result of these findings is that the plaintiff is entitled to succeed in the suit, and the suit must be decreed.

The next question is the extent of the decree to be given in favour of the plaintiff. Her case in short is that she is entitled to get possession of all the properties in mauza Keri with Tola Bhagiya and that the other Tolas appertaining thereto, and that the survey entry recording some of the Tolas as appertaining to Bhagiya as distinct from mauza Keri is wrong. This issue has not so much concern with Defendants Nos. 2 to 5, but only Defendant No. 6. Defendant No. 6, as already observed in the earlier part of the judgment, has not taken keen interest in the litigation and did not contest the plaintiff's claim either here or in the Court below, though he filed a written statement; and in this appeal he has not entered appearance. It appears that the sale deed of 1909 (Exhibit 13) filed in this case describes the extent of the property to which the Defendant No. 6 is entitled as zarpeshgidar of the mokarrari interest in that village. He is not entitled to hold possession of more than what that document gives him. Therefore the plaintiff is entitled to take khas possession of all the properties, except Tola Bhagiya, as described and detailed in the deed of 1909 (Exhibit 13). This again was a clever move on the part of Janak Misra to have a large quantity of lands excluded from mauza Keri and to have Tola Bhagiya recorded in the record-of-rights in his name as owner thereof.

The result is that the judgment of the Court below is reversed and the decree is set aside, and the plaintiffs' suit is decreed with costs throughout. The plaintiffs will also be entitled to get mesne profits prior to the suit from Defendants Nos. 1 to 5. The amount will be determined in a subsequent proceeding; she will get mesne profits also pendente lite as also for the subsequent period up to the date of delivery of possession or three years from the date of the decree of this Court, whichever event occurs first.

Adami, J :—I agree.

Decree set aside.

1925 PATNA 795

MULLICK AND ROSS, JJ.

Gonda Singh and *another*—Plaintiffs—Appellants.

v.

Jitan Mahto and *others*—Defendants—Respondents.

Appeals Nos. 691, 1299, 1030 and 1144 to 1152 of 1923, Decided on 30th March 1925, from a decision of the Addl. Dt. J., Patna, D/- 23rd April 1923.

(a) *Landlord and Tenant—Record-of-rights describing dahiyak as abwab—Court looking into collection papers and holding entry to be wrong—Finding is one of fact.*

An entry in the record-of-rights classed the landlord's claim on account of dahiyak as an abwab. The lower appellate Court looked at the zamindari collection papers for many years and came to the conclusion that the presumption attaching to the record-of-rights had been rebutted and that the charge on account of dahiyak was not an illegal cess within the meaning of the Bengal Tenancy Act.

Held: that the finding of the lower appellate Court was one of fact based on evidence and could not be challenged in second appeal.

[P 796 C 1]

(b) *B. T. Act* (1885), *S.* 67.—*Bhaoli holdings—No evidence as to rent being payable quarterly—No interest can be charged.*

Where the holdings are bhaoli and there is no evidence that rent is payable quarterly, interest under S. 67 of the B. T. Act is not chargeable. [P 796 C 2]

S. M. Mullick and *Jalgobind Prasad Sinha*—for Appellants.

Bimala Charan Sinha—for Respondents.

Mullick, J.—The first question in the case is whether dahiyak is to be allowed to the plaintiffs. This has been viewed by the Munsif as an abwab. The Additional District Judge, however, in appeal finds that it is not an abwab but that it is a part of the hakmi share of the bhaoli rent. He holds that the share of the malik, instead of being 20 seers, is 22 & 1/2 seers and he disagrees with the entry in the record-of-rights which classes the claim on account of dahiyak as an abwab. The learned Judge, however, does not in terms say that the record-of-rights is rebutted; but on reading his judgment it is clear that what he means is that the presumption attaching to the record-of-rights had been rebutted and that the charge on account of dahiyak is not an illegal cess within the meaning of the Bengal Tenancy Act.

It is contended that the learned Judge had no evidence before him for coming to this finding; but it appears that he looked at the zamindari collection papers for many years and came to the conclusion that the zamindar had been realizing at the rate of 22 & 1/2 seers and not at the rate of 20 seers in the maund. I think there was evidence before the learned Judge and that his finding in regard to dahiyak cannot be challenged in second appeal.

The next point is whether the learned Judge's finding as to the years in which sugarcane was grown, and as to the raiyats by whom it was grown, is supported by evidence. On behalf of the landlords, who are the appellants before us, it is contended that the learned Judge has made a case of his own and has acted quite regardless of the evidence before him. But it appears that although there was evidence given by the plaintiffs with regard to sugarcane having been grown by the tenants, Baiju, Etwari and Bedu, for more than one year the learned Judge did not rely upon that evidence, but went upon the admission of the tenant Nanhku who said that he had grown sugarcane for one year only. In the circumstances we cannot say that there was no evidence for the finding that sugarcane was grown only in the year 1325 F. S.

The third point is that the learned Judge should have given either interest or damages. Now the holdings being bhaoli, and there being no evidence that rent was payable quarterly, interest under S. 67 of the Bengal Tenancy Act was not chargeable. Interest might have been claimable under the Interest Act, but the claim is not put under that enactment.

Then, as regards the claim for damages, the learned Judge had a discretion in the matter and the question cannot be agitated in second appeal.

The result, therefore, is that the only point in which the learned Judge'S decree will be varied is as to the hakmi share which will be calculated in the proportion of 9 to 7; that is to say 22 & 1/2 seers in the maund. The appeals are, therefore, decreed in this modified form with costs. Hearing-fee will be Rs. 16 in each case.

Ross, J.—I agree.

Appeal allowed.

1925 PATNA 796

ADAMI AND KULWANT SAHAY, JJ.

Kesheo Prasad Singh Bahadur—Plaintiff—Appellant.

v.

Lakhnath Roy and *others*—Defendants—Respondents.

Appeal No. 1011 of 1922, Decided on 14th May 1925, against appellate decree of the Dist. J., Shahabad, D. 27th July 1922.

B. T. Act (1885), *S.* 88—*Thiccadar is not "agent"—Thiccadar splitting up holding bona fide for benefit of estate—Landlord is bound by the arrangement.*

A thiccadar is not the agent of the landlord. Consent by a thiccadar given in good faith for the benefit of the estate to an alteration of the area of the holding under him and the apportionment of rent upon the new holdings is binding upon the landlord. 2 *P. L. J.* 151, *Foll.*

[P 797 C 1]

N. N. Sinha—for Appellant.

Jagannath Prasad—for Respondent.

Judgment.—The plaintiff in the suit out of which this second appeal arises sought to recover arrears of rent for the years 1324 to 1326 in respect of 31 bighas, 1 katha, 2 dhurs of land at a jama of Rs. 77-14-9 inclusive of cesses. The defendants, in their written statement, urged that the area of 31 bighas odd had been split up into separate holdings of which the various defendants were in occupation at certain rates of rent. The defendants further pleaded that they had

each of them paid the rent due by them to the landlord.

It happened that in the year 1327 the plaintiff gave a thica lease of this holding to one Mr. Fox and it was during his thicca that the area was split up into separate holdings. The plaintiff's claim was that he was not bound by the action of the thiccadar in splitting up the holdings and was entitled to recover a lump sum of rent from all the defendants jointly in respect of the whole 31 bighas.

Both the lower Courts have rejected the plaintiff's claim holding that he was bound by the action of the thiccadar and that a joint suit against all defendants could not be maintained.

Mr. Nirsu Narain Singh puts forward the elaim that S. 88 of the Bengal Tenancy Act applies, and frees the plaintiff from the obligation to stand by the splitting up brought about by the thiccadar. Mr. Nirsu Narain Singh, in fact, contends that the thiccadar was an agent within the meaning of S. 88. It cannot, I think be held that a thiccadar is the agent of the landlord. He holds under a lease and he collects the money for himself and not for the landlord. S. 105 of the Transfer of Property Act defines a lease of an immovable property as a transfer of a right to enjoy such property, made for a certain time. As the leaseholder, the thiccadar, can hardly be described as an agent. Furthermore, under Cl. (4) of S. 3 of the Bengal Tenancy Act the thiccadar is a landlord.

But in this case we are bound by the decision of this Court in the case of *Mahamad Nazirul Hussain* v. *Chuni Kamti* (1) where it was held that consent by a thiccadar given in good faith for the benefit of the estate to an alteration of the area of the holding under him and the apportionment of rent upon the new holdings is binding upon the landlord. In the present case the learned District Judge has found that there is no sign of any collusion between the raiyats and the thiccadar or of any bad faith on the part of the thiccadar.

It is then contended by Mr. Nirsu Narain Singh that a money-decree should be granted against the defendants and he refers us to the written statements where the defendants admit that they hold the split up holdings separately at certain rates of rent. He has not noticed, however, that the same statements put forward a plea of payment and under the circumstances no decree of the character he desires would be passed in the present case.

The appeal must be dismissed with costs,

Appeal dismissed.

(1) [1917] 2 P. L. J. 151=38 I. C. 706=1 P. L. W. 229.

★ 1925 PATNA 797

BUCKNILL AND KULWANT SAHAY, JJ.

Rupan Singh and *others*—Appellants.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 5 of 1925, Decided on 25th February 1925, from an order of the S. J., Patna, D/- 24th December 1924

★ (a) *Criminal P. C., S. 367 (5) Proviso—Heads of charge to jury should be put on record as soon as possible.*

According to the proviso to S. 367 (5) the recording of "heads of charge to the jury" need not be a verbatim reproduction of the Judge's summing up; nor is it necessary that the charge should be written out before it is delivered. But whether the heads of charge are written out before delivery or not, they should be placed on record by the Judge as soon as it is possible for him to do so and whilst what he said is fresh in his recollection. [P. 801, C. 2]

The heads of charge need not be meticulous or lengthy but must give accurately the substance of what the Judge said to the jury so that the High Court may, if occasion arises, be able to ascertain from the record whether the law and the facts relative to the case were fairly and properly put to the jurors.

Where the records of the heads of charge merely stated that certain sections of the Penal Code had been "read over and explained."

Held: that this was not a sufficient compliance with the law. 57 *I. C.* 934 and 1 *Pat. L. J.* 317, *Rel. on.* [P. 802, C. 2]

(b) *Criminal P. C., S. 298 — Formulating questions for consideration of jury is not required by law—The practice is, however, advisable.*

The law does not expressly require a Judge to formulate, at the conclusion of the delivery of his charge, specific questions for the jurors' reply. Such a practice is, however, helpful in deciding the legal effect of jury's finding, but the formulation of such questions requires great care and queries should be confined within the narrowest possible compass.

Kulwant Sahay, J.—In complicated cases the judge should in his charge to the jury, not only explain the law, but should draw their attention to the evidence in the case and explain how they

should apply the law to the particular facts of the case. Observations of Manuk, J. in 3 *Pat. L. J.* 655 *Appr.* [P 805 C 2, P 806 C 1]

Manuk, Bimala Charan Sinha and *B. P. Sinha*—for Appellants.

H. L. Nandkeolyar—for the Crown.

Bucknill, J.—This was an appeal made by nine men who were charged before the Sessions Judge of Patna, sitting with a jury in December 1924 with various offences. One of the appellants (Appellant No. 9), named Bangali Dusadh, was charged under S. 304, Penal Code, with having committed the offence of culpable homicide not amounting to murder by causing the death of one Khedan Goala : the jury unanimously found him not guilty and he was acquitted on this charge.

All the appellants were charged with an offence under the joint provisions of Ss. 304 and 149 ; that is to say, in this case, for being members of an unlawful assembly in prosecution of the common object, of which the appellant Bangali Dusadh, who was one of the members of the unlawful assembly, committed the offence of culpable homicide not amounting to murder by causing the death of Khedan Goala, the common object being stated to be the wrongful dispossession of the deceased Khedan from a field of 1 bigha and 2 kathas in area on which he had been settled by the malik after such land had been abandoned by persons named Akloo, Hari and Karu and for which field they (the appellants) mistook the field of Bhaju Goala. It is obvious that the jury was in a very confused state of mind as to this charge : they first of all, by a majority of 3 to 2, found all the accused guilty under S. 149 alone ; but what they meant it is impossible to say ; for a conviction under S. 149 alone cannot be properly recorded as the concurrent finding of the commission of an offence by any member of the unlawful assembly in prosecution of the common unlawful object of the assembly is necessary.

It has been suggested by the learned Assistant Government Advocate that the jury meant that they thought that all the appellants were guilty under Ss. 304 and 149, although they did not think that the evidence proved which of the appellants caused Khedan Goala's death. But this conjecture will not serve ; for, on the learned Sessions Judge pointing out to the jury that their verdict was an impossible one, the jury by a majority of 4 to 1 promptly returned a verdict of not guilty against all the appellants under Ss. 304 and 149 ; and the Judge then acquitted all the accused on this charge. So all that can be concluded is that the jury's minds were not clear about the law at the end of the Judge's charge and, assuming that he had explained the law properly to the jury, it seems certain that the jury could not have understood his exposition.

All the appellants were also charged under S. 147 with being members of an unlawful assembly and using force with the common wrongful object of taking forcible possession of the field of the deceased Khedan for which they (the appellants) mistook the field of Bhaju Goala.

The jury, by a majority of 3 to 2, found all the appellants guilty of the charge under S. 147 : the Judge accepted this verdict : and, on 24th December 1924, he sentenced one of the appellants (No. 2) named Gobind Singh to two years' rigorous imprisonment (presumably because he was principally interested in the land in question or was alleged to have taken a very prominent part in the matter) and all the rest of the eight appellants to one year's rigorous imprisonment each. It is from these findings, convictions and sentences that the appellants now appeal.

One is naturally very loath to interfere with a jury's verdict ; but the grounds put forward in this appeal, which are, so the learned counsel who appears for the appellants has urged, such as show omissions to direct and misdirections by the learned Judge and which should be regarded under the provisions of S. 537 (*d*) of the Criminal Procedure Code as having occasioned a failure of justice, are numerous and by no means trivial ; and it is necessary, therefore, to give some account of the circumstances which are said to have given rise to Khedan's death. Some of the facts which it is necessary to recite are not in dispute.

There is a Tola of a village called Kalyanpura known as Bhatbigha ; it is not far from Behar. One Jagdeo Bhat was formerly owner of Tauzi No. 10851 in this Bhatbigha Tola. It is said that after the survey which took place in 1909 some of the raiyats who had previously been on this land abandoned their plots and that

Jagdeo settled these derelict lands with fresh people, one of whom was the deceased Khedan.

About ten years ago Jagdeo sold the whole Tauzi to one Kailaspati Bhat : this purchaser kept on the old raiyats and took over one Mithu Singh, who had been Jagdeo's servant, as his (Kailaspati's) barahil : amongst the raiyats was the deceased Khedan.

It is said that amongst the raiyats who abandoned their land after the survey were three brothers named Aklu, Hari and Karu ; they and another man called Lekha (who is also stated to have left his plot) are said to have held together about 5 bighas of land : Lekha is said to have cultivated his share separately and the three brothers to have managed 2 bighas 17 kathas ; this latter piece has conveniently been referred to as "Aklu's land." According to the evidence, some 1 bigha 2 kathas of Aklu's land was settled with Khedan : and one plot (No. 199) out of this area lay, it is said, to the south-east of a larger (but considerably sub-divided) plot, known as plot 193, which was the abandoned land of another raiyat called Ganga Singh : in the south-east corner of this Plot 193 another small bit of land had been also settled with the deceased.

A large portion of Aklu's land (about 1 bigha 1 katha) formed a Plot, No. 192, which lies west of plot No. 193 : it is not suggested that any part of Plot 192 was ever settled with Khedan ; nor that any portion of Plot 193 ever belonged to Aklu ; nor has it ever been suggested by the prosecution that what is said to have taken place took place on land which ever belonged to Aklu. It was at first, i. e., in the first information laid by the deceased's son, stated that the appellants had tried to eject and had attacked the deceased from and on his plot in Plot 193: but that story was changed, and the prosecution account now is that the deceased was assaulted on the eastern ridge of the middle north-western portion of Plot 193, which is said to have belonged to one Bhaju and for whom the deceased's son cultivated it : Bhaju is quite a youth.

Now there seems no doubt that Aklu, some years ago, sold his land or his rights (whatever they were) in his land to two persons named Somar Mahto and Chatardhari ; the latter disposed of his share to Somar Mahto ; Somar and his son in turn sold to the son of No. 2 appellant Gobind Singh ; this last transaction was in July of last year ; it was probably a farzi transaction.

Now the appellant No. 2 is a barahil of one Manna Lal who owns certain properties in a place called Samasti : Appellant No. 1 is the manager of this Manna Lal ; and he (Rupan Singh) lives at a place called Maraura. Appellant No. 3 is the titular vendee from Somar and his son and is the son of Appellant No.1. Appellant No. 4 is a brother of Appellant No. 9 who is the field watchman of Samasti : the other four appellants are also men of Samasti : Samasti is only about a mile from Kalyanpur.

Now there is no doubt that an occurrence took place on August 5th, 1924, somewhere on or in the neighbourhood of Plots Nos. 192 and 193 in the course of which Khedan was speared in the abdomen and died not long afterwards : another man, called Pairoo, who was one of those in company with Khedan, had his left thumb hurt : the deceased's son, Etwari Dusadh, also of course of his father's party, sustained a simple fracture of the left ulna ; whilst a fourth man named Hiraman (not one of the appellant's faction) received a lathi blow on the right hand.

On the other side, the appellant Gobind had no less than eight injuries including five lacerated wounds on the head none of which, however, were really serious. It seems very likely that all the accused were present at the time when the affair, whatever it was, took place : and this appears to be the fact notwithstanding that all the accused except Gobind and his son (who give their version of the occurrence as an attack upon themselves) deny having been there : but the evidence of their identification at the scene is undoubtedly very voluminous.

Without in any way wishing to criticize any opinion, whatever it was, which was taken by the jury upon the evidence as to what actually took place, it is necessary here, to state, with the view of considering subsequently the attack made upon the learned Sessions Judge's charge to the jury, that there were several versions of the affair from which a choice could be made.

There was first of all a story of information received by the chowkidar of Bhatibigha named Etwari Dusadh (Prosecution witness 9) (not of course, the

same person as the informant Etwari Goala) and of what he saw before the occurrence whilst he was going to parade at his thana at Bihar very early in the morning of the day of the affair : he reported at the police station and his report was entered at the station diary : he seems to have been fully, though not entirely accurately, cognizant of the position of affairs and of the parties. He then stated that the Appellant No. 1 (Rupan Singh) had bought recently 3 bighas of land at Bhatibigha which belonged to a goala of Bhatibigha : the land had, however, been cultivated by one Mithoo Singh " from before " ; that on that day, "men on behalf of Rupan" were going with ploughs to take possession of the land and that arrangements were being made on behalf of Mithoo for resistance : he added that he himself was sure that as soon as the plough would be at work on Rupan's behalf, Mithoo would resist and that there was every likelihood of a serious breach of the peace. As this report was lodged before anything had happened it seems very strongly to be probable that it represents the true position of matters. The next account of what took place is the first information given by the deceased's son Etwari Goala: not to be confounded with the chowkidar Etwari Dusadh.

His story then was that 1 bigha, 2 kathas of a field "comprised in three bandhs" was settled by the malik Jagdeo with the informant's father in 1909 and that since that time the informant's father had been in possession of this field or piece of land. This field had, once, formed part of property belonging to Aklu, Hari and Karu Gope : but that they had left the village not long after the survey although their names continued to be retained in the khatian. The malik, a new one to whom Jagdeo had sold about nine years age, had settled these left lands with new tenants : but Aklu, Hari and Karu had, about the year 1921, sold the property (which they had abandoned) to one Durga Gope who in 1923 sold it to Dharam Singh Gope of a place called Mahalpur : but neither of these two successive purchasers had ever had actual possession of the land. This Dharam Singh Gope in his turn had sold the land to the 2nd appellant Gobind (or his son the 3rd appellant) a week or so before the occurrence. About one pahar after sunrise a mob of 40 or 50 persons including Appellants Nos. 1, 2, 4, 5, 6, 7, 8 and 9 came to take possession of this field of 1 bigha, 2 kathas : when the mob reached the field the deceased was working there but they began to uproot his transplanted paddy crop : the deceased remonstrated with the appellants telling them not to do so ; the 2nd appellant then said, "Beat the *betichod*," and the 9th appellant then stabbed the deceased with a spear, the deceased fell down and the assailants ran away.

The informant and Hiraman (his friend) retaliated on the attackers hitting Gobind (Appellant No. 2) and Bangali (No. 9) with lathis : the assailants had lathis, swords, garasas and spears. The informant did not know the 3rd appellant Gobind's son by name or, apparently, by sight.

Now this was an intelligible story ; namely, that Gobind (Appellant No. 2) had recently bought a field originally belonging to Aklu and his brothers on which the deceased had been settled by the landlord after Aklu and his brothers had abandoned it ; that thereupon Gobind and his friends came to take possession of it and began to uproot the rice : that the deceased remonstrated and was then stabbed and belaboured as a result of which he soon died.

But this was not the story which was put forward by the prosecution at the hearing of the case nor was it the account of the matter which the informant (Etwari Goala) gave in his evidence in Court : this forms a different and a third account. He now said that a mob of men including all the appellants, came and began to uproot paddy seedlings in a field belonging to a person called Bhaju : that the deceased interfered with them and got assaulted. The detailed story which the informant now gave portrays that all the mob had lathis except Appellant No. 9 who had a spear. He deposed that the deceased and Appellant No. 2 had a conversation together before the deceased was touched ; when Gobind's men began to uproot the paddy seedlings in Bhaju's field the deceased remonstrated ; Gobind then said he had bought this field ; the deceased asked Gobind whose field it was and Gobind replied it was Aklu's : the deceased told Gobind that this field of Bhaju's was not and never had been Aklu's and told Gobind

that he was looting ; Gobind then gave orders that the deceased should be beaten. Now it is important to notice here several points one is that no one has suggested that Bhaju's field belonged to the deceased or that it was ever part of Aklu's or his brother's land ; or that Gobind had bought it or that the deceased had any call to interfere in what Gobind and his party was doing except that the deceased (or his son) is said to have cultivated Bhaju's land for him as he (Bhaju) was a youth. At any rate it is a different story to that in the first information and the difficulty is attempted to be avoided by framing the charge in the ingenious phrasing that the accused mistook Bhaju's land for Khedan's.

But it seems not very clear that the affair really took place on Bhaju's land at all ; blood-stained earth was found right away from Bhaju's land and a long way from Khedan's plot at which place Etwari Goala first put the occurrence. Then there is a fourth account which is that given by Gobind and his son : the former who, it will be remembered, had received numerous injuries, lodged a first information at the thana on August 7th (i. e., two days after the affair had taken place) : he explains the delay by saying that he was too much hurt to walk and could not get bearers to carry him and, also that he was rather fearful as he had been accused already by the other side. However, his story is that he had bought land (2 bighas 17 kathas) which originally belonged to Aklu and his brothers in the name of his son (Appellant No. 3) some ten days previously : he had taken possession of it and been ploughing it : on the day of the occurrence he was ploughing the remaining portion when Khedan, Etwari Goala, Hiraman, Mithu (names with which we are already familiar) and a number of other men—some ten or more (some of whom he named)—came up and Mithu (the new landlord's barahil) told him that the malik had given instructions that the ploughing should be stopped. Gobind, however, paid no heed and persisted in going on : then he was attacked by Mithu and his party: Gobind's son (Appellant No. 3) was there too : and when Gobind was knocked down his son gave an alarm and called to his aid eight or ten men : what happened then we are not told.

The plot which Gobind says he purchased was 2 bighas, 17 kathas, in extent: it is not suggested he was ploughing on Khedan's land but it was suggested that he was ploughing Plot No. 192 which used to belong to Aklu and his brothers.

So we have four stories, viz;

(1) The chowkidar's which envisages a fight between Mithu and party (representing the new landlord and, perhaps, his new settlers) and Gobind and party ;

(2) Etwari Goala's 1st information account which puts the affair in Khedan's Plot 193 : subsequently changed to ;

(3) The trial account : in which the affair is placed in or near Bhaju's land ;

(4) Gobind's account which falls in with No. 1 story rather better than with either of Etwari's.

I have thought it necessary to mention these stories seriatim because, without knowing of them all, it is impossible to understand clearly all the criticisms levelled against the learned Sessions Judge's summing up : the jury had ample choice : presumably they thought that the trial account may have been right although it is not clear what they thought was the object of the unlawful assembly.

Now, with the above stories in mind, there has now to be considered the learned Judge's charge.

It is suggested that it is not at all clear what is meant by S. 367 (5) of the Criminal Procedure Code, where, in the proviso, it uses the words " heads of charge to the jury ": and that it is uncertain what is and what is not enough to constitute a fulfilment of this duty imposed upon the Court of Session, i. e., to record the heads of charge. It is asked whether it should be a verbatim reproduction of the Judge's observations ; whether it must or may be written out beforehand ; or written by the Judge from his remembrance of what he actually did say to the jury. The answers to all these questions are really simple. The suggestion that it should be a verbatim reproduction of the Judge's words is negatived by the phrasing of the proviso itself in which it is expressly stated that judgment need not he written but merely " heads of the charge ": it is in this country not feasible to have a verbatim report of every Sessions Judge's charge to a jury if he delivered it extemporarily as there is no staff of stenographers, as a rule, available for such a purpose.

Nor is there anything in the section which contemplates that the charge must be written out beforehand ; and although it is common ground that many Sessions Judges do prepare their charges by writing them out prior to their delivery, such a practice would surprise most experienced Judges of Assize and would and must be a matter at times of considerable delay and inconvenience ; and not in the spirit of S. 297 of the Criminal Procedure Code which contemptates that the Judge shall charge the jury as soon as possible after the case for the defence and the prosecutor's reply (if any) are concluded, or of S. 296, Criminal Procedure Code, which touches on the undesirability of the separation of jury prior to the charge.

But it is quite certain that, assuming the heads of charge are written out before delivery or taken down verbatim, they should be placed on record by the Judge as soon as he may find it possible to do so and whilst what he said is fresh in his recollection.

Then as to sufficiency : it is certain that the record need not be meticulous or lengthy but it must give accurately the substance of what the Judge said to the jury so that the High Court may, if occasion arises, be able to ascertain from this record whether the law and the facts relative to the case were fairly and properly put to the jurors. This is obviously a point which can only be decided by looking at the charge itself in the light of the circumstances of each case.

A Judge's record of his heads of charge is not a matter to be treated cavalierly or lightly thrown aside on the ground of insufficiency or misdirection : S. 357, Criminal Procedure Code, expressly provides that, in order to justify the alteration or reversal of any finding, sentence, or order on account of the faulty nature of a charge to a jury, the Court must be satisfied that some failure of justice has thereby been occasioned: whilst sub-S. (2) of S. 423 again states that a verdict of a jury shall not be altered or reversed on appeal unless the appellate Court regards such verdict as erroneous owing to misdirection by the trying Judge or to a misunderstanding by the jurors of the law as expounded to them by him.

It is obvious, therefore, that an appellant who seeks to set aside the result of a trial by jury has a task of considerable magnitude and must to be successful, present a case of real substance.

Now in the appeal under consideration the first objection made against the Judge's record of his charge is that he contents himself when recording how he had laid down the law to the jury by writing, " Ss. 141 to 149 and 299 to 304 read over and explained. "

It is difficult to view so short a summary as this as satisfactory : and so cursory a statement has been directly disapproved of in the case of *Kasimuddin Nasya* v. *King-Emperor* (1). The nature of what is requisite to be expressed in the record of a Judge's charge is well expressed by our own Court in *Eknath Sahay* v. *King-Emperor* (2), where it is said by Atkinson, J., that " the objects of the heads of charge is to inform the High Court, should occasion arise, of what direction the Judge gave in law to the jury and the nature of his summing up of the evidence not only for the prosecution, but also for the defence. The heads of charge are not intended to be an exhaustive detail of every particular which the Judge may have addressed to the jury. The Judge is not bound to address himself in every particular and in every detail to every suggestion put forward by the defence. It is the duty of the Judge fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and of the defence, respectively. In doing so he is entitled to take into consideration the speeches made upon both sides by the Crown and by the prisoner's counsel in considering his presentation of the evidence to the jury. The heads of charge should record in an intelligible form and with sufficient fullness the points of law and the directions given by the Judge to the jury, and the r cord should represent with accuracy the substance of the charge by the Judge. "

It is impossible in the present appeal to gather from the words used by the Judge what he did or did not say, but the fact that the jury recorded a majority verdict (as I have mentioned above) of guilty under the provisions of S. 149 of the Indian Penal Code indicates very clearly that they did not understand rightly the judge's exposition (whatever

(1) [1920] 21 Cr. L. J. 694=57 I. C. 934.
(2) [1916] 1 P.L.J. 317=17 Cr. L. J. 353=2[illegible] I. C. 657=2 Pat. L. W. 348.

it was) of the law ; assuming, as of course I do that his exposition was correct. Nor, apparently, when the jury had returned its verdict under S. 149, did the Judge's further exposition clear their minds : his record is :

" I point out to the jury that S. 149 cannot stand without S. 304, i. e., in order to a conviction " (I do not follow this myself unless it means, " in order to base or find a conviction" " under S. 149 it must be found that an offence under S. 304 was committed by some members of the assembly in prosecution of the common object. "

The jury were, as is perhaps not surprising, evidently puzzled by the word " some " : it is obvious that it might mean " some particular or known members " ; in which case, if it was imagined that only in such case was the operation of the section effective, it would have been an incorrect or incomplete statement of the law : or it might mean " some known or unknown, " i. e., " *any* member, " in which case it would have been right.

What the jury had in their minds when returning their first verdict of guilty under S. 149 cannot be ascertained ; but it certainly looks as if, having not understood the Judge in the first instance, they thought that the word " some " connoted Appellant No. 9 (i. e., some particular and known member of the assembly) and they were, having already found him not guilty under S. 334, not prepared to saddle the others with any guilt which was not, as they thought, imputable directly to him. This may, as the learned Assistant Govenment Advocate ruefully points out, well be a matter at which the prosecution might feel aggrieved ; but what the jury really meant is merely a point for conjecture : the only clear inference emerging being that they failed to understand the Judge if he interpreted the law to them correctly.

In circumstances such as the foregoing where it is obvious that jury was very much confused, it would perhaps be right to think that their majority verdict of 3 to 2 of guilty against the appellants under S. 147 was also the subject of uncertainty. I am not prepared to say that, simply because they had been at a loss to understand what the Judge had told them about S. 149, they necessarily misunderstood what he stated with regard to S. 147, although there is, it is true, no indication in his record of what he actually did say. But there are several criticisms which have been directed against the form of the charge in so far as it may be said to relate to the conviction under S. 147 : and these criticisms in this case undoubtedly upon examination necessitate very careful consideration.

The first criticism relates to the omission to draw attention to the exact nature of the charge.

The Judge, when referring to the alleged common object of the assembly, observes that it was to take forcible possession of Khedan's land; but he does not say that a basic feature of the charge was the inclusion (to meet the prosecution story) of the words

" for which you mistook the field of Bhaju Goala. "

The Judge does not put this to the jury but merely says that

" There is a difficulty about the alleged mistake as to the identity of Khedan's land and the consequent occurrence alleged to have taken place on Bhaju's land. "

He does not point out that it is admitted that Gobind had bought land to the west (Plot No. 192) which had nothing to do with Khedan ; that the prosecution story at the trial did not suggest that the appellants had tried to eject Khedan ; that there was no sort of reason shown why Gobind should have mistaken Bhaju's land for Khedan's or for part of the Aklu brothers' old holding ; or that it was quite clear that Etwari Goala's story detailed in the first information and his account detailed in his evidence are quite different and that the venue had obviously been changed. He says that " there is a difficulty, " and that if the venue has been changed the true facts are not before the Court and one could not say how precisely the events led up to what he calls " the fight " ; he *does* add that if the jury thought the place of occurrence had been changed the accused would be entitled to the benefit of the doubt, but he is in that passage referring to the suggestion, that the " fight " took place in Plot 192. He also *does* indicate that there was evidence to show that Aklu and his brothers and other old tenants did not consider that

they had altogether thrown up and abandoned their lands and that the sales to Gobind were really bona fide transactions which were not liked by the malik and the results, if any, of which he was ready to oppose.

But it has been pointed out by the learned counsel for the appellants (and to my mind correctly) that the learned Judge appears quite to have omitted to explain to the jury what was the real nature of the "difficulty" or the "doubt" which he incidentally mentioned or to indicate that the result of a change of venue must be most seriously inimical to the prosecution case. Nor does he adequately explain to the jury the fact that the story in the first information report and the prosecution story indubitably display a complete change of venue.

The so-called "difficulty" is really a very serious double point which alters the whole complexion and strength of the prosecution case. If Gobind and his party, after having bought the Aklu land, went to take possession of it, there is nothing primarily unlawful in their assembly for that purpose. It is quite necessary to place them, in order to sustain a conviction under S. 147, on land to which they had no sort of claim: the first information report describes minutely an affair on land (which was part of Aklu's land) in the occupation of Khedan: but that story is completely altered for two obvious reasons: firstly, because the evidence (e. g., as to signs of disturbance and the presence of blood) would support no such case and secondly, because, if Gobind's intention was to take possession of what he had bought, Khedan's Plot 193 was admittedly a bit of it: but so too was Plot 192 to which Khedan had no sort of claim and which is adjacent to Bhaju's field.

The second point in this connexion is that such a direct change in the venue would very greatly if not utterly discredit the whole of the prosecution story; not only of course as to where the affair took place, but as to what actually occurred, and would throw into prominence and indicate as a much more probable alternative the chowkidar's report that there was likely to be a fight on account of Mithu, the barahil of the new malik, intending to resist Gobind's desire to take possession of and plough the lands which he (Gobind) had acquired.

If these results of the alteration in the venue had been explained to the jury, and it had also been pointed out that under such circumstances considerations, quite different to those circumscribed by the provisions of the law relating to unlawful assemblies, would arise in apportioning or fixing the culpability (if any) for the death of Khedan on any person or persons, I have a very strong feeling that the jury would not have returned the verdict which they did. I am satisfied that from what I can gather from the heads of the charge that the position was not sufficiently explained to them or, if there are lacunae in the record which were in fact filled up verbally by the Judge when delivering his charge, that the jury failed to understand the import of what he said.

In my opinion the point mentioned above, coupled with the confusion shown by the jury with regard to their verdicts (for there were two) relative to S. 149, makes it obligatory for us to allow this appeal; but there are a few further observations which I should like to make with reference to further criticisms directed by the learned counsel for the appellants against the Judge's charge.

One of these criticisms is that the learned Judge made some actual and serious mistakes in his summing up, if the record of the heads of the charge is correct.

(a) In his reference to the chowkidar's report he says:

"The sanha indicates that the dispute was between Mithu and Gobind."

It must be pointed out, however, that this is incorrect: the sanha, as it appears in the papers before this Court, does not even mention Gobind's name.

(b) Again, still referring to the sanha, the learned Judge says:

"The substance of this sanha is that Rupan Singh (Appellant No. 1) was going that day with men and ploughs to take possession of some three bighas of land which he had purchased from a goala of Bhatbhigha this year."

It must, again, be pointed out that this is quite incorrect according to the wording of the sanha as it lies before us. Rupan is not personally mentioned at all as going, or intending to go, to take possession.

(c) Again with regard to the alleged settlement of some of Aklu's land with Khedan, Etwari stated in the first information report that this settlement was effected in 1316 F, after Aklu and others had abandoned their holdings : and that settlement was effected a year after the receipt of the survey khatian : and Etwari produced what purported to be genuine receipts for the year 1316 F. But the survey settlement was only published in 1317 and the appellants produced the khatian showing that Aklu's name was therein still recorded. This quite disposed of Etwari's date " 1316 ; " but the learned Judge did not regard the discrepancy as important because, so he says in his charge, the *attestation would* have taken place in 1316.

It is also now pointed out by the learned Assistant Government Advocate that the date " 1316, " as given by Etwari Goala, was really merely a mistake ; as the whole of the rest of the tenour of his evidence was to the effect that the land was settled a year after the survey khatian had been received. But it is rather incongruous to brush aside the date of 1316 as a mistake when Etwari Goala produces in proof thereof rent-receipts for that year. What must be the nature of such receipts if 1316 was a mistake of Etwari's and what can be the value of Etwari's evidence if he is prepared thus to bolster up his case with counterfeit receipts? The learned Judge did not point out any of these serious inferences to the jury, but brushed aside the criticism directed against Etwari's story of settlement on reasoning which seems fallacious and misleading.

There were other criticisms of the record of the charge but none so penetrating as the above, Those, however, to which I have drawn specific attention are sufficiently important ; and only strengthen the view which I have already expressed that this appeal must be allowed.

The learned counsel for the appellant has asked us with great earnestness to express some view as to the desirability of a Sessions Judge formulating, at the conclusion of the delivery of his charge, specific questions for the jury's reply. I do not think that any rule can possibly be laid down on this subject : there is nothing to prevent such questions being formulated and, in cases presenting complication, I used to find, when sitting as a Judge of Assize, that such a practice was helpful to the jury and useful in deciding the legal effect of the jury's findings : but the formulation of such questions requires great care, and queries should be confined within the lowest possible compass : in a very large number of cases such procedure is not requisite as a simple finding of guilty or not guilty serves all necessary purposes.

It must not be thought that I have intended in my remarks to express any view that the summing up by the Judge was an inefficient one taken as a whole ; but it was rather a complicated case presented in a very confused fashion. In many parts of the Judge's record it is clear that he summed up to the jury with skill, and in some portions rather strongly in favour of the accused ; but if the record before us really gives a substantially accurate record of what he said to the jury he obviously omitted much of importance. If on the other hand it does not give a substantially accurate account of what he said, then we have no means of knowing what he did say or how he filled up the important gaps.

I have no hesitation in this case in coming to the conclusion that the record of the heads of charge to the jury (a) shows insufficient material to enable this Court to judge what the learned Judge told the jury ; (b) shows that there were serious omissions (and certain actual mistakes) in directing the jury on the facts and law which, in my view, did in every probability occasion a verdict different to that which would have been otherwise given.

It is also clear to my mind from the verdicts of the jury that they did not in the least understand, and actually misunderstood, the Judge's exposition of the law.

For the above reasons I am of the opinion that the appeal must be allowed, the convictions quashed and the sentences set aside, and the appellants set at liberty. There will be no order by this Court for a new trial or expression of opinion as to whether a new trial is desirable or necessary.

Kulwant Sahay, J.—I agree. I only desire to add that in complicated cases the Judge in his charge to the jury ought not only to explain the law, but should also draw their attention to the evidence in the case and to explain as to how they should apply the law as explained by him to the particular facts of the case. In

other words where the facts are complicated he should explain to them what are the points which they ought to take into consideration in arriving at their verdict. The observations of Manuk, J., in the case of *Sunder Buksh Singh* v. *King-Emperor* (3), as regards the duty of Sessions Judges to assist assessors by putting specific questions concerning the facts upon which the law will turn may with advantage be borne in mind by Judges in charging the jury, so that in cases involving complicated questions of fact and law the jury may have a clear idea of the real questions requiring consideration in order to arrive at a correct verdict. In the present case it is obvious that the jury were in a hopelessly confused state of mind and had no clear comprehension of the law which they were called upon to apply to the facts of the case.

Appeal allowed.

(3) [1918] 3 P. L. J. 653=(1918) P. H. C. C. 359=48 I. C. 163=19 Cr. L. J. 983.

1925 PATNA 806

KULWANT SAHAY, J.

W. K. Dansford—Defendant—Petitioner.

v.

B. D. Shaw & Co.—Plaintiffs—Opposite Party.

Civil Revision No. 554 of 1924, Decided on 25th March 1925, from an order of the Sub.-J., Darbhanga, D/- 19th September 1924.

(a) *Lim. Act, Arts.* 52 & 85—*Goods supplied on credit—Payment made on presentation of bills—Suit to recover price is governed by Art.* 52 *and not Art.* 85.

A suit to recover price of goods by a tradesman on credit for which payments were made on presentation of bill is governed by Art. 52 of the Act, and the period of limitation is three years from the date of the delivery of the goods. Art. 85 does not apply to such a case. [P.807,C.1]

(b) *Lim. Act, S.* 20—*Payment must appear in the handwriting of the person making the same.*

Under the proviso to S. 20 a fresh period of limitation cannot be computed from the time when the payment was made, unless the fact of the payment appears in the handwriting of the person making the same. [P. 807, C. 1]

B. C. De—for Petitioner.

Murari Prasad, Aniruddhji Barman and *Anand Prasad*—for Opposite Party.

Judgment.—This is an application in revision on behalf of the defendant in a Small Cause Court suit. The suit was for recovery of a sum of money, principal with interest, for price of goods sold and delivered by the plaintiffs to the defendant. The claim was for Rs. 207-12-0 as principal and Rs. 148-14-0 as interest making a total of Rs. 356-10-0. The defendant admitted a sum of Rs. 55-8-0 and deposited the same in Court and denied his liability to pay the balance. He further pleaded limitation.

The Small Cause Court Judge has decreed the entire claim, and has held that the plaintiffs have proved their claim by production of their *bahis*. On the question of limitation he held that it was a case of running account and the claim was nat barred by limitation.

The only point raised in the present revision by the defendant is that the claim for the balance not admitted is barred by limitation. The plaintiffs are tradesmen and they used to supply goods to the defendant on credit and used to make up their bills and present the same to the defendant with vouchers. It appears that the transaction between the plaintiffs and the defendant has been going on from some time before November 1920. On the 29th November 1920, the plaintiffs presented a bill to the defendant for a sum of Rs. 309-12-0 for goods supplied during the period from 19th May to 29th November 1920. This sum of Rs. 309-12-0 was made up of Rs. 157-8-0 being the price of goods supplied during the same period and a sum of Rs. 152-4-0 being the balance due on account of a previous bill. The defendant's case is that when the previous bill was presented to him, he denied his liability to pay the price of the goods valued at Rs. 152-4-0 and admitted the rest of that previous bill which was paid. His allegation is that no vouchers were produced for the goods for which Rs. 152-4-0 was demanded and he refused to pay the same. In the bill presented on the 29th November 1920, the amount of Rs. 152-4-0 was again included without any vouchers, and he again refused to pay the same, but paid the balance of the bill. Subsequently bills were presented for goods supplied and the defendant says that the sum of Rs. 152-4-0 was again included in those bills which he refused to pay. The present claim of Rs. 207-12-0 is made up

of Rs. 152-4-0 due on account of the previous bill, and Rs. 55-8-0 for goods supplied subsequently. The defendant admits his liability to pay the Rs. 57-8-0 and did in fact deposit this amount in Court. As regards Rs. 152-4-0 he denies his liability and pleads limitation.

The learned Judge in the Court below has found that Rs. 152-4-0 was due from the defendant, and this question cannot be agitated in the present case. The only question for consideration, therefore, is as to whether the claim for Rs. 152-4-0 is barred by limitation.

It is not disputed that this sum of Rs. 152-4-0 is the balance due on account of the bill presented before November 1920. But, it is contended that, as there was a running account between the parties, and there was payment made within the period of limitation in part satisfaction of the debts, the claim is saved from limitation. On behalf of the plaintiffs it is contended that the article applicable is No. 85 of the First Schedule to the Limitation Act. To my mind, this article has no application to the present case. It was not a case of a balance due on a mutual, open and current account where there have been reciprocal demands between the parties. It was a case of supply of goods by a tradesman on credit for which payments were made on presentation of bills. I think the article applicable is Art. 52 of the Act, and the period of limitation is, therefore, three years from the date of the delivery of the goods. Admittedly the goods were delivered beyond three years of the institution of the suit, and the claim would, therefore, be barred by limitation. The learned vakil for the plaintiffs-opposite party, however, relies on S. 20 of the Limitation Act, and contends that part of the principal of the debt having admittedly been paid before the expiration of the period of limitation a fresh period began to run from the time of payment. But in order to save limitation, the payment must appear in the handwriting of the person making the same. The payment alleged is that of the principal and not of interest, and under the proviso to S. 20 a fresh period of limitation cannot be computed from the time when the payment was made unless the fact of the payment appears in the handwriting of the person making the same. There is no allegation, much less proof, of there being any such handwriting of the person making the part payment in the present case, and the claim must, therefore, be held to be barred by limitation.

The decree of the Court below must, therefore, be set aside and the suit dismissed with costs. The plaintiffs will, of course, be entitled to withdraw the sum admitted and deposited by the defendant in the Court below.

Decree set aside.

★ 1925 PATNA 807

JWALA PRASAD AND KULWANT SAHAY, JJ.

Gajadhar Prasad—Judgment-debtor—Petitioner.

v.

Firm Manulal Jagarnath Prasad—Decree-holder—Opposite Party.

Civil Revision No. 266 of 1924, Decided on 19th January 1925, from the order of the Sub-J., Motihari, D/- 8th March 1924.

(a) *Practice — Adjournment — Notice of — Signatures of pleaders of both parties should be on order sheet.*

The form of the order sheet especially requires that signatures of the parties or their pleaders should be taken on the order sheet in token of information of the order of adjournment having been communicated to them. The statement in the order sheet that the case was adjourned at the request of the pleaders does not necessarily imply that they actually came to know of the date fixed. [P. 809, C. 1]

★ (b) *Civil P. C., O. 21, R. 6 (b)—Certificate wrong — Court to which decree is transferred should construe the decree itself and proceed—It need not get the certificate amended by the Court transferring the decree.*

Under R. 6 (b) where no satisfaction of the decree has been obtained the certificate is to state that "satisfaction of the decree has not been obtained, by execution within the jurisdiction of the Court by which it was passed. But the Court has not to state the amount due under the decree or the relief to which the decree-holder is entitled. The decree will be the guide in these matters for the executing Court, which is entitled to construe the decree for itself. If the Court transferring the decree puts a wrong construction on the decree in the certificate, the judgment-debtor need not be directed to approach that Court for getting it amended. Any such order passed by the executing Court is ultra vires and an interference in revision is justified.

[P. 809, C. 2, P. 810, C. 1]

★ (c) *Civil P. C., S.* 11—*Execution proceedings —Order ultra vires does not operate as res judicata in same proceeding.*

An order of executing Court which is ultra vires does not operate as res judicata in a subsequent stage of the same execution proceedings. [P 810 C 1]

L. K. Jha—for Petitioner.

Murari Prasad and *Anirudhaji Burman* —for Opposite Party.

Judgment. — The opposite party obtained a decree against the petitioner on the 10th March 1923 from the Court of the Additional Subordinate Judge of Benares. The decree directed that the defendant do deliver to the plaintiff 3½ per cent. Government promissory notes of the face value of Rs. 2000-0-0 with interest upon the face value amounting to Rs. 360-0-0 within a month from the date of the decree, failing which the decree-holder would be entitled to recover from the judgment-debtor Rs. 1,630-0-0 plus costs of the suit Rs. 287-8-0. The Government promissory notes were not delivered nor was the amount mentioned above paid. The decree-holder, therefore, obtained an order transferring the decree from the Benares Court to the Court at Champaran with a certificate as required under Ss. 38 to 42 read with O. 21, Rr. 3 to 9 of the Code of Civil Procedure. That certificate stated that the amount due to the decree-holder on the date of the certificate was Rs. 2,281-12-0 with costs of Rs. 4-0-0 odd for obtaining the certificate. The decree was consequently being executed by the Subordinate Judge of Motihari. The judgment-debtor objected to the execution of the decree and the amount for which the execution was levied, upon the ground that the decree did not allow to the decree-holder more than Rs. 1,630-0-0 plus costs Rs. 287-8-0 and that the amount of Rs. 281-0-0 odd, etc., mentioned in the certificate was wrong. He further objected to the charge of interest in execution of the decree as being contrary to the terms of the decree. These objections were disallowed by the Subordinate Judge on the 10th September 1923, holding that the proper Court for giving relief to the judgment-debtor was the Benares Court. On merits the Subordinate Judge accepted the interpretation of the decree in accordance with the contention of the judgment-debtor holding that the decree-holder was not entitled to more than Rs. 1,630-0-0 plus Rs. 287-8-0 as costs. He gave two weeks' time to the judgment-debtor to apply to the Benares Court. On the 12th September 1923 the judgment-debtor put in another petition stating that the decree-holder was not entitled to charge further interest after the issue of the certificate. In this petition he also reiterated all the objections embodied in his first petition as regards the inaccuracy in the amount mentioned in the certificate. This was rejected on the 15th September 1923 by the Subordinate Judge on the ground that his former order of the 10th September 1923 operated as res judicata.

The matter was then taken to the District Judge in appeal, who by his order of the 28th January 1924 set aside the order of the Subordinate Judge holding that the objection as to further interest after the date of the certificate was not covered by the previous order of the Subordinate Judge, dated the 10th September 1923. He also observed that the objection as to further interest was taken in the previous objection of the judgment-debtor.

As regards the objection as to the amounts mentioned in the certificate, the District Judge observed that the Subordinate Judge rightly directed that the petitioner should have gone to the Benares Court.

The case was then remanded to the Subordinate Judge for determination of the judgment-debtor's objection of the 12th September 1923 as to further interest. The record was received by the Subordinate Judge on the 8th February 1924, and he directed that information of this be given to the pleaders, fixing the 23rd February 1924. On the latter date the Subordinate Judge noted that both parties were absent, but at the request of the pleaders of the parties the case was adjourned to 8th March 1924. On the 8th March 1924 the Subordinate Judge passed the following order :—

"The parties are absent on call. Then B. Rajesheri Prasad, pleader, states he appears for the D. H. The J. D. does not appear on call. His pleader B. Jaganath stated that the client must be called out. As the J. D. does not appear this objection is dismissed for default as he did not appear on the previous date too. The

J. D. has filed a petition for time on the ground that Nand Lal Banerjee, his pleader, has gone to Benares. This is frivolous as it is quite uncertain when the latter pleader would return or would give up the practice altogether."

There can hardly be any doubt that the order is illegal and the learned Subordinate Judge refused to exercise jurisdiction vested in him by law.

The record was received by the Subordinate Judge of Motihari on the 8th February 1924 in the absence of the parties and the pleaders were informed. On the 23rd February 1924 the parties were absent and at the request of the pleaders present, the case was adjourned to 8th March 1924. The order sheet is signed only by Mr. R. Prasad. He is not the judgment-debtor's pleader. The judgment-debtor's pleader was Mr. Nand Lal Banerjee and probably Babu Jagarnath. But the order sheet does not appear to have been signed by any of them. On the 8th March, when the case was disposed of, the Subordinate Judge noted that the parties were absent and the judgment-debtor's pleader, Mr. Nand Lal Banerjee, was also away to Benares. Babu Jagarnnath Prasad, on behalf of the judgment-debtor accordingly filed a petition for an adjournment of the case. The learned Subordinate Judge refused it. In the circumstances of the case he could not refuse the application, for it does not appear that any information of the date fixed was communicated either to the judgment-debtor or his pleader. The form of the order sheet, as pointed out in several cases, especially requires that signatures of the parties or their pleaders should be taken on the order sheet in token of the information of the order having been communicated to them. The statement in the order sheet, that the case was adjourned at the request of the pleaders, does not necessarily imply that they actually came to know of the date fixed. If the signatures of the parties or their pleaders had been taken on the order sheet there would have been no room for such a contention. I, therefore, hold that the order was passed without any information to the judgment-debtor and consequently the order cannot be substained and his objection remains undisposed of.

The learned Subordinate Judge was fully cognizant of the case, and upon merits he ought to have held that the decree-holder was not entitled to levy execution for an amount in excess of what was allowed to him by the decree. Suppose for the sake of argument that the parties were absent, yet it was the duty of the Subordinate Judge to see that in ex-parte execution even the decree holder does not realise more than what the decree allowed him In the present case there was no order as to interest either prior to or after the decree was passed. There was nothing mentioned in the certificate as to future interest. Therefore, on the face of the decree and the certificate, the decree-holder was not entitled to charge future interest. The learned Subordinate Judge has himself held on the previous occasion that the decree-holder was not entitled to more than Rs. 1,630 plus Rs. 287-8. Therefore, he ought not to have allowed future interest whether the judgment-debtor did or did not appear before him. In this view also the order of the Subordinate Judge is wrong.

The learned Subordinate Judge is also wrong, and so is the learned District Judge, in holding that although under the decree the decree-holder was not entitled to more than Rs. 1,630 plus Rs. 287-8, the judgment-debtor ought to have gone to the Benares Court for his relief as to the interest charged by the decree-holder in execution, and to have got the certificate amended. The Court was executing the decree, and not the certificate, and the executing Court at Motihari was competent to construe the decree. O. 21, R. 6, Cl. (b) runs as follows: "The Court sending a decree for execution shall send a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied." Under it, where no satisfaction of the decree has been obtained, the certificate is to state that "satisfaction of the decree has not been obtained, by execution within the jurisdiction of the Court by which it was passed. Under it the Court has not to state the amount due under the decree or the relief to which the decree-holder is entitled. The decree will be the guide in these matters for the executing Court. Under the latter part of the clause

referred to above: "Where the decree has been executed in part," the Court has to state the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied. This does not apply to the present case as no part of the decree was realized in the Court which transferred the decree. Under S. 42 read with O. 21, R. 9 of the Code of Civil Procedure the Court to which the decree is transferred for execution has the same powers in executing the decree "as if it had been passed by itself." Thus the Court at Motihari, to which the decree was transmitted for execution, was competent to decide the objection of the judgment-debtor that the decree-holder was not entitled to get more than Rs, 1,630 plus Rs. 287-8. The learned Subordinate Judge was wrong in holding that the judgment-debtor ought to have gone to the Benares Court for the reliefs he sought. Therefore, the order passed by the learned Subordinate Judge and so also by the learned District Judge, that the judgment-debtor should have gone to the Benares Court for the reliefs sought by him, amounts to a refusal to exercise the jurisdiction vested in them by law. The order is ultra vires; and it cannot operate as res judicata, for the second application of the judgment-debtor, dated the 12th September 1923, wherein he reiterated his objection was in the course of the same execution which was yet pending and not disposed of. In this view of the case the learned Subordinate Judge is wrong in executing the decree for a sum in excess of what the decree allowed to the decree-holder, namely, Rs. 1,630 plus Rs. 287-8. The Court was bound to construe the decree and in giving effect to the certificate of the Benares Court as against the express terms of the decree was going behind the decree which is not cognizable by law. Therefore, the orders of the Subordinate Judge, dated 10th and 15th September 1923, and 8th March 1924, are all wrong and without jurisdiction. The decree-holder is entitled only to the aforesaid sum, and the learned Subordinate Judge is wrong in executing the decree for a higher sum, that is, for the interest prior to or after the decree or certificate. These orders will be vacated.

It has been brought to light that the property of the judgment-debtor has been sold for a sum in excess of the amount in the decree and the sale has fetched price much more than the amount of the decree. This order would affect the sale and would entitle the decree-holder to execute the decree afresh. In order to avoid further harassment and expense in connextion with this small decree the parties have now come to terms that the sale should stand and the decree-holder will pay in cash to the judgment-debtor Rs. 400 within two months from this date (19th January 1925), failing which the judgment-debtor will be entitled to execute this order as a decree. There will be no order as to costs of this application.

The result is that the judgment-debtor will be entitled to get Rs. 400 from the decree-holder within two months, failing which this order will be executed by the judgment-debtor as a decree.

Revision allowed.

★ 1925 PATNA 810

MULLICK AND KULWANT SAHAY, JJ.

Shaikh Muhammad Khalil — Defendant—Appellant.

v.

Shaikh Abdul Rahim and *another*—Plaintiff and Defendant—Respondents.

Appeal No. 253 of 1923, Decided on 6th March 1925, from Original Order of the Dist. Judge of Darbhanga, D/- 7th July 1923.

★ (*a*) *Civil P. C., S.* 104—*Award filed—Right to appeal is not lost though a decree is drawn up.*

S. 104 of the Code clearly gives a right of appeal against an order to file the award, and the fact that a judgment has been pronounced and decree drawn up does not render the order to file the award incapable of appeal. 19 *C. W. N.* 948, *Foll.* [P 812, C 1]

(*b*) *Civil P. C., Sch.* 2 *Para.* 14—*Parties representing whole property to be theirs—Third persons interested in the property but arbitrator unaware of the fact and deciding the dispute—Party to reference cannot challenge the award—Evidence Act, S.* 115.

When all the parties to the reference represent to the arbitrator that whole of the properties in dispute belonged to them and that third persons had no interest in such properties, the arbitrator is justified in treating the whole of such properties as belonging to the parties to the reference. If, as a matter of fact, third persons had any interest in those properties, and the parties to arbitration agreed to have such properties partitioned between them by the arbitra-

tor, it is not open to any one of them to contest the validity of the award on the ground that it deals with matters in which third parties are interested. [P. 813, C. 2]

★ (c) *Civil P. C., Sch., 2 Paras. 20 and 14—Portion of award not within the arbitrator's jurisdiction—Portion separable from the rest—It is invalid but the rest of the award may be filed.*

Even in cases of a reference to arbitration without the intervention of a Court, when an application is made under paragraph 20 to file an award, the Court is competent to make an order to file an award even where the award deals with matters in excess of the authority conferred upon the arbitrator, where the portion of the award dealing with such matters can be separated from the rest of the award. 36 *All.* 336 (*P. C.*), *Foll.*; 1923 *Patna* 470, *Not Foll.*

The ground upon which the Court can refuse to file an award under paragraph 21 is the ground upon which the Court should remit an award under paragraph 14, and as the Court cannot remit an award under paragraph 14 if the portion in excess of the arbitrator's authority be separable from the rest, it follows that it cannot refuse to file the award under paragraph 21 in those circumstances. [P. 816, Cs. 1 & 2]

★ (d) *Arbitration — Arbitrator may delegate ministerial work to be done by others.*

It is open to the arbitrator to have ministerial and other works performed by a third person, and therefore, where in an arbitration for partition the measurements were made and the maps prepared by the amin.

Held: that it cannot be said that the partition was effected by the amin and not by the arbitrator. [P. 817, C. 2]

K. Hasnain, B. N. Mitter and *Saiyid Ali*—for Appellants.

Hasanjan and *L. K. Jha*—for Respondents.

Kulwant Sahay, J.—This is an appeal against an order of the District Judge of Darbhanga, dated the 7th July 1923, whereby he ordered an award to be filed under paragraph 21 of the second schedule to the Code of Civil Procedure. The application to file the award was made under paragraph 20 on a reference to arbitration without the intervention of the Court. It appears that the plaintiff, Shaikh Abdul Rahim, who was the petitioner for filing the award and the two defendants Mohammad Khalil and Shaikh Abdul Aziz are three brothers. The application was contested by Mohammad Khalil who was Defendant No. 1, while the other defendant, Abdul Aziz, supported the plaintiff's application to file the award. The reference to arbitration was made under a registered deed of agreement executed by the three brothers on the 16th April 1919. The matter in difference between the parties was the question of partition of certain ancestral and self-acquired properties held by the three brothers and the dispute between the parties was referred for arbitration to one Shaikh Abdullah. Before the submission to arbitration it appears that there was an amicable partition amongst the three brothers as regards a portion of the properties in dispute, and on the 23rd July 1919 a *barawarda* prepared as regards the partition effected between the parties amicably was presented before the arbitrator who signed the same and obtained the signature of each of the brothers thereon. According to the plaintiff the arbitrator then proceeded to partition the remaining properties and this was done after measurements had been made and the final award was made on the 10th of January 1922. The plaintiff applied before the District Judge to file the award on the 11th of May 1922. Mohammad Khalil, Defendant No. 1, objected to the filing of the award on various grounds imputing misconduct to the arbitrator and alleging that the award was in excess of the authority given to the arbitrator under the deed of agreement. The learned District Judge has held that except in three particulars, the award was valid and, that as regards the three particulars in respect whereof he found that the award was in excess of the reference, he directed that such particulars could not be made a rule of the Court and, as the portion of the award dealing with those particulars was separable from the rest of the award, he held that the rest of the award was valid and could be filed and a decree passed thereon. He accordingly ordered the award to be made a rule of the Court subject to the exceptions as regards the three particulars stated above and he directed that a decree be prepared accordingly.

Against this order the Defendant No. 1, Mohammad Khalil, has preferred the present appeal and it has been contended on his behalf that the order to file the award is bad in law. The grounds urged by him for setting aside the order are:—First, that the award is invalid inasmuch as the arbitrator decided several matters not referred to him under the agreement; (2) that the arbitration came to an end in July 1919 and, after the partition of the properties referred to in the *barawarda* signed by the parties on the 23rd July

1919, the arbitrator had no authority to proceed with the arbitration and to divide the rest of the properties between the parties ; (3) that the reference was abandoned on account of the long delay between the submission to arbitration and the date of award ; (4) that the award was bad inasmuch as the arbitrator delegated his functions to an amin and did not himself decide material particulars relating to the valuation of the properties ; (5) that the arbitrator was guilty of misconduct and the award was invalid on account of such misconduct ; (6) that the award, as found by the District Judge, being in excess of the authority of the arbitrator in respect of three particulars, the Court had no jurisdiction to order the filing of the award, even when such portion of the award could be separated from the rest of the award.

This appeal has been argued at great length by the learned vakils for the parties and after a careful consideration. I am of opinion that the contentions raised by the appellant are unsound, and the order of the District Judge directing the award to be filed is a valid and legal order and ought to be affirmed.

I may, at the outset, dispose of a preliminary objection taken towards the end of the argument by Mr. Lakshmi Kanta Jha who appeared for the Defendant No. 2 Respondent, namely, that no appeal lay against the order filing the award. The order under appeal is one passed under paragraph 21 of the Second Schedule to the Code of Civil Procedure upon an application made under paragraph 20 with reference to an arbitration without the intervention of the Court. Under S. 104 (1) (f), Civil. P. C. such an order is appealable. The contention of the learned vakil, however, is that after the order made by the District Judge to file the award he proceeded to pronounce judgment according to the award and a decree had been prepared in abordance with such judgment, and under Cl. (2) of paragraph 21 no appeal lies from such decree except in so far as the decree is in excess of or not in accordance with the award. His contention is that when a decree is prepared in accordance with the ward, the order to file the award is no longer subject to appeal. This contention has absolutely no force. S. 104 of the Code clearly gives a right of appeal against an order to file the award and the fact that a judgment has been pronounced and decree drawn up, does not render the order to file the award incapable of appeal. The question was considered in several cases and I need only refer to the decision of Mookherji and Beachcroft, JJ. in *Soudamini Ghosh* v. *Gopal Chandra Ghosh* (1) where it has been held that the right to appeal against an order directing to file an award made by arbitrators without the intervenation of the Court is not lost as soon as a decree is drawn up in accordance with the judgment pronounced on the basis of the award. The order does not merge in the decree. The preliminary objection must therefore be overruled.

As regards the merits ; in order to determine whether the award is in excess of the jurisdiction vested in the arbitrator it is necessary to refer to the terms of the agreement, because the authority of the arbitrator is derived from the terms of the reference contained in the agreement itself. The agreement of the 16th of April 1919 (Ex. 1 in the case) runs thus : "We the three brothers are separate in mess but a large property is being held jointly by us. A dispute is going on amongst us in respect of the partition of the ancestral properties and the properties acquired by purchase as well as of the *nami* and *benami* properties. Therefore taking into consideration the loss to be sustained on account of the costs of the suit which is calculated to ruin the properties we appoint Shaikh Abdullah, son of Munshi Badan Lal, by occupation a zamindar and cultivator, resident of mouza Rahimabad, parganna Saraisa, police station Tajpur, sub-registry office Samastipur, district Darbhanga an arbitrator for the settlement of all points in dispute and do declare as follows : The said arbitrator shall hear the objections and take oral or documentary evidence of the parties and pass an award in respect of and partition the properties forming the Milkiyat interest, kabza kasht lands, faqirana, minhai and mokarari lands, ancestral and acquired in the name of any one of the parties or any other person which exists at present. The said award shall be approved and accepted by us. No one of the parties shall have any right of raising any sort of

(1) [1915] 19 C. W. N. 948=28 I. C. 557=21 C. L. J. 273.

objection against the said award. The award passed by the said arbitrator shall be in writing. In the said award a full detail shall be separately given of the properties belonging to each of the parties. The original award of the said arbitrator shall be engrossed on a stamp of Rs. 5, shall bear the signature of the arbitrator and shall remain in possession of me, Executant No. 1, while two copies thereof bearing the signature of the arbitrator shall be engrossed on stamps for Re. 1 each, and shall remain in possession of the remaining executants. The said award shall be final, and none of the parties shall have any right of disobeying it and bringing a suit in Court against it. Therefore, we executed this deed of agreement, so that it might be of use when required." The Executant No. 1 referred to in the body of this agreement was Shaikh Abdul Rahim, the plaintiff, Executant No. 2 was Mohammad Khalil the Defendant No. 1, and Executant No. 3 was Abdul Aziz the Defendant No. 2. It has been contended on behalf of the appellant that the award is in excess of the authority given to the arbitrator inasmuch as the properties which were joint between only two of the parties and not between all the three parties to the reference have been partitioned by the arbitrator. As regards this objection, on a reference to the terms of the agreement, I have no doubt that the parties intended that such properties as were held jointly between only two of the parties to the reference were also to be partitioned by the arbitrator. There can be no doubt that, whether the dispute related as to matters common to all the three parties or to only two of them, all such disputes were referred to the arbitrator and the arbitrator had full authority under the terms of the agreement to decide such questions also.

The next objection is that the arbitrator professed to deal with the interest of persons who were not parties to the reference. In order to understand this objection it is necessary to state that the three brothers who are parties to the present proceedings had inherited a portion of the properties is dispute from their father and, in such ancestral properties, their sisters would, ordinarily, under the Muhammadan Law, also have some shares. The properties which were to form the subject-matter of the partition were not set out in the agreement and the arbitrator had to find out what were the properties which were to be partitioned amongst the three brothers. In order to determine this, he had to enquire as to whether the sisters had any share in the ancestral properties or not. It appears from proceedings before the arbitrator, especially from the deposition of Mohammad Khalil, that the parties represented before the arbitrator that the sisters had no share in the ancestral properties or, in any event, that they had relinquished their interest in such properties. When all the parties to the reference represented to the arbitrator that whole of the ancestral properties in dispute belonged to them and that their sisters or third persons had no interest in such properties, I think the arbitrator was justified in treating the whole of such properties as belonging to the parties to the reference. If, as a matter of fact, third persons had any interest in those properties and the parties agreed to have such properties partitioned between them by the arbitrator, it is not open to any one of them to contest the validity of the award on the ground that it deals with matters in which third parties are interested. In the present case, however, the arbitrator appears to have made enquiries and to have been satisfied that the sisters had no interest in the ancestral properties. One of the sisters, Mt. Latifan, is married to one Nawab Jan and he appears to have helped in bringing about the amicable partition which formed the subject-matter of the *barawarda* prepared in July 1919. That *barawarda*, it is admitted before us, deals with most of the ancestral properties held by the brothers and a portion was left out from it which was the subject-matter of the subsequent partition by the arbitrator. *barawarda*, it is admitted before us, was the result of a private partition amongst the brothers, and it deals with almost the whole of the ancestral properties held by the brothers. No portion of such ancestral properties was then left out by the three brothers as forming the interest of the sisters. It is clear therefore, that they themselves treated the whole of the ancestral properties as belonging exclusively to them and not to the sisters. The arbitrator states that he made enquiries from the sisters and he was satisfied that they had no interest in the ancestral properties.

There is no reason to doubt the truth of the statement made by the arbitrator and I am of opinion that, even, assuming that the sisters had any interest in the ancestral properties, the award was not in excess of the authority of the arbitrator because he proceeded to partition such ancestral properties amongst the brothers. Under the terms of the agreement it was his duty to determine what the properties to be divided between the parties were and, if, in coming to this decision, he committed any mistake, that is no ground for holding the award to be invalid.

The same remarks would apply to the objection of the appellant that the arbitrator has proceeded to deal with properties belonging to third persons who have been found by the arbitrator to be benamidars for the parties. This is dealt with in Cl. 2 of the award. It appears that certain properties were acquired in the name of Shaikh Nawab Jan under two deeds of sale, dated the 30th May 1912 and 10th May 1912. The arbitrator says that Shaikh Nawab Jan admitted that he was a benamidar for the parties. There were certain other properties which stood in the name of one Shaikh Mohammad Ismail and had been acquired under a deed of sale, dated the 17th December 1918 and the arbitrator says that the lands covered by this deed also belonged to the three brothers and that Mohammad Ismail was merely a benamidar for them. It is apparent from the evidence on the record that the three brothers represented before the arbitrator that the property standing in the names of Nawab Jan and Mohammad Ismail were their properties and the deeds of sale were produced before the arbitrator by one of the parties to the reference. Both Nawab Jan and Mohammad Ismail were examined as witnesses in the present proceedings before the District Judge and none of them laid any claim to the properties standing in their names. It is significant that although on 22nd November 1922 Nawab Jan and his wife (one of the sisters of the parties) filed a petition before the District Jndge claiming interest in some of the properties partitioned by the award, yet when Nawab Jan was examined as a witness on the 25th June 1923, no question was put to him in respect of his own or his wife's claim in respect of any of the properties dealt with in the award. I am of opinion that the award is not invalid on account of the arbitrator having partitioned properties standing in the name of these two persons.

It has further been argued on behalf of the appellant that as regards certain kabza kasht and inam lands situate within the area of mauza Tisi Narsam the arbitrator has proceeded to make a partition not only between the three brothers but also between another person named Mohammad Ismail who, it appears is a different person from Mohammad Ismail held to be a benamidar of the parties under the deed of the 17th December 1918. Now, it appears from the award that Mohammad Ismail's share in these kabza kasht lands had already been separated into a separate takhta by private partition and Mohammad Ismail had nothing to do with the shares of the three brothers which were held separately from the takhta held by Mohammad Ismail and the arbitrator has proceeded to partition only that portion of the kabza kasht and inam lands which was held jointly by the three brothers and in which Mohammad Ismail had no share. The objection on these grounds must therefore fail.

Objection is next taken to the matter dealt with in paragraph 7 of the award. Various objections were taken before the District Judge as regards this paragraph, but before us the only objection urged by the learned vakil for the appellant is that the arbitrator has reduced the share of the appellant and his wife from three-fifths to one half. This paragraph as translated and printed in the paper book is vague and unintelligible, and in part the translation is inaccurate. I have, however, looked into the original award in the vernacular and I am satisfied that the complaint of the appellant is unfounded. The real facts appear to be that in the village Nawachack Minhai the parties held certain lands which formed their kasht or tenancy right. These lands they divided amicably and the shares allotted to each was set out in the *barawarda* of July 1919. Over and above the kasht right the parties had also got some proprietary interest and in the record-of-rights prepared in the Cadastral Survey under Chapter X of the Bengal Tenancy Act, their proprie-

tary shares were shown in the khewat as follows :—

Mohammad Khalil	...	2 shares.
Mt. Bibi Bihan (wife of Md. Khalil)	...	1 share.
Abdur Rahim	...	1 share.
Abdul Aziz	...	1 share.

It appears that there were other proprietors also who owned the rest of the village and the shares shown in the khewat were not two-fifths or one-fifth as translated on page 68 of the paper-book. The parties subsequently acquired by purchase the shares of Shankar Thakur Hajam and Jailal Thakur Hajam and the arbitrator treated all the shares held by the three brothers as consisting of 16 annas and he declared the shares of Abdur Rahim and of Abdul Aziz to be 4 annas each and he left the remaining 8 annas to Mohammad Khalil and his wife Bibi Bihan. This did not amount to a reduction of the share of Mohammad Khalil. Indeed it appears from the deposition of the D. W. 2 and D. W. 5 that it was agreed between the parties that Abdur Rahim and Abdul Aziz should each get four annas proprietary interest in the village and the arbitrator did not award them more than 4 annas each. I am of opinion that this portion of the award is not in excess of the authority of the arbitrator.

As regards the matters found by the learned District Judge to be beyond the authority of the arbitrator, there is no dispute before us that those matters were decided by him in excess of his authority. They are dealt with in Cls. (3), (4) and (6) of the award. In Cl. (3) the arbitrator awarded a certain sum of money as mesne profits against the Defendant No. 2 ; in Cl. (4) the arbitrator awarded a sum of money as compensation to Abdul Aziz as against Mohammad Khalil on account of certain brick kilns ; in Cl. (6) the arbitrator directed certain rents to be realized by Abdul Aziz for the period from 1326 to 1328. As has been held by ths learned District Judge, these matters were not referred to the arbitrator and he had no authority to decide these points. It has, however, been argued by the appellant that the whole award is bad in law and the Court had no jurisdiction to order the award to be filed when any portion of it was in excess of the authority of the arbitrator irrespective of the fact that such portion could be separated from the rest of the award without affecting the determination of the matters referred to therein. There has been a divergence of judicial opinion on the point as tc whether the Court has authority to direct an award to be filed in a reference to arbitration without the intervention of a Court when a portion of the award deals with matters not referred to arbitration, even where such portion is separable from the rest of the award. *Dinabandhu Jana* v. *Chintamani Jana* (2) and *Jaldhari Rai* v. *Mohammad Abdul Kabir* (3) are direct authorities for the proposition that even where the portion of the award open to exception is separable from the rest the Court cannot proceed to give effect to the portion which is valid, in a proceeding under para. 21 of the Second Schedule to the Civil Procedure Code. On the other hand *Mahendra Nath Das* v. *Mohilal Kolay* (4) is an authority for the proposition that the Court is competent to direct the award to be filed in respect of the portion which was within the authority of the arbitrator where the portion in excess of such authority is separable from the rest. The Judicial Committee of the Privy Council in *Amir Begum* v. *Badruddin Hossain* (5) in dealing with an award a portion whereof was found to be outside the power of the arbitrator observed as follows : "The award further purported to assign specific lands in the zamindari of Rusibigha by way of partition, a matter clearly outside the power of the arbitrator which would render his award invalid unless this portion of his award is separable from the rest. In the opinion of their Lordships there is no defect whatever in separating this portion of the award from the rest. It is well recognized law that when a separate portion of an award is bad the remainder of the award if good can be maintained." No doubt, no reasons have been assigned by their Lordships for coming to this conclusion ; but the question was directly raised in the arguments of the learned counsel on both sides, and their Lordships laid down the law that where a separable portion of

(2) [1915] 19 C. W. N. 476=26 I. C. 697.
(3) 1923 Pat. 470=1 Pat. L. R. 244=4 P. L. T 669.
(4) [1918] 27 C. L. J. 104=43 I. C. 770.
(5) [1914] 36 All. 336=17 O. C. 120=18 C.W.N 755=1 O. L. J. 249=12 A. L. J. 537=1 6 Bom. L. R. 413=(1914) M. W. N. 472=1 6 M. L. T 35=27 M. L. J. 181=23 I.C. 625= 19 C. L. J. 494 (P. C.).

an award is bad the remainder of the award if good can be maintained. That case appears to deal with a reference to arbitration without the intervention of the Court and the appeal arose out of an application under the provisions of Schedule 2, paragraph 20, of the Code of Civil Procedure. This decision of the Privy Council is binding upon us and we are bound to follow it and to hold that even in cases of a reference to arbitration without the intervention of a Court, when an application is made under paragraph 20 of the Second Schedule to file an award the Court is competent to make an order to file the award even where the award deals with matters in excess of the authority conferred upon the arbitrator, where the portion of the award dealing with such matters can be separated from the rest of the award. The decision of the Privy Council in *Buta* v. *Municipal Committee of Lahore* (6) also supports this view. On examining the terms of paragraph 21 of the schedule, it appears that the Court has power to order the award to be filed in respect of the portion which is within the authority of the arbitrator when the portion beyond such authority is separable from the rest. Paragraph 21 provides that where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order an award to be filed and shall proceed to pronounce judgment according to the award. Paragraph 14 deals with grounds upon which a Court may remit an award to the reconsideration of the arbitrator where the award has left undetermined any of the matters referred to arbitration or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred. This power to remit the award to the reconsideration of the same arbitrator is given in reference to arbitration in suits and paragraph 21 provides that the grounds referred to in paragraph 14 if proved in cases of arbitration without the intervention of a Court will make the award invalid, inasmuch as the Court has no power to remit the award for reconsideration when the reference is made without the intervention of the Court. The ground, however, in clause (a) of paragraph 14 is that the award has determined any matter not referred to arbitration and *such matter cannot be separated without affecting the determination of the matters referred.* Where, however, such matters can be separated, the ground referred to in clause (a) of paragraph 14 does not apply, and the Court can under paragraph 21 order the rest of the award which is within the authority of the arbitrator to be filed directing the portion, which is in excess of his authority, to be expunged. The ground upon which the Court can refuse to file an award under paragraph 21 is the ground upon which the Court should remit an award under paragraph 14, and as the Court cannot remit an award under paragraph 14 if the portion in excess of the arbitrator's authority be separable from the rest, it follows that it cannot refuse to file the award under paragraph 21 in those cricumstances. I am, therefore, of opinion that this objection of the appellant cannot be sustained.

As regards the objection that after July 1919 the arbitrator had no authority to proceed with the arbitration and that the arbitration came to an end with the *barawarda* of July 1919, it is clear from the evidence that the objection cannot be sustained. What actually happened was that after the reference to arbitration, the first sitting of the arbitrator took place in May 1919. The arbitrator has been examined as witness in the case and he says that in that sitting he called for written statements of the claims of the parties and they filed the same, that he asked the parties to produce witnesses and the parties gave their own evidence and produced their documents. There had been a previous arbitration and he examined those arbitrators and also village people. The previons arbitrators had made pattibandis and the parties caused the papers relating thereto to be filed by the Amin, Abdus Samad. The second sitting took place in July 1919 and in this sitting the *barawarda* of 'the lands which the parties had divided privately and amicably was filed before the arbitrator and all the parties and witnesses present signed the *barawarda*. This, however, did not exhaust all the pro-

(6) [1902] 29 Cal. 854=29 I. A. 168=7 C. W. N. 82=4 Bom. L. R. 673=87 P. R (1902)=8 Sar. 327 (P. C.).

perties and several other properties were left for partition. The arbitrator in the second sitting ordered the Amin, Abdus Samad, to measure the other lands which had not been partitioned. It appears from the evidence that the Amin made attempts to measure the lands in October 1919 and in June 1920, but he could not do any thing, as on the first occasion there was a death in the family and on the second occasion Mohammad Khalil was engaged in building a pucca house. The third sitting took place in March 1921 when the arbitrator directed the measurement of the remaining lands and measurements were made by the amin Abdus Samad in March, April and May 1921 during which period he also prepared the papers and the maps. It is clear from the evidence that the arbitration was not complete in July 1919 and the power of the arbitrator was not put an end to in any way either by notice or by any acts of the parties cancelling the reference.

The objection that the long delay in making the award went to show a revocation or an abandonment of the arbitration is equally groundless. There was no time limit to effect the arbitration, and under the circumstances disclosed in the evidence, I am not prepared to say that the delay was so unreasonable as to lead to a conclusion that the partieshad abandoned or revoked the reference. Reliance has been placed by the appellant upon the cases of *Mohammad Ramzan* v. *Mt. Sardar Begum* (7) and *Madhao Kashinath* v. *Sambashiva* (8). In the first case there was a delay of about five years and in the second case a delay of about six years, and under the peculiar circumstances of those cases it was held that the delay was such as to lead to a reasonable presumption that the parties had abandoned or revoked the reference. In the present case the delay does not appear to be so unreasonable as to lead to any such presumption.

Reference has been made to the fact that the award was made at a time when a criminal case between the parties had just come to an end and it is argued that this gives rise to a suspicion that the award was not a real decision made by the arbitrator but was the result of collusion between some of the parties to the reference and the arbitrator. We have considered the evidence on the point, and I am not prepared to say that the fact that the award was made about the time when the criminal case came to an end is any reason for holding that the award is the result of any collusion between the arbitrator and the other parties to the reference. No imputation of any misconduct as against the arbitrator has been established by the evidence, and the arbitrator, who appears to be a man of position and a gentleman in whom the parties had confidence in the beginning, seems to have acted with perfect impartiality in deciding the difference between the parties.

The objection that the award was bad inasmuch as the arbitrator delegated his functions to the amin, Abdus Samad, is also baseless. It is open to the arbitrator to have ministerial and other works performed by a third person, and because the measurements were made and the maps prepared by the amin it cannot be said that the partition was effected by the amin and not by the arbitrator. It is contended that the arbitrator has admitted in his deposition that he did not find the valuations or raibandis of the lands; but it is clear from the evidence that although the valuation was really made by the amin the question was considered by the arbitrator when the amin submitted the papers before him.

Another point taken by the learned vakil for the appellant is that although the arbitrator in his award says that the *barawarda* prepared in July 1919 did not form a part of his award yet the District Judge has ordered the same to be treated as a part of the award. The reasons given by the learned District Judge for doing so appear to be sound. Although a portion of the properties was partitioned amicably between the parties it did not exhaust the whole of the properties and the fact that they presented the *barawarda* of 1919 before the arbitrator goes to show that they desired the same to be made a part of the award.

I see no reason to disturb the decision of the learned District Judge, and I am of opinion that the appeal must be dismissed with costs.

Mullick, J.—I agree that the appeal should be dismissed with costs; but I

(7) [1919] 71 P. R. 1919=52 I. C. 847.
(8) [1920] 54 I. C. 126.

desire to make a few observations with regard to the validity of the award in this case.

It is clear that the arbitrators have gone outside the terms of reference in regard to certain matters, and this being an arbitration without the intervention of the Court, the question is whether a decree can be passed on that portion of the award which is within the terms of the reference. In *Kunj Lall* v. *Banwari Lall* (9), to which I was a party, it was held by this Court that where the arbitrators had omitted to decide a question referred to them the entire award was bad. In *Jaldhari Raj* v. *Muhammad Abdul Kabir* (3), to which also I was a party, one of the questions argued was whether in an arbitration without the intervention of the Court a decree could be given upon that portion of the award which was within the terms of the reference if such portion was separable from the rest. In point of fact in in this case the award failed because, among other reasons, the two portions were not separable; but there are observations in the judgment which expressed the view that, even if the valid portion can be separated from the invalid portion, the Court has no option under the Civil Procedure Code, but to refuse to cause the award to be filed. This view was based upon *Dinabandhu Jana* v. *Chintamoni Jana* (2) and the case cited therein as well as earlier decisions in other Courts. Some of these earlier decisions were referred to in *Mustafa Khan* v. *Phulja Bibi* (10) were it was laid down broadly that the Court had no power to amend a private award or to remit it for reconsideration, but only possessed the power to file and enforce it or to reject it. It has been contended that as paragraph 12 does not give the Court any express power to modify or correct an award made without the intervention of the Court and paragraph 14 does not give any power to remit the award and that as paragraph 19 makes the provisions of paragraph 12 applicable to an award following upon an agreement filed in Court under paragraph 17 while no such provision is made in respect of an award made without the intervention of a Court, the intention of the legislature is that such an award must be rejected in its entirety if any part of it is bad for want of jurisdiction even if such part can be separated from the other part and does not affect the decision on the matter referred. There is much force in this argument; and it may be said that the legislature has given power to a Court to modify an award made with its intervention because the jurisdiction of the arbitrators is from the outset clearly defined by the Court itself. In private arbitrations it is often a matter of considerable difficulty to determine the scope of the reference and to say how far the decision upon one part has influenced the decision on the other parts of the award.

The matter, however, appears to be settled by authority. Neither in *Kunj Lall* v. *Banwari Lall* (9) nor in *Jaldhari Rai* v. *Muhammad Abdul Kabir* (3) was any reference made to the decisions of the Privy Council in *Buta* v. *Municipal Committee of Lahore* (6) and *Amir Begam* v. *Badruddin Husain* (5), but these cases seem to be directly in point and conclusive. In both these cases it was held by the Judicial Committee that if the part made with jurisdiction could be separated from the rest, then the former part of the award was valid and could be maintained. There is, therefore, no occasion to refer the question to a Full Bench even if it could be held that the point now raised was directly decided in *Jaldhari Rai* v. *Muhammad Abdul Kabir* (3), (1923 Patna 470).

Appeal dismissed.

(9) [1918] 4 P. L. J. 394=48 I. C. 711.
(10) [1905] 27 All. 526=(1905) A.W.N. 86=2 A.L.J. 416.

★ 1925 PATNA 818

KULWANT SAHAY, J.

Sheodhari Rai—Petitioner.

v.

Jhingur Rai and *others* — Opposite Party.

Misc. Criminal Case No. 78 of 1924, Decided on 20th October 1924.

(a) *Criminal P. C., S. 526—Magistrate making remarks that he is unfavourably disposed to prosecution—Transfer should be ordered.*

If the Magistrate makes observations which go to show that he is not favourable to the prosecution, complainant has cause for reasonable apprehension in his mind that the case is not being tried in a fair way, and there is sufficient ground to order transfer of the case. [P. 819, C. 2]

★ (b) *Criminal P. C., S. 526 (3)—Person at whose instance prosecution is started is "party interested"—Such person is entitled to apply for transfer; but his rights are subordinate to those of Public Prosecutor.*

A private person, who lodges an information before the police of a certain offence and a criminal prosecution is started upon that information, is a person who is interested in the prosecution within the meaning of Cl. (3) of S. 526, and therefore he is entitled to apply for transfer under S. 526, but his rights are subordinate to those of the Crown: in other words, if the Public Prosecutor, or the person who is conducting the prosecution on behalf of the Crown, is unwilling to have the case transferred, the person at whose instance the case was started has no right to get the case transferred.

[P 820 C 1]

P. C. Rai—for Petitioner.

R. T. N. Sahai and *B. P. Verma*—for Opposite Party.

Judgment.—The petitioner lodged an information at the Dumraon police station charging the opposite parties with having been members of an unlawful assembly and with having forcibly looted the crops of the petitioner which were being conveyed from the fields to his kalihan. They were also charged with having caused hurt to several persons of the petitioner's party in the course of the loot of the crops. The police investigated the case and submitted a charge sheet against the opposite parties under Ss. 147 and 379, Indian Penal Code, and the opposite parties are being tried before the Sub-Divisional Magistrate of Buxar. The present application is made on behalf of the petitioner for transfer of the case from the file of the Sub-Divisional Magistrate of Buxar on the ground that during the course of the trial the Magistrate has made certain observations which have led the petitioner to apprehend that he will not get a fair trial in the Court of the Sub-Divisional Magistrate. It appears that in the course of the examination of the prosecution witnesses the learned Sub-Divisional Magistrate made certain observations which went to show that he was not favourable to the prosecution. For instance, when one of the witnesses stated that the opposite party had looted the crops while the police were in the village, the Magistrate is said to have observed: "Were they fools that they committed an act before the police?" Then again, in the course of the examination of one of the witnesses, the learned Sub-Divisional Magistrate is said to have observed that the accused had filed tanazas in respect of the fields in dispute and, that, therefore, the petitioner wanted to get rid of them by having them sent to jail. During the examination of another prosecution witness the learned Sub-Divisional Magistrate is said to have observed as follows: "How much money have you paid to the police as bribe?" and when the witness denied having given a bribe to the police, the learned Magistrate asked him: "How much money have you taken for giving evidence?" It is further stated that after the examination of the prosecution witnesses the Magistrate wanted to frame charges under Ss. 147 and 379, Indian Penal Code, but that an application was made on behalf of the prosecution before him stating that the case made out disclosed an offence under S. 395, Indian Penal Code, and that the opposite parties ought to be charged with an offence under S. 395, upon which he is said to have torn out the paper upon which the charge was being written. The learned Magistrate has sent an explanation in which he does not deny having made the observations as stated above during the examination of the witnesses. Under the circumstances it is clear that the petitioner has cause for reasonable apprehensions in his mind that the case is not being tried in a fair way by the Sub-Divisional Magistrate. The petitioner went to the District Magistrate and applied for the transfer of the case from the file of the Sub-Divisional Magistrate under S. 528, Cr. P. C. The learned District Magistrate observes that the remarks said to have been made by the Sub-Divisional Magistrate seem to have been uttered in a moment of annoyance and that at the worst they show a lack of temper or discretion, but do not show that the Magistrate is prejudiced. I am not prepared to say that there was any reason for the Magistrate being annoyed and that the remarks and observations alleged to have been made by him, and which have not been denied by him, were uttered in a moment of annoyance. I am, therefore, clearly of opinion that this is a fit case to be transferred from the file of the Sub-Divisional Magistrate.

A preliminary objection has, however, been taken on behalf of the accused persons to the effect that the petitioner has no locus standi to make this application for transfer inasmuch as he is not a complainant in the case, but that it is a police

case and that the case is being conducted by the Public Prosecutor on behalf of the Crown. Reliance has been placed upon the observations of Mullick, J., in the case of *Jamuna Kanth Jha* v. *Rudra Kumar Jha* (1), where he held that a private person has the right to set the criminal law in motion, but he has no control over the proceedings and that he is not entitled to apply for the transfer of a case under S. 526, Cr. P. C. Mr. Justice Jwala Prasad, however, who was another member of the same Bench, was of a different opinion. He held that the person at whose instance a criminal case is lodged is entitled to apply for transfer under S. 526, but his rights are subordinate to those of the Crown ; in other words, that if the Public Prosecutor or the person who is conducting the prosecution on behalf of the Crown is unwilling to have the case transferred, the person at whose instance the case was started has no right to get the case transferred. Clause (3) of S. 526 provides that the High Court may act either on the report of the lower Court or on the application of a party interested or on its own initiation. In the present case the question is, whether the petitioner is a " party interested" within the meaning of Cl. (3) of S. 526. It has been shown by Mr. Justice Jwala Prasad in the judgment referred to above that a private person who lodges an information before the police of a certain offence and a criminal prosecution is started upon that information, is a person who is interested in the prosecution within the meaning of Cl. (3) of S. 526. Reference has been made to Cl. (8) of S. 526, which provides that the Public Prosecutor, the complainant or the accused is entitled to ask the Magistrate for a postponement in order to enable them to move the High Court for a transfer of the case, and the word used there is the "complainant" and not a person interested. It has been tried to be argued on behalf of the opposite parties that the words "party interested" in Cl. (3) have the same meaning as the word " complainant " in Cl. (8) of S. 526. I am, however, unable to agree to this contention. If the Legislature intended that the words " party interested " in Cl. (3) should have the same meaning as the word " complainant " in Cl. (8) there is no reason why there was any difference introduced by the Legislature in the two clauses. If it was intended that the " party interested " could only be the complainant there is no reason why the word "complainant" was not used in Cl. (3) as it was used in Cl. (8). I am, therefore, of opinion that, as held by Mr. Justice Jwala Prasad in the case referred to above, the present petitioner is a party interested within the meaning of Cl. (3) of S. 526 and he is entitled to apply for transfer of the case. It may be noted that there is no objection on behalf of the Crown to the transfer, and the Crown does not appear to oppose the application.

It has further been pointed out by the learned vakil for the petitioner that the present application is really an application, under S. 439, for revision of the order of the District Magistrate, and is not a substantive application for transfer under S. 526. The application before the District Magistrate was apparently made under the provisions of S. 528, Cr. P. C., and the learned District Magistrate having refused to make the transfer the petitioner has come up to this Court against that order in revision, and if that is so, then the question whether the petitioner is entitled to apply for transfer under S. 526 does not arise. Having regard to the circumstances of the case, I am of opinion that this is a fit case in which a transfer ought to be ordered. The case is, therefore, transferred from the file of the Sub-Divisional Magistrate of Buxar to the file of the District Magistrate of Arrah, who will either try the case himself or make it over to another Magistrate competent to try it.

Petition allowed.

(1) [1920] P. H. C. C. 42=52 I. C. 424=4 P. L. J. 656=20 Cr. L. J. 648.

1925 PATNA 820

ADAMI AND SEN, JJ.

Sahdeo Singh and *others* — Plaintiffs—Appellants.

v.

Kishun Behari Pandey and *others*—Defendants—Respondents.

Appeal No. 62 of 1923, Decided on 24th June 1925, against an appellate decree of the Addl. Sub.-J., Muzaffarpur. D/- 22nd November 1922.

Hindu Law—Alienation—Daughter can alienate property inherited from father, only for necessity —But alienation of her life interest can be given effect to by partition at the instance of the alience.

A daughter is a limited owner and therefore not entitled to alienate the property inherited from her father absolutely without there being legal necessity therefor. She cannot bind the inheritance for her own personal debts or private purposes as against reversioners, but she can do so only for her own life. She can alienate her own life interest and effect can be given to such alienation by partition sought at the instance of the alienee. [P. 821, C. 2]

S. N. Rai—for Appellants.

Harnarain Prasad and *Anand Prasad* —for Respondents.

Sen, J.—The plaintiffs-appellants instituted a suit for declaration of their title to and for recovery of possession of 2 bighas 6 kathas and 19-1/2 dhurs of land which they had purchased by a kobala, dated the 31st January 1917, but from which they alleged that they had been dispossessed by the respondents in June 1920. The kobala was executed by one Mahaoti Ojhain, one of the two daughters of one Sham Lal Ojha, and the said vendor purported to convey the entire half-share inherited by her as heir of her father, Sham Lal Ojha. The respondents, on the other hand, contended that the entire properties alleged by the plaintiffs-appellants to have been owned by Sham Lal really belonged to Sham Lal's widow, Mahavati Ojhain, who had acquired her interest therein under two sanads; that the said widow had by a deed of gift, dated the 30th June 1905, conveyed her interest to Damodar Ojha, grandson of Sham Lal Ojha, by his other daughter Bhagawati Ojhain, who in turn purported to sell the entire interest for a sum of Rs. 1,300 by a kobala, dated the 5th November 1919. The Munsif gave a decree in favour of the plaintiff. He found that the kobala put forward by the plaintiff was genuine, that the entire property had really been Sham Lal's, having been acquired by him and that, therefore, Mahaoti Ojhain, as one of his two daughters, was entitled to a half share therein and had validly alienated that share in favour of the plaintiffs-appellants. The learned Subordinate Judge affirmed these findings arrived at by the Court of first instance and also found that the alleged deed of gift by Sham Lal's widow in favour of Damodar Ojha, was illegal and invalid, and that it had not been acted upon. He then proceeded to consider the question as to whether the alienation by Mahaoti Ojhain was under circumstances of legal necessity. He found that there was no legal necessity for the transfer and thus concluded that the kobala executed by her could not bind the property so conveyed.

It is urged before us by the learned advocate appearing for the appellants that in any event the alienation in favour of the plaintiffs would be binding during the life time of Mahaoti Ojhain and that, therefore the Court of appeal below was in erroria dismissing the suit altogether. On behalf of the respondents it is conceded that a daughter could alienate her share in the inheritance, such alienation being good only for her life time, but what is questioned is that a definite plot of land, such as, the one the subject-matter in this suit could not be sold.

It is also urged by the learned advocate for the respondents that the Court of appeal below appears to have come to a finding that the kobalas in favour of the appellants, as well as that in favour of the respondents are both collusive documents and that, therefore, the proper course for the Court of appeal below was to dismiss the suit.

With regard to the first point it is clear that Mahaoti Ojhain being a limited owner was not entitled to alienate the property absolutely without there being legal necessity therefor. She could not bind the inheritance for her own personal debts or private purposes as against reversioners, but she could do so only for her own life. It is also clear on the authorities that a daughter can alienate her own life interest, and effect can be given to such alienation by partition sought at the instance of the alienee. In the present case Mahaoti Ojhain purported clearly to transfer the land in question as representing her half-share in the inheritance. That being so, there does not appear to be any difficulty in the way of giving a declaration in favour of the plaintiffs-appellants that they are entitled to the half-share of Mahaoti Ojhain in the inheritance, such interest to enure only for the lifetime of Mahaoti Ojhain. The plaintiffs-appellants must be left to such course as they may be advised to take for the purpose of getting partition of their acquired share according to law. But it is impossible in the circumstances of this

case to grant the prayer for possession asked for in the plaint.

With regard to the second point it does not at all appear clear that the learned Subordinate Judge has come to a definite finding upon proper materials that the kobala in favour of the appellants was a collusive document. No doubt an observation to that effect appears in the last paragraph but one of the judgment. But it seems hardly to amount to a finding of fact and cannot be taken to dislodge the clear finding of fact arrived at by the Court of first instance, after a due consideration of the evidence that the plaintiff's kobala was genuine and for consideration. Moreover, a case of collusion does not arise under the circumstances. It has been found that the estate was of Sham Lal Ojha's, that the plaintiff's vendor, one of the daughters of Sham Lal, was entitled to a half-share thereof, and that she parted with that interest in favour of the vendor, the vendor admitting that the kobala was genuine and for consideration. No case of collusion between the vendor and the vendee can arise in these circumstances and no such case was put forward in the pleadings.

The appeal will, therefore, be allowed in part. It is declared that the appellants are entitled to the half-share of their vendor, Mahaoti Ojhain in the estate of her father, Sham Lal Ojha without prejudice to the rights of the reversioner or reversioners, if any, upon the death of Mahaoti Ojhain. The appellants are entitled to their costs from the respondents.

Adami, J.—I agree.

Appeal allowed in part.

1925 PATNA 822

DAS AND ADAMI, JJ.

Sadho Saran Pande—Appellant.

v.

Mt. Subhadra and *others*—Respondents.

Appeals Nos. 254 and 255 of 1924, Decided on 13th May 1925, against an appellate order of the Dist. J., Saran, D/- 25th August 1924.

(*a*) *Civil P. C., O.* 21, *R.* 2—*Scope.*

Dismissal of an application by the judgment-debtor under R. 2 (2) does not bar the decree-holder's certifying the payment under R. 2 (1). [P. 823, C. 1]

(*b*) *Civil P. C. O,* 21, *R.* 2 (1)—*Joint decree-holder can certify adjustment of payment as regards his own claim but cannot, as regards other joint decree-holders.*

It is not open to one of two joint holders of a decree to certify satisfaction of the whole decree so as to bind the other decree-holder. But at the same time, a joint decree-holder may certify satisfaction in respect of his own interest there-in. 26. *All.* 318 and 1923 *All.* 494, *Rel.* [P. 823, C. 1]

Shivanandan Rai—for Appellant.

Hardeshwar Prasad Sinha and *Rajeswar Prasad*—for Respondents.

Das, J.—This appeal is directed against the order of the learned District Judge of Saran, dated the 25th August 1924, by which he refused an application by one of the decree-holders under the provision of O. 21, R. 2, paragraph 1.

Sona Koer and Subhadra Koer recovered a decree for costs as against the appellant. The decree-holders took out execution. An application was thereupon presented on behalf of the judgment-debtor apparently under the provision of O. 21, R. 2, paragraph 2 of the Code. He alleged that he had paid the entire decretal amount to Sona Koer and he applied that the payment be certified. His application was supported by a petition of Sona Koer; but it appears that the Court of first instance thought that the application was not a bona fide one and dismissed it on the 10th of May 1924. On the 5th June 1924 the judgment-debtor preferred an appeal to the Court of the District Judge of Saran. On the 28th June 1924 Sona Koer herself presented an application which has given rise to these proceedings by which she certified the payment alleged to have been made to her and asked the Court to record the payment. She gave evidence in support of her application and the learned Munsif, accepting her story, allowed her petition and dismissed the execution case on full satisfaction. Thereupon Subhadra Koer appealed to the District Judge of Saran, and the learned Judge has taken the view first that the order of the 10th May 1924 operated as res judicata thereby putting an effectual bar on the right of the Court to give any effective relief to the judgment-debtor; and secondly that it was not open to a joint decree-holder to give a